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CASES REPORTED

Vols. 162–165 P.

	P.	
	Vol.	Page
Abalas v. Consolidated Const. Co., App.	164	19
Abrams; People v., Sup.	162	395
Ætna Life Ins. Co. v. Industrial Accident Commission, Sup.	165	15
Agnew; Fiori v., App.	164	899
Agoure; Lapique v., App.	165	57
Ah Quong; Cameron v., Sup.	165	961
Ainsa v. Mercantile Trust Co. of San Francisco, Sup.	163	898
Aki, Ex parte, App.	163	338
Alameda County v. Cook, App.	162	405
Alameda Lodge, No. 1015, B. P. O. E. of United States; Varcoe v., Sup.	163	909
Alaska Pac. S. S. Co. v. Pillsbury, two cases, Sup.	163	204
Albert v. McKay & Co., Sup.	163	666
Aldersley's Estate, In re, Sup.	163	206
Allen; City of Los Angeles v., App.	163	697
Allen; People v., App.	162	401
Allen v. Union Trust & Savings Bank, Sup.	165	1010
Allen Co. v. Wood, App.	162	121
Allen's Estate, In re, Sup.	165	1010
Allen's Estate, In re, Sup.	165	1011
All Persons; Knight v., App.	162	1051
Altpeter v. Postal Telegraph-Cable Co., App.	164	35
American Can Co.; Gomez v., App.	164	913
Anderson v. Mathews, Sup.	163	902
Anderson; Realty Dock & Improvement Corp. v., Sup.	164	4
Anglo-Pacific Development Co.; Castro Point Ry. & Terminal Co. v., App.	165	544
Arakelian; Luft v., App.	165	712
Arbogast v. Superior Court in and for Sacramento County, App.	162	909
Arnold v. San Francisco-Oakland Terminal Rys., Sup.	164	798
Arthur v. City of Petaluma, Sup.	165	698
Associated Oil Co. v. Commary-Peterson Co., App.	163	702
Atchison, T. & S. F. Ry. Co.; Edmunds v., Sup.	162	1038
Atchison, T. & S. F. Ry. Co.; Fresno Traction Co. v., Sup.	165	1013
Atchison, T. & S. F. Ry. Co.; Smithson v., Sup.	162	111
Atlantic Portland Cement Co.; Northwestern Portland Cement Co. v., Sup.	163	47
Atwell v. Haskell, Sup.	162	896
Avila; Taylor v., Sup.	165	533
Ayers v. Ross, Sup.	165	529
Ayers' Estate, In re, Sup.	165	528
Azevedo; Brazil v., App.	162	1049
Back Country Transp. Co.; Potter v., App.	164	342
Bailey v. Baker, App.	165	543
Baker, Ex parte, App.	162	922
Baker; Bailey v., App.	165	543
Baker; Herrington v., Sup.	163	1009
Bank of Bakersfield; Conner v., Sup.	163	353
Bank of California, National Ass'n v. Richardson, Sup.	165	152
Bank of Commerce & Trust Co. v. Kenney, Sup.	165	8

	P. Vol.	Page
Bank of Haywards v. Kenyon, App.	163	869
Bank of Italy; Keeney v., App.	165	735
Barmore, Ex parte, Sup.	163	50
Barron Estate Co. v. Waterman, App.	162	410
Bauman v. Wuest, App.	162	434
Bayly v. Lee, Sup.	162	96
Beach-Robinson Co.; Held v., App.	162	661
Beale v. City of Santa Barbara, App.	162	657
Bekins Van & Storage Co.; Dynes v., Sup.	165	12
Belabco; Locomobile Co. of America v., App.	162	920
Bell v. Moloney, Sup.	165	917
Belmore Land & Water Co.; Chambers v., App.	164	404
Benjamin; People v., App.	163	235
Berlin Realty Co.; Clark v., App.	164	333
Bernard v. Renard, Sup.	165	694
Bernardo; Del Monte Ranch Dairy v., Sup.	164	628
Bettencourt v. Superior Court of Kings County, App.	163	682
Black v. Warehouse Inv. Co., App.	162	403
Blaisdell; Southern Pac. R. Co. v., App.	164	804
Blaisdell; Southern Pac. R. Co. v., App.	164	805
Blinn Lumber Co. v. Cohn, App.	165	444
Boardman Co. v. Petch, Sup.	162	1028
Board of Police Com'rs of City and County of San Francisco; Donovan v., App.	163	69
Board of Sup'rs of Orange County; Bryant v., App.	163	341
Board of Trustees of Auburn School Dist. of City of Auburn, Placer County; Sweeney v., App.	165	42
Boas v. Knewing, Sup.	165	690
Bohlig; Boscus v., Sup.	162	100
Bond v. Superior Court of Alameda County, Sup.	163	496
Bornschein v. Whitaker, Sup.	165	523
Boscus v. Bohlig, Sup.	162	100
Botsford; Lininger v., App.	163	63
Bouck; Cross v., Sup.	165	702
Boutagy; Schnierow v., App.	164	1132
Bracquee v. Mottet Co., Sup.	165	696
Brakebill; Wolf v., App.	162	918
Brandt Bros. v. Fresno Hotel Co., Sup.	164	788
Bratman; Smith v., Sup.	163	892
Braun v. Vallade, App.	164	904
Brazil v. Azevedo, App.	162	1049
Brians v. Superior Court of Sonoma County, App.	162	420
Brion v. Cahill, Sup.	165	704
Brittan v. Fisher, App.	163	874
Brooke v. Quigley, App.	165	731
Brown v. Industrial Accident Commission of California, Sup.	163	664
Brown; Jackson v., App.	165	152
Brown v. Superior Court, Los Angeles County, Sup.	165	429
Brownell v. Superior Court in and for San Bernardino County, App.	162	419
Browne's Estate, In re, Sup.	165	960
Bryant v. Board of Sup'rs of Orange County, App.	163	341
Bryant v. Pacific Electric Ry. Co., Sup.	164	385
Bucher; Kling v., App.	163	871
Builders' Realty Co.; Jacobi v., Sup.	164	394
Bullfrog; Goldfield R. Co. v. Jordan, Sup.	163	40
Bunnell v. Thomas, App.	165	1047

	P. Vol.	Page
Burkett v. Doty, App.	162	1042
Burns v. Hammel, App.	162	669
Busick; Kato v., Sup.	162	108
Byrnes; Lazarus v., App.	163	227
Cahill; Brion v., Sup.	165	704
C. A. Hooper & Co. v. Railroad Commission of California, Sup.	165	689
Cale; Wetzel v., Sup.	165	692
California Fruit Canners' Ass'n; Matchette v., App.	164	423
California Western R. & Nav. Co. v. Industrial Accident Commission, App.	164	912
Calistoga Electric Co.; Napa Valley Electric Co. v., Sup.	163	497
Calkins; Wilson v., Sup.	165	423
Call v. Jenner Lumber Co., App.	165	23
Callahan v. Danziger, App.	163	65
Cameron v. Ah Quong, Sup.	165	961
Campbell's Estate, In re, Sup.	165	931
Caner v. Owners' Realty Co., App.	165	727
Canfield's Estate; Young v., App.	164	1134
Capps; City of San Diego v., App.	163	235
Cardinet Fountain Brush Co.; Wagner v., App.	163	337
Carlson v. Farm Land Inv. Co., App.	164	344
Carlson v. Farm Land Inv. Co., Sup.	164	348
Carlston; Portola Realty Co. v., App.	162	899
Carpenter v. Lee, Sup.	165	525
Carr's Estate, In re, Sup.	165	958
Case Threshing Mach. Co. v. Copren Bros., App.	162	647
Cashin; Farnsworth v., Sup.	165	920
Cass v. Rochester, Sup.	163	212
Castro Point Ry. & Terminal Co. v. Anglo-Pacific Development Co., App.	165	544
Central California Traction Co.; Rystinki v., Sup.	165	952
Chafor v. City of Long Beach, Sup.	163	670
Chambers, Ex parte, App.	163	223
Chambers v. Belmore Land & Water Co., App.	164	404
Chambers; Chenoweth v., App.	164	428
Chambers; Legerton v., App.	163	678
Chambers; Sacramento County v., App.	164	613
Champion Horseshoe Co.; Kinkade v., App.	163	228
Chappelle v. Woodhams, Sup.	164	1110
Chenoweth v. Chambers, App.	164	428
Choate; Warden v., App.	165	36
Christeson; Hicks v., Sup.	164	395
Citizens' Trust & Savings Bank; Spafford v., Sup.	165	1
City and County of San Francisco; Cooper v., Sup.	162	631
City and County of San Francisco; Hayne v., Sup.	162	625
City and County of San Francisco; Simpson v., Sup.	162	631
City and County of San Francisco; Telegraph Hill Neighborhood Ass'n v., Sup.	162	630
City of Beverly Hills v. City of Los Angeles, Sup.	165	924
City of Long Beach; Chafor v., Sup.	163	670
City of Los Angeles v. Allen, App.	163	697
City of Los Angeles; City of Beverly Hills v., Sup.	165	924
City of Los Angeles; Silver Lake Power & Irrigation Co. v., App.	162	432
City of Madera; San Joaquin Light & Power Corp. v., Sup.	165	701
City of Oakland; Foley v., App.	164	419
City of Oakland; Spitzer v., App.	163	1044
City of Petaluma; Arthur v., Sup.	165	698
City of Petaluma; Thomas v., App.	165	1021

	P.	
	Vol.	Page
City of San Diego v. Capps, App.	163	235
City of San Jose v. Railroad Commission of California, Sup.	165	967
City of Santa Barbara; Beale v., App.	162	657
Claremont Country Club v. Industrial Accident Commission of California, Sup.	163	209
Clark v. Berlin Realty Co., App.	164	333
Clark; Johnson v., Sup.	163	1004
Claudius v. Davie, Sup.	165	689
Clay v. Superior Court of Los Angeles County, App.	162	416
Clayton; People v., App.	165	37
Clemens Horst Co. v. Tarr Mining Co., Sup.	163	492
Clinch; Tryon v., App.	162	428
Cline v. Lewis, Sup.	165	915
Coates; People v., App.	163	502
Cohn; L. W. Blinn Lumber Co. v., App.	165	444
Cole; Pacific Gas & Electric Co. v., App.	162	435
Colkins; Hyatt v., Sup.	163	1007
Collins; Rudell v., Sup.	163	204
Collins' Estate, In re, Sup.	164	1110
Colquhoun v. Fursman, App.	164	10
Colquhoun; Lee v., Sup.	164	894
Columbia Life & Trust Co.; Goldstone v., App.	164	416
Commary-Peterson Co.; Associated Oil Co. v., App.	163	702
Compton Land Co. v. Vaughan, App.	164	610
Conklin v. Woody, App.	165	973
Conlin v. Studebaker Bros. Co. of California, Sup.	165	1009
Connell Co. v. Jenner, App.	165	54
Conner v. Bank of Bakersfield, Sup.	163	353
Consolidated Const. Co.; Abalas v., App.	164	19
Consolidated Lumber Co. v. Frew, App.	162	430
Consolidated Lumber Co. v. Superior Court of California, in and for Los Angeles County, App.	164	612
Cook; Alameda County v., App.	162	405
Cooper v. City and County of San Francisco, Sup.	162	631
Copren Bros.; J. I. Case Threshing Mach. Co. v., App.	162	647
Cordes; Johnson v., App.	165	1040
Cotton; Gray v., Sup.	162	1019
Countryman; Gabbs v., App.	165	446
Cram v. McNeil, App.	162	140
Crawford; Shull v., App.	164	330
Credit Ass'n of California v. Griffin, App.	163	695
Crocker, In re, Sup.	163	1015
Cross v. Bouck, Sup.	165	702
Cunningham; Payne v., Sup.	165	531
Curtis v. Upton, Sup.	165	935
Danziger; Callahan v., App.	163	65
Davie; Claudius v., Sup.	165	689
Davis' Estate, In re, Sup.	165	525
Dean v. Hawes, App.	163	1038
Del Monte Ranch Dairy v. Bernardo, Sup.	164	628
Denny; Graziani v., Sup.	162	397
De Rome v. Great Western Smelting & Refining Co., Sup.	165	919
De Rome's Estate, In re, Sup.	165	919
Des Granges v. Des Granges, Sup.	165	13
Devenney; Maybury Ranch Co. v., App.	165	1020
De Whirst; Fighiera v., App.	162	655

	Vol.	Page
Dias; Kuns v., App.	163	1052
Diestelhorst v. Industrial Accident Commission, App.	164	41
Dilger v. Whittier, App.	164	49
Dodd; Egan v., App.	164	17
Dodds v. Spring, Sup.	163	351
Doe Estate Co.; Roebling Const. Co. v., App.	165	547
Donovan v. Board of Police Com'rs of City and County of San Francisco, App.	163	69
Doolittle v. Savage Tire Co., App.	165	728
Doty; Burkett v., App.	162	1042
Dowling v. Spring Valley Water Co., Sup.	162	894
Drennan, Ex parte, App.	164	807
Dreyfus' Estate, In re, Sup.	165	941
Drown v. New Amsterdam Casualty Co., Sup.	165	5
Dumbarton Land & Improvement Co. v. Murphy, App.	163	866
Dunfield; Manor v., App.	165	983
Dunlap; Sunset Lumber Co. v., App.	163	338
Dusenbery; Levy v., App.	163	231
Dynes v. Bekins Van & Storage Co., Sup.	165	12
Easkoot; Upton v., Sup.	165	935
Easton; Van Calbergh v., Sup.	164	1113
E. Clemens Horst Co. v. Tarr Mining Co., Sup.	163	492
Eddie v. Gage Mfg. Co., App.	164	1133
Edmunds v. Atchison, T. & S. F. Ry. Co., Sup.	162	1038
Edward Barron Estate Co. v. Waterman, App.	162	410
Eells v. Eells, Sup.	165	441
Egan v. Dodd, App.	164	17
Eggers; Hillyer v., App.	164	27
Elliott v. Robbins, App.	165	1042
Ellis v. Funk, App.	163	332
Ellsworth v. National Home & Town Builders, App.	164	14
Emanuel v. Oberlin Bros. Co., App.	164	818
Emart's Estate, In re, Sup.	165	707
Employers' Indemnity Exch.; Pierce v., App.	164	403
Eng-Skell Co.; Marvin v., App.	164	332
Erbe; Keeley v., App.	164	906
Estey; Squires v., App.	165	34
Eucalyptus Growers' Ass'n v. Orange County Nursery & Land Co., two cases, Sup.	163	45
Ewald v. Kierulff, Sup.	165	942
Fages; People v., App.	162	137
Fairmont Creamery Co. v. Los Angeles Ice & Cold Storage Co., App.	165	553
Farias v. Farias, App.	164	818
Farley v. Reindollar, Sup.	165	19
Farm Land Inv. Co.; Carlson v., App.	164	344
Farm Land Inv. Co.; Carlson v., Sup.	164	348
Farnsworth v. Cashin, Sup.	165	920
Fealy; People v., App.	165	1034
Fiat Motor Sales Co. of California; Morris v., App.	162	663
Fighiera v. De Whirst, App.	162	655
Fiori v. Agnew, App.	164	899
First Congregational Church of Christ in Corona v. Lowrey, Sup.	165	440
First Nat. Bank; Palo Alto Mut. Building & Loan Ass'n v., App.	164	1124
Firth; Simmons v., App.	164	807
Fisher; Brittan v., App.	163	874
Fisher v. Oliver, Sup.	164	800

	P. Vol.	Page
F. M. Landon Co.; Union Inv. Co. v., App.	162	903
Fodera; People v., App.	164	22
Foley v. City of Oakland, App.	164	419
Frame; Tidewater Southern Ry. Co. v., App.	163	720
Francis v. Independent Electrical Supply Co., App.	165	716
Francis v. West Virginia Oil Co., Sup.	162	394
Frank & Co. v. New Amsterdam Casualty Co., Sup.	165	927
Fraser; Strahm v., App.	163	680
Fred Medart Mfg. Co. v. Weary & Alford Co., App.	165	35
Freeman v. Phipps, Sup.	163	1015
Fresno Canal & Irrigation Co. v. People's Ditch Co., Sup.	163	497
Fresno Hotel Co.; Brandt Bros. v., Sup.	164	788
Fresno Hotel Co.; Sweet v., Sup.	164	788
Fresno Traction Co. v. Atchison, T. & S. F. Ry. Co., Sup.	165	1013
Fresno Traction Co.; Harrell v., App.	163	504
Frew; Consolidated Lumber Co. v., App.	162	430
Frink; Hedges v., Sup.	163	884
Fuhrman, In re, Sup.	165	958
Funk; Ellis v., App.	163	332
Fursman; Colquhoun v., App.	164	10
Gabbs v. Countryman, App.	165	446
Gage Mfg. Co.; Eddie v., App.	164	1133
Gall; Wolf v., Sup.	162	115
Gall; Wolf v., App.	163	346
Gall; Wolf v., Sup.	163	350
George C. Peckham Co.; Smalley v., Sup.	165	438
Getz; Goldberg v., App.	163	221
Gibson v. McReynolds, Sup.	165	921
Gideon v. Howard, App.	164	11
Gilbreth; People v., App.	164	18
Gillette; Landwehr v., Sup.	163	1018
Glenn v. Rice, Sup.	162	1020
Glenwood Lumber Co.; Woodard v., Sup.	163	1017
Glougie v. Glougie, Sup.	162	118
Goetz; Ward v., App.	165	1022
Goldberg v. Getz, App.	163	221
Goldstone v. Columbia Life & Trust Co., App.	164	416
Gomez v. American Can Co., App.	164	913
Gonzalez v. Gonzalez, Sup.	163	993
Gonzales; People v., App.	164	1131
Graca v. Rodrigues, Sup.	165	1012
Grandi; People v., App.	165	1027
Gray v. Cotton, Sup.	162	1019
Gray v. Reclamation Dist. No. 1500, Sup.	163	1024
Graziani v. Denny, Sup.	162	397
Great Western Smelting & Refining Co.; De Rome v., Sup.	165	919
Green v. Stone, Sup.	164	643
Griffin; Credit Ass'n of California v., App.	163	695
Grossman; Superior California Fruit Land Co. v., App.	162	1046
Grotefend v. May, App.	165	27
Haas; Schallman v., App.	164	336
Hackney Mfg. Co.; Remsberg v., Sup.	164	792
Hadley; People v., Sup.	165	442
Hall v. Hall, Sup.	164	390
Hamilton v. Mallard, App.	165	725
Hammel; Burns v., App.	162	669

	P. Vol.	Page
Hammond v. Pacific Electric Ry. Co., App.	164	50
Hance; Thompson v., Sup.	163	1021
Hanke v. Martin, App.	162	427
Hansen v. Sierra & San Francisco Power Co., App.	162	924
Harney; Tidewater Southern Ry. Co. v., App.	162	664
Harrell v. Fresno Traction Co., App.	163	504
Harrell; Rauer's Law & Collection Co. v., App.	162	125
Hartford Accident & Indemnity Co. v. Industrial Accident Commission, App.	163	225
Haskell; Atwell v., Sup.	162	896
Hawes; Dean v., App.	163	1038
Hawn; Kloster v., App.	164	402
Hay v. McDonald, App.	165	1030
Hayne v. City and County of San Francisco, Sup.	162	625
Haynes; Provident Gold Mining Co. v., App.	162	1181
Hayward; White v., App.	165	972
Hedges v. Frink, Sup.	163	884
Hefner v. Sealey, Sup.	164	898
Heidt; Van Tassell v., App.	164	817
Held v. Beach-Robinson Co., App.	162	661
Henderson; Pleasant Valley Hotel Co. v., App.	164	420
Henson; People v., App.	163	685
Herbold, Appeal of, Sup.	165	941
Hernan v. Our Lady's Home, App.	162	901
Herrera; People v., App.	163	879
Herrington v. Baker, Sup.	163	1009
Herskowitz; Myers v., App.	165	1031
Hertweck; Rauer v., Sup.	165	946
Hicks v. Christeson, Sup.	164	395
Hillyer v. Eggers, App.	164	27
Hillyer v. Hynes, App.	165	718
Hines, Ex parte, App.	164	339
Hirst; Smith v., App.	163	334
Holden v. Mensinger, Sup.	165	950
Holmberg; Ott Hardware Co. v., App.	162	911
Holt; Smalley v., App.	165	1023
Hooper & Co. v. Railroad Commission of California, Sup.	165	689
Hopkins; Pacific Portland Cement Co. v., Sup.	162	1016
Horgan; People v., App.	162	399
Horton v. Winbigler, Sup.	165	423
Houghton v. Kern Valley Bank, App.	165	738
Howard; Gideon v., App.	164	11
Hughes v. Warman Steel Casting Co., Sup.	163	885
Humphrey, In re, Sup.	163	60
Hunt v. Wicht, Sup.	162	639
Huntoon's Estate, In re, Sup.	163	52
Hyatt v. Colkins, Sup.	163	1007
Hynes; Hillyer v., App.	165	718
Independent Electrical Supply Co.; Francis v., App.	165	716
Industrial Accident Commission; Ætna Life Ins. Co. v., Sup.	165	15
Industrial Accident Commission; California Western R. & Nav. Co. v., App.	164	912
Industrial Accident Commission; Diestelhorst v., App.	164	44
Industrial Accident Commission; Hartford Accident & Indemnity Co. v., App.	163	225
Industrial Accident Commission; Northwestern Pac. R. Co. v., Sup.	163	1000

	Vol.	Page
Industrial Accident Commission; Richmond Dredging Co. v., App.	164	407
Industrial Accident Commission; Santa v., Sup.	165	689
Industrial Accident Commission; Ward v., Sup.	164	1123
Industrial Accident Commission of California; Brown v., Sup.	163	664
Industrial Accident Commission of California; Claremont Country Club v., Sup.	163	209
Industrial Accident Commission of California; Miller & Lux v., App.	162	651
Industrial Accident Commission of California; North Pac. S. S. Co. v., Sup.	163	199
Industrial Accident Commission of California; North Pac. S. S. Co. v., Sup.	163	203
Industrial Accident Commission of California; North Pac. S. S. Co. v., Sup.	163	910
Industrial Accident Commission of California; Smith v., Sup.	162	636
Industrial Accident Commission of California; United States Fidelity & Guaranty Co. v., Sup.	163	1013
Industrial Accident Commission of California; Western Indemnity Co. v., Sup.	163	60
Industrial Accident Commission of State of California; Modoc County v., App.	163	685
Ingram v. Slayton, App.	165	1026
Isch, Ex parte, App.	162	140
Isch, Ex parte, Sup.	162	1026
Jackson v. Brown, App.	165	152
Jacobi v. Builders' Realty Co., Sup.	164	394
Jaffray; Leonard v., Sup.	165	956
Jarvis; Riverside Land Co. v., Sup.	163	54
Jenner; Connell Co. v., App.	165	54
Jenner Lumber Co.; Call v., App.	165	23
Jepson's Estate, In rt, Sup.	164	1
Jesse A. Linney & Co.; West v., App.	164	608
J. Frank & Co. v. New Amsterdam Casualty Co., Sup.	165	927
J. I. Case Threshing Mach. Co. v. Copren Bros., App.	162	647
Johnson v. Clark, Sup.	163	1004
Johnson v. Cordes, App.	165	1040
Johnson v. Johnson, App.	164	421
Johnson; Purdy v., Sup.	163	893
Johnson v. V. D. Reduction Co., Sup.	164	1119
Jones v. Luckel, Sup.	163	906
Jones; Meyer v., App.	163	67
Jones; Shoenhair v., App.	165	971
Jones; Smith v., Sup.	163	890
Jordan; Bullfrog, Goldfield R. Co. v., Sup.	163	40
Jordan; Kinard v., Sup.	164	894
Judson Mfg. Co. v. Lutge, Sup.	163	1017
Justice's Court of Los Angeles Tp.; Maidenberg v., App.	163	872
Karahadian v. Lockett, App.	165	552
Kato v. Busick, Sup.	162	108
Kaye v. Superior Court of Kern County, App.	164	912
Keeley v. Erbe, App.	164	906
Keeney v. Bank of Italy, App.	165	735
Keith's Estate, In re, Sup.	165	10
Kellerman; Piper v., App.	162	423
Kenney; Bank of Commerce & Trust Co. v., Sup.	165	8
Kenyon; Bank of Haywards v., App.	163	869
Kern Valley Bank; Houghton v., App.	165	738

	P.	
	Vol.	Page
Kierulff; Ewald v., Sup.	165	942
Kinard v. Jordan, Sup.	164	894
King; O'Brien v., Sup.	164	631
Kinkade v. Champion Horseshoe Co., App.	163	228
Kirk; People v., App.	163	696
Kitley; People v., App.	164	609
Klein v. Markarian, Sup.	165	3
Kling v. Bucher, App.	163	871
Kloster v. Hawn, App.	164	402
Knewing; Boas v., Sup.	165	690
Knight v. All Persons, App.	162	1051
Knox; People v., App.	162	407
Kohn v. Parent, Sup.	163	1008
Kruse v. Pillsbury, Sup.	162	891
Kuhn; People v., App.	165	26
Kuns v. Dias, App.	163	1052
Laguna Lands; McClatchy v., App.	164	41
Lake v. Sterling Development Co., App.	164	913
Landon Co.; Union Inv. Co. v., App.	162	903
Landwehr v. Gillette, Sup.	163	1018
Langford v. San Diego Electric Ry. Co., Sup.	164	398
Lapique v. Agoure, App.	165	57
Lapique v. Plummer, App.	165	56
Lapique v. Walsh, App.	165	56
Lauer v. Williams, App.	163	687
Lazarus v. Byrnes, App.	163	227
Lee; Bayly v., Sup.	162	96
Lee; Carpenter v., Sup.	165	525
Lee v. Colquhoun, Sup.	164	894
Legerton v. Chambers, App.	163	678
Legerton v. Lewis, App.	163	679
Leonard v. Jaffray, Sup.	165	956
Leutheuser v. Silent, App.	163	225
Levi; Merchants' Collection Agency v., App.	163	870
Levi v. Sockolov, App.	162	902
Levy v. Dusenbery, App.	163	231
Lewis; Cline v., Sup.	165	915
Lewis; Legerton v., App.	163	679
Lewis v. Lewis, Sup.	163	42
Lichtenthaler v. Samson Iron Works, App.	162	441
Lilienthal; McDougald v., Sup.	164	387
Lillis v. Silver Creek & Panoche Land & Water Co., App.	163	1040
Limoneira Co. v. Railroad Commission of California, Sup.	162	1033
Lincoln v. Pacific Electric Ry. Co., App.	164	412
Lininger v. Botsford, App.	163	63
Linney & Co.; West v., App.	164	608
Lippert v. Pacific Sugar Corp., App.	164	810
Lockett; Karahadian v., App.	165	552
Locomobile Co. of America v. Belabco, App.	162	920
Logan; People v., Sup.	164	1121
London Assur. Corp.; Sowell v., App.	163	242
Lopez; People v., App.	165	722
Los Angeles County v. Sullivan, App.,	162	907
Los Angeles Ice & Cold Storage Co.; Fairmont Creamery Co. v., App.	165	553
Los Angeles Ice & Cold Storage Co.; Smith-Booth-Usher Co. v., Sup.	165	430
Los Molinos Land Co. v. MacKay, Sup.	165	926

	Vol.	Page
Lowrey; First Congregational Church of Christ in Corona v., Sup.	165	440
Luck Sing; People v., App.	162	137
Luckel; Jones v., Sup.	163	906
Luft v. Arakelian, App.	165	712
Lutge; Judson Mfg. Co. v., Sup.	163	1017
L. W. Blinn Lumber Co. v. Cohn, App.	165	444
Lynch v. Pacific Electric Ry. Co., App.	164	20
Lytle, In re, App.	163	685
L. & E. Emanuel v. Oberlin Bros. Co., App.	164	818
Mabrier; People v., App.	165	1044
McAleer; People v., App.	164	425
McCaleb v. McCaleb, App.	163	1045
McClatchy v. Laguna Lands, App.	164	41
McClay v. Superior Court of California in and for Los Angeles County, App.	163	68
McCombs' Estate, In re, Sup.	162	897
McCormack v. McCormack, Sup.	165	930
McDonald; Hay v., App.	165	1030
McDonnell; People v., App.	163	1046
McDougald v. Lilienthal, Sup.	164	387
McGinn v. Rees, App.	165	52
MacKay; Los Molinos Land Co. v., Sup.	165	926
McKay & Co.; Albert v., Sup.	163	666
McLaury; State Bank of Lansing v., Sup.	165	7
McLean; Redmond v., App.	164	15
McMahon's Estate, In re, Sup.	163	669
McNeil; Cram v., App.	162	140
McReynolds; Gibson v., Sup.	165	921
McRoskey; Sawyer v., App.	163	336
Madalina, Ex parte, Sup.	164	348
Magee v. Magee, Sup.	162	1023
Magidson, Ex parte, App.	163	689
Magri; People v., App.	163	503
Maidenberg v. Justice's Court of Los Angeles Tp., App.	163	872
Mallard; Hamilton v., App.	165	725
Manchester's Estate, In re, Sup.	163	358
Manor v. Dunfield, App.	165	983
Marcuse; Schwarz & Gottlieb v., Sup.	165	1015
Marino; People v., App.	165	564
Markarian; Klein v., Sup.	165	3
Martin; Hanke v., App.	162	427
Marvin v. Eng-Skell Co., App.	164	332
Marx's Estate, In re, Sup.	164	640
Maryland Gold Quartz Mining Co.; Whildin v., App.	164	908
Maschini; People v., App.	165	546
Matchette v. California Fruit Canners' Ass'n, App.	164	423
Mathews, In re, Sup.	164	8
Mathews; Anderson v., Sup.	163	902
Mathews; Rouse v., Sup.	164	8
May; Grotefend v., App.	165	27
May; Superior California Fruit Land Co. v., App.	162	1049
Maybury Ranch Co. v. Devenney, App.	165	1020
Medart Mfg. Co. v. Weary & Alford Co., App.	165	35
Meek v. Pacific Electric Ry. Co., Sup.	164	1117
Mensinger; Holden v., Sup.	165	950
Mercantile Trust Co. of San Francisco; Ainsa v., Sup.	163	898

	P.	
	Vol.	Page
Merchants' Collection Agency v. Levi, App.	163	870
Merrill v. Superior Court of City and County of San Francisco, App.	164	340
Mêsmer v. Uharriet, Sup.	162	104
Messenheimer, Ex parte, App.	163	869
Metcalfe; Suhr v., App.	164	407
Meyer v. Jones, App.	163	67
Miller v. Oliver, Sup.	163	355
Miller v. Oliver, Sup.	163	357
Miller & Lux v. Industrial Accident Commission of California, App.	162	651
Milloglav v. Zacharias, App.	165	977
Modoc County v. Industrial Acc. Commission of State of California, App.	163	685
Moloney; Bell v., Sup.	165	917
Mono County Irr. Co. v. State, App.	162	641
Mono Irr. Co. v. State, App.	162	647
Monroe; Williamson v., Sup.	163	662
Monsen v. Monsen, Sup.	162	90
Moore v. San Vicente Lumber Co., Sup.	165	687
Moore v. Strayer, Sup.	165	530
More; Santa Barbara County v., Sup.	164	895
Morris v. Fiat Motor Sales Co. of California, App.	162	663
Mottet Co.; Bracquee v., Sup.	165	696
Murnahan; People v., App.	162	422
Murphy; Dumbarton Land & Improvement Co. v., App.	163	866
Myers v. Herskowitz, App.	165	1031
Napa Valley Electric Co. v. Calistoga Electric Co., Sup.	163	497
National Home & Town Builders; Ellsworth v., App.	164	14
New Amsterdam Casualty Co.; Drown v., Sup.	165	5
New Amsterdam Casualty Co.; J. Frank & Co. v., Sup.	165	927
Nicholson v. Nicholson, Sup.	163	219
Nolan; People v., App.	165	715
North Alaska Salmon Co. v. Pillsbury, Sup.	162	93
Northern California Power Co.; Silva v., App.	162	412
Northern California Power Co. v. Waller, Sup.	163	214
Northern Const. Co.; Soule v., App.	165	21
North Pac. S. S. Co. v. Industrial Accident Commission of California, Sup.	163	199
North Pac. S. S. Co. v. Industrial Accident Commission of California, Sup.	163	203
North Pac. S. S. Co. v. Industrial Accident Commission of California, Sup.	163	910
Northwestern Pac. R. Co. v. Industrial Accident Commission, Sup.	163	1000
Northwestern Portland Cement Co. v. Atlantic Portland Cement Co., Sup.	163	47
Oberlin Bros. Co.; L. & E. Emanuel v., App.	164	818
O'Brien v. King, Sup.	164	631
Orr; Webster v., Sup.	163	361
O'Dea v. Roberts, App.	164	1135
Oliver; Fisher v., Sup.	164	880
Oliver; Miller v., Sup.	163	355
Oliver; Miller v., Sup.	163	357
Olson v. Superior Court of Merced County, Sup.	165	706
Orange County Nursery & Land Co.; Eucalyptus Growers Ass'n v., Sup.	163	45
Otis v. Zeiss, Sup.	165	524
Ott Hardware Co. v. Holmberg, App.	162	911
Ottinger; Paff v., App.	163	230
Our Lady's Home; Hernan v., App.	162	901
Owners' Realty Co.; Caner v., App.	165	727

P.

	Vol.	Page
Pacific Carbon Mfg. Co.; Passmore v., App.	163	221
Pacific Coast Casualty Co. v. Pillsbury, App.	162	1040
Pacific Coast Casualty Co.; Rodgers v., Sup.	164	1115
Pacific Electric Ry. Co.; Bryant v., Sup.	164	385
Pacific Electric Ry. Co.; Hammond v., App.	164	50
Pacific Electric Ry. Co.; Lincoln v., App.	164	412
Pacific Electric Ry. Co.; Lynch v., App.	164	20
Pacific Electric Ry. Co.; Meek v., Sup.	164	1117
Pacific Gas & Electric Co. v. Cole, App.	162	435
Pacific Gas & Electric Co. v. Rollins, App.	164	53
Pacific Kissel Kar Branch; Tockstein v., App.	164	906
Pacific Portland Cement Co. v. Hopkins, Sup.	162	1016
Pacific Power Co. v. State, App.	162	641
Pacific Power Co. v. State, App.	162	643
Pacific Sugar Corp.; Lippert v., App.	164	810
Paff v. Ottinger, App.	163	239
Palo Alto Mut. Building & Loan Ass'n v. First Nat. Bank, App.	164	1124
Parent; Kohn v., Sup.	163	1008
Passmore v. Pacific Carbon Mfg. Co., App.	163	221
Patty; Pohlmann v., App.	165	447
Payne v. Cunningham, Sup.	165	531
Peckham Co.; Smalley v., Sup.	165	438
Pedreira v. Pedreira, App.	164	30
Peeples; People v., App.	162	653
People v. Abrams, Sup.	162	395
People v. Allen, App.	162	401
People v. Benjamin, App.	163	235
People v. Clayton, App.	165	37
People v. Coates, App.	163	502
People v. Fages, App.	162	137
People v. Fealy, App.	165	1034
People v. Fodera, App.	164	22
People v. Gilbreth, App.	164	18
People v. Gonzales, App.	164	1131
People v. Grandi, App.	165	1027
People v. Hadley, Sup.	165	442
People v. Henson, App.	163	685
People v. Herrera, App.	163	879
People v. Horgan, App.	162	399
People v. Kirk, App.	163	696
People v. Kitley, App.	164	609
People v. Knox, App.	162	407
People v. Kuhn, App.	165	26
People v. Logan, Sup.	164	1121
People v. Lopez, App.	165	722
People v. Luck Sing, App.	162	137
People v. Mabrier, App.	165	1041
People v. McAleer, App.	164	425
People v. McDonnell, App.	163	1046
People v. Magri, App.	163	503
People v. Marino, App.	165	564
People v. Maschini, App.	165	546
People v. Murnahan, App.	162	422
People v. Nolan, App.	165	715
People v. Peeples, App.	162	653
People v. Perry, App.	163	683

P.

	Vol.	Page
People v. Prietz, App.	164	13
People v. Rindge, Sup.	164	633
People v. Rippe, App.	163	506
People v. Scarpa, App.	163	882
People v. Scarpa, Sup.	163	883
People v. Schmidt, App.	165	555
People v. Searle, App.	164	819
People v. Slaughter, App.	165	44
People v. Smith, App.	164	609
People v. Stockton, App.	165	717
People v. Sweetman, App.	164	627
People v. Sweetman, Sup.	164	628
People v. Tugwell, App.	163	508
People v. Valencia, App.	163	865
People v. Van Nuys Lighting Dist. of Los Angeles County, Sup.	162	97
People v. Wakao, App.	165	720
People v. Weston, App.	163	691
People v. Wilbur, App.	165	729
People v. Winkler, Sup.	162	109
People v. Yip Sing, App.	164	806
People's Ditch Co.; Fresno Canal & Irrigation Co. v., Sup.	163	497
Perry; People v., App.	163	683
Petch; W. F. Boardman Co. v., Sup.	162	1028
Phipps; Freeman v., Sup.	163	1015
Pierce v. Employers' Indemnity Exch., App.	164	403
Pillsbury; Alaska Pac. S. S. Co. v., Sup.	163	204
Pillsbury; Kruse v., Sup.	162	891
Pillsbury; North Alaska Salmon Co. v., Sup.	162	93
Pillsbury; Pacific Coast Casualty Co. v., App.	162	1040
Pillsbury; Steamship Bowdoin Co. v., Sup.	163	204
Pillsbury; United States Fidelity & Guaranty Co. v., Sup.	162	638
Piper v. Kellerman, App.	162	423
Platnauer v. Superior Court in and for Sacramento County, App.	163	237
Platnauer v. Superior Court of California in and for Sacramento County, App.	165	41
Pleasant Valley Hotel Co. v. Henderson, App.	164	420
Plummer; Lapique v., App.	165	56
Plummer; Snyder v., Sup.	162	1040
Pohlmann v. Patty, App.	165	447
Porter v. Stockdale, App.	164	33
Portola Realty Co. v. Carlston, App.	162	899
Postal Telegraph-Cable Co.; Altpeter v., App.	164	35
Potter v. Back Country Transp. Co., App.	164	342
Pridham; Van de Water v., App.	164	1136
Prietz; People v., App.	164	13
Proper v. Reclamation Dist. No. 1500, Sup.	163	1037
Prouty v. Rogers, App.	164	901
Provident Gold Mining Co. v. Haynes, App.	162	1181
Purdy v. Johnson, Sup.	163	893
Quigley; Brooke v., App.	165	731
Railroad Commission; San Joaquin Light & Power Corp. v., Sup.	165	16
Railroad Commission of California; C. A. Hooper & Co. v., Sup.	165	689
Railroad Commission of California; City of San Jose v., Sup.	165	967
Railroad Commission of California; Limoneira Co. v., Sup.	162	1033
Railroad Commission of State of California; United Railroads of San Francisco v., Sup.	162	391

CASES REPORTED

P.

	Vol.	Page
Railroad Commission of State of California; Western Ass'n of Short Line Railroads v., Sup.	162	391
Ramish v. Workman, App.	164	26
Rauer v. Hertweck, Sup.	165	946
Rauer's Law & Collection Co. v. Harrell, App.	162	125
Realty Dock & Improvement Corp. v. Anderson, Sup.	164	4
Reclamation Dist. No. 1500; Gray v., Sup.	163	1024
Reclamation Dist. No. 1500; Proper v., Sup.	163	1037
Redmond v. McLean, App.	164	15
Reed Orchard Co.; Vallejo & N. R. Co. v., App.	162	914
Rees; McGinn v., App.	165	52
Reindollar; Farley v., Sup.	165	19
Remsberg v. Hackney Mfg. Co., Sup.	164	792
Renard; Bernard v., Sup.	165	694
Rice; Glenn v., Sup.	162	1020
Richardson; Bank of California, National Ass'n v., Sup.	165	152
Richmond Dredging Co. v. Industrial Accident Commission, App.	164	407
Richmond Dredging Co.; Taugher v., App.	165	31
Rindge; People v., Sup.	164	633
Rippe; People v., App.	163	506
Rispin; Robinson v., App.	165	979
Riverside Land Co. v. Jarvis, Sup.	163	54
Robbins; Elliott v., App.	165	1042
Roberts; O'Dea v., App.	164	1135
Robinson v. Rispin, App.	165	979
Robinson v. Smith-Booth-Usher Co., App.	164	29
Rochester; Cass v., Sup.	163	212
Rodgers v. Pacific Coast Casualty Co., Sup.	164	1115
Rodrigues; Graca v., Sup.	165	1012
Roebling Const. Co. v. Doe Estate Co., App.	165	547
Rogers; Prouty v., App.	164	901
Rolleri v. Rolleri, App.	164	817
Rollins; Pacific Gas & Electric Co. v., App.	164	53
Ross; Ayers v., Sup.	165	529
Rouse v. Mathews, Sup.	164	8
Rudell v. Collins, Sup.	163	204
Ryal; San Luis Obispo County v., Sup.	165	1
Rystinki v. Central California Traction Co., Sup.	165	952
Sacramento County v. Chambers, App.	164	613
Samson Iron Works; Lichtenthaler v., App.	162	441
San Diego Electric Ry. Co.; Langford v., Sup.	164	398
San Francisco-Oakland Terminal Rys.; Arnold v., Sup.	164	798
San Joaquin Fruit & Vegetable Growers' Protective Ass'n; Webster v., App.	162	654
San Joaquin Light & Power Corp. v. City of Madera, Sup.	165	701
San Joaquin Light & Power Corp. v. Railroad Commission, Sup.	165	16
San Luis Obispo County v. Ryal, Sup.	165	1
Santa v. Industrial Accident Commission, Sup.	165	689
Santa Barbara County v. More, Sup.	164	895
San Vicente Lumber Co.; Moore v., Sup.	165	687
Saul, Ex parte, App.	163	505
Savage Tire Co.; Doolittle v., App.	165	728
Sawyer v. McRoskey, App.	163	336
Scarpa; People v., App.	163	882
Scarpa; People v., Sup.	163	883
Schallman v. Haas, App.	164	336

P.	Vol.	Page
Schnierow v. Boutagy, App.	164	1132
Schmidt; People v., App.	165	555
Schwarz & Gottlieb v. Marcuse, Sup.	165	1015
Sealey; Hefner v., Sup.	164	898
Searle; People v., App.	164	819
Seely v. Stoltz's, Inc., App.	163	681
Seiler's Estate, In re, Sup.	164	401
Semon; Smith v., App.	163	1038
Settle; Stieglitz v., Sup.	165	436
Shea; Sullivan v., App.	162	925
Sherman; Winbigler v., Sup.	165	943
Sherriff v. Sherriff, App.	163	878
Shinn; Turton v., App.	164	38
Shoenhair v. Jones, App.	165	971
Shull v. Crawford, App.	164	330
Sierra & San Francisco Power Co.; Hansen v., App.	162	924
Silent; Leutheuser v., App.	163	225
Silva v. Northern California Power Co., App.	162	412
Silva v. Silva, App.	162	142
Silver Creek & Panoche Land & Water Co.; Lillis v., App.	163	1040
Silver Lake Power & Irrigation Co. v. City of Los Angeles, App.	162	432
Simmons v. Firth, App.	164	807
Simpson v. City and County of San Francisco, Sup.	162	631
Slaughter; People v., App.	165	44
Slayton; Ingram v., App.	165	1026
Smalley v. George C. Peckham Co., Sup.	165	438
Smalley v. Holt, App.	165	1023
Smith, Ex parte, App.	164	618
Smith v. Bratman, Sup.	163	892
Smith v. Hirst, App.	163	334
Smith v. Industrial Accident Commission of California, Sup.	162	636
Smith v. Jones, Sup.	163	890
Smith; People v., App.	164	609
Smith v. Semon, App.	163	1038
Smith; Tracy v., Sup.	165	535
Smith-Booth-Usher Co. v. Los Angeles Ice & Cold Storage Co., Sup.	165	430
Smith-Booth-Usher Co.; Robinson v., App.	164	29
Smithson v. Atchison, T. & S. F. Ry. Co., Sup.	162	111
Snyder v. Plummer, two cases, Sup.	162	1040
Sockolov; Levi v., App.	162	902
Soule v. Northern Const. Co., App.	165	21
Southern Pac. R. Co. v. Blaisdell, App.	164	804
Southern Pac. R. Co. v. Blaisdell, App.	164	805
Sowell v. London Assur. Corp., App.	163	242
Spafford v. Citizens' Trust & Savings Bank, Sup.	165	1
Spafford's Estate, In re, Sup.	165	1
Spitzer v. City of Oakland, App.	163	1044
Spring; Dodds v., Sup.	163	351
Spring Valley Water Co.; Dowling v., Sup.	162	894
Squires v. Estey, App.	165	34
Standart; Walsh v., Sup.	164	795
State; Mono County Irr. Co. v., App.	162	641
State; Mono Irr. Co. v., App.	162	647
State; Pacific Power Co. v., App.	162	641
State; Pacific Power Co. v., App.	162	643
State Bank of Lansing v. McLaury, two cases, Sup.	165	7

	P.	
	Vol.	Page
Steamship Bowdoin Co. v. Pillsbury, Sup.	163	204
Steinberger v. Young, Sup.	165	432
Stephens v. Weyl-Zuckerman & Co., App.	165	975
Sterling Development Co.; Lake v., App.	164	913
Stewart v. Stewart Hotel Co., App.	164	620
Stewart Estate Co. v. Stewart Hotel Co., App.	164	620
Stewart Hotel Co.; Stewart v., App.	164	620
Stewart Hotel Co.; Stewart Estate Co. v., App.	164	620
Stewart's Estate, In re, Sup.	163	902
Stieglitz v. Settle, Sup.	165	436
Stockdale; Porter v., App.	164	33
Stockton; People v., App.	165	717
Stoddart's Estate, In re, Sup.	163	1010
Stoltz's, Inc.; Seely v., App.	163	681
Stone; Green v., Sup.	164	643
Stone's Estate, In re, Sup.	164	643
Strahm v. Fraser, App.	163	680
Strayer; Moore v., Sup.	165	530
Studebaker Bros. Co. of California; Conlin v., Sup.	165	1009
Suhr v. Metcalfe, App.	164	407
Sullivan; Los Angeles County v., App.	162	907
Sullivan v. Shea, App.	162	925
Sunset Lumber Co. v. Dunlap, App.	163	338
Superior California Fruit Land Co. v. Grossman, App.	162	1046
Superior California Fruit Land Co. v. May, App.	162	1049
Superior Court in and for City and County of San Francisco; Suttman v., Sup.	162	1032
Superior Court in and for Sacramento County; Arbogast v., App.	162	909
Superior Court in and for Sacramento County; Platnauer v., App.	163	237
Superior Court in and for San Bernardino County; Brownell v., App.	162	419
Superior Court, Los Angeles County; Brown v., Sup.	165	429
Superior Court of Alameda County; Bond v., Sup.	163	496
Superior Court of California in and for Los Angeles County; Consolidated Lumber Co. v., App.	164	612
Superior Court of California in and for Los Angeles County; McClay v., App.	163	68
Superior Court of California in and for Sacramento County; Platnauer v., App.	165	41
Superior Court of City and County of San Francisco; Merrill v., App.	164	340
Superior Court of Kern County; Kaye v., App.	164	912
Superior Court of Kings County; Bettencourt v., App.	163	682
Superior Court of Los Angeles County; Clay v., App.	162	416
Superior Court of Merced County; Olson v., Sup.	165	706
Superior Court of Sonoma County; Brians v., App.	162	420
Suttman v. Superior Court in and for City and County of San Francisco, Sup.	162	1032
Sweeney v. Board of Trustees of Auburn School Dist. of City of Auburn, Placer County, App.	165	42
Sweet v. Fresno Hotel Co., Sup.	164	788
Sweetman; People v., App.	164	627
Sweetman; People v., Sup.	164	628
Tarr Mining Co.; E. Clemens Horst Co. v., Sup.	163	492
Taugher v. Richmond Dredging Co., App.	165	31
Taylor v. Avila, Sup.	165	533
Telegraph Hill Neighborhood Ass'n v. City and County of San Francisco, Sup.	162	630

	P.	
	Vol.	Page
Thomas; Bunnell v., App.	165	1047
Thomas v. City of Petaluma, App.	165	1021
Thompson v. Hance, Sup.	163	1021
Thompson v. Wolf, Castle Bros., Wolf & Son, App.	162	918
Tidewater Southern Ry. Co. v. Frame, App.	163	720
Tidewater Southern Ry. Co. v. Harney, App.	162	664
Tockstein v. Pacific Kissel Kar Branch, App.	164	906
Tracy v. Smith, Sup.	165	535
Tryon v. Clinch, App.	162	428
Tugwell; People v., App.	163	508
Turton v. Shinn, App.	164	38
Uharriet; Mesmer v., Sup.	162	104
Union Inv. Co. v. F. M. Landon Co., App.	162	903
Union Trust & Savings Bank; Allen v., Sup.	165	1010
United Railroads of San Francisco v. Railroad Commission of State of California, Sup.	162	391
United States Fidelity & Guaranty Co. v. Industrial Accident Commission of California, two cases, Sup.	163	1013
United States Fidelity & Guaranty Co. v. Pillsbury, Sup.	162	638
Upton; Curtis v., Sup.	165	935
Upton v. Easkoot, Sup.	165	935
Utah Const. Co. v. Western Pac. Ry. Co., Sup.	162	631
Valencia; People v., App.	163	865
Vallade; Braun v., App.	164	904
Vallejo & N. R. Co. v. Reed Orchard Co., App.	162	914
Van Calbergh v. Easton, Sup.	164	1113
Vance's Estate, In re, Sup.	162	103
Van de Water v. Pridham, App.	164	1136
Van Nuys Lighting Dist. of Los Angeles County; People v., Sup.	162	97
Van Tassell v. Heidt, App.	164	817
Varcoe v. Alameda Lodge, No. 1015, B. P. O. E. of United States, Sup.	163	909
Vaughan; Compton Land Co. v., App.	164	610
V. D. Reduction Co.; Johnson v., Sup.	164	1119
Wagner v. Cardinet Fountain Brush Co., App.	163	337
Waite, Ex parte, App.	162	140
Waite, Ex parte, Sup.	162	1028
Wakao; People v., App.	165	720
Walden's Estate, In re, Sup.	164	639
Waller; Northern California Power Co. v., Sup.	163	214
Walsh; Lapique v., App.	165	56
Walsh v. Standart, Sup.	164	795
Ward v. Goetz, App.	165	1022
Ward v. Industrial Accident Commission, Sup.	164	1123
Warden v. Choate, App.	165	36
Warehouse Inv. Co.; Black v., App.	162	403
Warman Steel Casting Co.; Hughes v., Sup.	163	885
Waterman; Edward Barron Estate Co. v., App.	162	410
Weary & Alford Co.; Fred Medart Mfg. Co. v., App.	165	35
Webster v. Orr, Sup.	163	361
Webster v. San Joaquin Fruit & Vegetable Growers' Protective Ass'n, App.	162	654
Wells, In re, Sup.	163	657
Wenman, Ex parte, App.	165	1024
West v. Jesse A. Linney & Co., App.	164	608
Western Ass'n of Short Line Railroads v. Railroad Commission of State of California, Sup.	162	391

	P.	
	Vol.	Page
Western Indemnity Co. v. Industrial Accident Commission of California, Sup.	163	60
Western Pac. Ry. Co.; Utah Const. Co. v., Sup.	162	631
Weston; People v., App.	163	691
West Virginia Oil Co.; Francis v., Sup.	162	394
Wetzel v. Cale, Sup.	165	692
Weyl-Zuckerman & Co.; Stephens v., App.	165	975
W. F. Boardman Co. v. Petch, Sup.	162	1028
Whildin v. Maryland Gold Quartz Mining Co., App.	164	908
Whitaker; Bornschein v., Sup.	165	523
White v. Hayward, App.	165	972
Whittier; Dilger v., App.	164	49
W. H. Wolf, Castle Bros., Wolf & Son; Thompson v., App.	162	918
Wicht; Hunt v., Sup.	162	639
Wilbur; People v., App.	165	729
Wiley B. Allen Co. v. Wood, App.	162	121
Williams; Lauer v., App.	163	687
Williamson v. Monroe, Sup.	163	662
Willits' Estate, In re, Sup.	165	537
Wilson v. Calkins, Sup.	165	423
Winbigler; Horton v., Sup.	165	423
Winbigler v. Sherman, Sup.	165	943
Winchester v. Winchester, Sup.	165	965
Winkler; People v., Sup.	162	109
Wise's Estate, In re, Sup.	165	531
Wisner, Ex parte, App.	163	868
Wolf v. Brakebill, App.	162	918
Wolf v. Gall, Sup.	162	115
Wolf v. Gall, App.	163	346
Wolf v. Gall, Sup.	163	350
Wolf, Castle Bros., Wolf & Son; Thompson v., App.	162	918
Wood; Wiley B. Allen Co. v., App.	162	121
Woodard v. Glenwood Lumber Co., Sup.	163	1017
Woodhams; Chappelle v., Sup.	164	1110
Woody; Conklin v., App.	165	973
Workman; Ramish v., App.	164	26
Worthley v. Worthley, App.	165	714
Wuest; Bauman v., App.	162	434
Yip Sing; People v., App.	164	806
Young v. Canfield's Estate, App.	164	1134
Young; Steinberger v., Sup.	165	432
Zacharias; Milloglav v., App.	165	977
Zeiss; Otis v., Sup.	165	524

CALIFORNIA REPORTER

162 PACIFIC REPORTER

(174 Cal. 97)

MONSEN et al. v. MONSEN. (Sac. 2271.)

(Supreme Court of California. Dec. 19, 1916. Rehearing Denied Jan. 18, 1917.)

1. Specific Performance 🔑86—Wills 🔑58(1)—Contract to Make Will.

A man may make a valid contract, binding himself to dispose of his property in a particular way by will, and a court of equity will enforce such agreement specifically by treating the heirs as trustees and compelling them to convey the property.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 223, 224; Dec. Dig. 🔑86; Wills, Cent. Dig. § 164; Dec. Dig. 🔑58(1).]

2. Specific Performance 🔑28(1) — Contract to Devise—Evidence.

The requirement of Civ. Code, § 3390, that to be specifically enforced the terms of an agreement must be sufficiently certain to make the precise act which is to be done clearly ascertainable, applies to contracts to dispose of property by will.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61, 65, 66; Dec. Dig. 🔑28(1).]

3. Specific Performance 🔑121(7) — Evidence—Contract to Dispose of Property by Will.

In suit for specific performance of a contract to leave to plaintiff a child's share of decedent's estate, evidence that decedent and his wife agreed to take plaintiff and treat him as their child, and that they indicated that he should succeed to their property and at one time made a will, making him the sole beneficiary, which they showed to him, was not sufficient to show the precise contract alleged.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 391–393; Dec. Dig. 🔑121(7).]

4. Appeal and Error 🔑1011(1)—Review—Findings on Conflicting Evidence.

The rule that upon conflicting evidence all reasonable inferences are to be indulged to support the findings does not justify the sustaining of a finding not having the support of substantial evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. 🔑1011(1).]

Department 1. Appeal from Superior Court, Colusa County; H. M. Albery, Judge.

Action by Hine G. Monsen against Mary Annie Monsen and others. From judgment for plaintiff, defendants appeal. Reversed.

U. W. Brown, of Colusa, and Frank Freeman, of Willow, for appellants. N. J. Manson, of San Francisco, Thomas Rutledge, of Colusa, F. St. John Fox, of San Francisco (J. P. Langhorne, of San Francisco, of counsel), for respondent.

SLOSS, J. The defendants, claiming as executors and beneficiaries under the will of Friedriech Monsen, deceased, appeal from a judgment enforcing an alleged contract by which the decedent had agreed that the plaintiff should receive and inherit a child's share of the property which said decedent might leave.

[1] The action is of a type familiar in this court, and illustrated by a line of decisions beginning with Owens v. McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369. As was said in that case, there has been "from a very early date a general concurrence among the authorities upon the proposition that a man may make a valid agreement binding himself to dispose of his property in a particular way by last will and testament, and a court of equity will enforce such an agreement specifically by treating the heirs as trustees and compelling them to convey the property in accordance with the terms of the contract." Without referring to the numerous decisions in other jurisdictions, we make note of the cases in which the rule, as thus declared, has been recognized here. McCabe v. Healy, 138 Cal. 81, 70 Pac. 1008; Baumann v. Kusian, 164 Cal. 582, 129 Pac. 986, 44 L. R. A. (N. S.) 756; Rogers v. Schlotterback, 167 Cal. 35, 138 Pac. 728; Blanc v. Connor, 167 Cal. 719, 141 Pac. 217. In the case at bar, as in those cited, the plaintiff relied upon a parol agreement. It may not be amiss to point out the manifest danger of fraud, perjury, and injustice that may inhere in a recognition of the right to alter, by parol testimony, the course of disposition of the property of a decedent. It was, no doubt, a recognition of this danger that led the Legislature to adopt the amendments to section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure, bringing agreements of this character within the scope of the statute of frauds. The agreement here relied upon was, however, claimed to have been made, and executed, on plaintiff's part, long prior to the changes in the Codes, and its validity is not affected by them. Rogers v. Schlotterback, supra.

[2] While the cases which we have cited declare the propriety of an enforcement, in equity, of contracts to make a particular disposition of property upon the death of the promisor, they all agree that enforcement will not be decreed except upon the conditions applicable to all demands for specific performance. One of these is that the terms of the agreement must be definite and certain. Section 3390 of the Civil Code, in enumerating the obligations which cannot be specifically enforced, concludes:

> "(6) An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable."

In Owens v. McNally, the court used this language:

> "Where a contract such as this, resting in parol and sought to be enforced after the death of the other party to it, comes before a court of equity for review, it is scrutinized, and should be scrutinized, with particular care, and only upon a satisfactory showing that it is definite and certain and just will it be enforced. The proofs of the contract should be clear, and the acts of the claimant referable alone to the contract."

McCabe v. Healy recognizes the same doctrine, although it was there held that the contract was sufficiently certain. In Baumann v. Kusian, we find in the opinion the statement that:

> "It is well settled that to warrant specific enforcement of a contract of the character here alleged the contract must be definite and certain."

In Rogers v. Schlotterback, the court says that a contract of the kind here alleged will be enforced "if such a contract may fairly be said to be clearly and satisfactorily shown, if it is clear, certain, and definite in its terms; and if specific performance would not be harsh and oppressive and unjust to innocent third parties. * * *" Finally, in Blanc v. Connor, 167 Cal. 719, 141 Pac. 217, the court, after reviewing the earlier cases, again emphasized the rule that "proof of the contract to make a certain kind of will must be definite and distinct before a chancellor will enforce specific performance."

Plaintiff was the son of Peter Grevie and Fredrika, his wife. The Grevies had two other sons, both older than plaintiff. The family lived on a farm in Colusa county. Friedriech Monsen and Magdalena, his wife, were a childless couple residing on a farm near that of the Grevies. Peter Grevie and Friedriech Monsen were brothers of the half blood. The plaintiff was born in March, 1883. His mother died in April of the same year, and a few months later the plaintiff was put in charge of the Monsens. He remained with them during his childhood, receiving nurture and education at their hands. He took, or was given, their name, being known as Hine G. Monsen, and it is perfectly apparent from the evidence that the relations which grew up between him and the Monsens were of a warmly affectionate kind. In 1904 Magdalena Monsen died. In 1907 Friedriech Monsen married Mary Annie Fuerstein, and two sons were born of that marriage. Friedriech Monsen died April 2, 1913, leaving a will and codicil by which he disposed of his entire estate (appraised at about $115,000) to persons other than the plaintiff.

The agreement on which plaintiff relies is set forth in his complaint with great detail and particularity, and the findings follow the allegations of the complaint. Briefly stated, it is averred and found that in September, 1889, Peter Grevie, plaintiff's father, and Friedriech Monsen, for the benefit of the plaintiff, entered into a contract whereby Peter Grevie promised and agreed that he would surrender his said son to Friedriech Monsen to adopt, have, and keep as said Monsen's son, and would renounce and waive all his claims as father of said plaintiff and in consideration thereof Monsen agreed with said Peter Grevie for plaintiff's benefit that said Monsen would and he did thereby accept and adopt plaintiff as his own son, and would protect and maintain and provide for him as such son, and would in every way become responsible for his moral and physical welfare, and would assume all responsibility for the debts of said plaintiff to be incurred, and he further agreed that upon the death of the said Friedriech Monsen the said plaintiff "should have, receive and inherit and should be and become entitled to and vested with a child's and son's share of all of the property, both real and personal, of which the said Friedriech Monsen might die seised or possessed, in the same manner and to the same effect as if he, the said plaintiff, Hine G. Monsen, were a child and son and heir at law of the said Friedriech Monsen, deceased, and as a child and son and heir at law of the said Friedriech Monsen, deceased." Having found the agreement as thus outlined, the court drew the conclusion of law that plaintiff was entitled to receive one-third of the estate of Friedriech Monsen, subject to costs of administration, and judgment was entered accordingly.

[3] When we come to examine the record, we fail to find in it any substantial evidence showing "clearly and satisfactorily," or at all, the making of the contract described with such precision in the complaint and the findings. The only witness who undertook to give direct testimony that a contract of any kind had been entered into was the plaintiff himself. As already stated, the plaintiff first came into Monsen's family when he was a few months old. Some five years later Peter Grevie, his father, came to the Monsen house to take the plaintiff away. Plaintiff's testimony was that upon this occasion his father said, "'I have come to take you home with me.' Mrs. Monsen interrupted, saying, 'Peter, Hine is our boy. It was understood by us that he was our boy when we took him.' After this * * * a very heated discussion occurred, at the close of which Peter Grevie said, 'You can have the boy.'" In this conversation, the recital of which, as already stated, constituted the only direct testimony of an agreement, there was not a word said about inheritance, or testamentary disposition, or, indeed, about property at all. The further evidence on respondent's part consisted of proof of the Monsens' acts and declarations, offered as the basis for an inference that the agreement pleaded had been made. We think that these items of evidence, taken collectively, fall far short of proving the making of the contract alleged and found. We shall not extend this opin-

ion so far as to recite all of this evidence. Many of the statements tend to show, merely, the deep affection entertained by Friedriech Monsen and his wife for the plaintiff, that they treated him as a son, and that they bestowed many material and other kindnesses upon him. This evidence could support, at the utmost, an inference that the Monsens had agreed to take plaintiff and treat him as their child. Inasmuch, however, as a parent is under no legal obligation to give his property by will to a child, no cause of action would arise from such a contract. Baumann v. Kusian, supra. We shall refer, briefly, to the items of evidence which may be thought to bear more directly upon the alleged making of the contract pleaded. The earliest statement testified to is one made by Mrs. Magdalena Monsen to a witness (Miss Boggs), and having reference, apparently, to the plaintiff's original coming into the Monsen family, some years prior to the time when Peter Grevie came to take his child away. This witness testified that Mrs. Magdalena Monsen had told her that soon after plaintiff's birth his mother died, and his father asked her, Mrs. Monsen, to take care of the baby for him, and that she said:

> "I will not do it that way. If you will give me the baby for my own I will do the best I can for him."

This, of course, is entirely insufficient to show any agreement by Mrs. Monsen, still less by her husband, to give to plaintiff a "child's share" of the husband's estate.

There was evidence that both Monsen and his first wife had made wills by which they had made the plaintiff the sole beneficiary, and that they had shown these wills to him. This indicates that the Monsens, at the time of making the wills, desired that plaintiff should succeed to their property. It indicates no more. The making of a will has no tendency to show that there is a contractual obligation to make such will.

To the witness Wilkins, Monsen said:

> "I took a boy from Mr. Grevie and legally adopted him and made him my heir."

The statement that he had "legally adopted" plaintiff, if made, was not true. There is no claim that any legal adoption had ever taken place. The statement that he had made him his heir is fully explained by the showing that he had made a will leaving everything to the plaintiff. It certainly does not show that he had bound himself by agreement to make such provision. Testimony of several witnesses that the Monsens had said that they would leave the plaintiff all they had, or that "they intended" that he should get their property, is entitled to no greater weight. All of this evidence is similar in character to that under consideration in Ackerman v. Ackerman's Executors, 24 N. J. Eq. 586 (cited with approval in Owens v. McNally, supra), of which the court said:

> "The complainant's evidence chiefly consists of loose conversations had by different persons with the testator * * * all of which evidence is * * * consistent with a purpose, at one time, on the part of the father, to devise the farm to Gilbert, and Gilbert's expectation that he would * * * but which fails to show any contract for the conveyance or devise of the farm, intended to be obligatory either upon the father or son."

One other item of evidence deserves specific mention. The plaintiff testified that the Monsens kept their wills in a safe, and that with these wills were duplicate copies of a memorandum which he had seen several times, the last occasion being some seven years before the trial. He did not undertake to give the exact wording of the memorandum, but declared that:

> "It stated something like this: 'We want it understood that we have raised and adopted Hine G. Monsen, and that at the time of our death, we want all of the property that we possess at that time to go to him.' I believe it also stated at the conclusion that, 'this being in accordance with an agreement with Peter Grevie.'"

This vague and uncertain testimony does not meet the requirements of the rule that there must be clear and distinct evidence of the precise terms of an agreement to devise or to make one an heir. The memorandum, as recalled by the witness, leaves the terms of the agreement indefinite in various respects. There is nothing to indicate what was to be done in return for the agreement of the Monsens, or what other consideration, if any, there was for their agreement. Again, so far as the language quoted shows, the obligation assumed by the Monsens under their "agreement with Peter Grevie" was simply that the plaintiff should be raised and adopted by them. The words "we want * * * the property * * * to go to him" are suggestive of a present desire rather than of a contractual obligation to have the property go thus. Something of the same uncertainty attaches to the plaintiff's testimony that Monsen had once said to him that he had made another will in his favor, "and this will is in accordance with an agreement with your father leaving all the property to you." It must be remembered that testimony of oral declarations or admissions (particularly those of persons who have been silenced by death) form a class of evidence which is not highly favored in the law. "Admissions are generally regarded as weak evidence for the proof of a fact, and are never conclusive of the facts stated, or of the inferences to be drawn therefrom; and our statute requires the jury to be instructed, on all proper occasions, 'that the evidence of the oral admissions of a party ought to be viewed with caution.' Code Civ. Proc., § 2071, subd. 4." Smith v. Whittier, 95 Cal. 279, 297, 30 Pac. 529, 534; Englebretson v. Ind. Acc. Com., 170 Cal. 798, 151 Pac. 421.

Beyond all this, the evidence relied on, even if it could be regarded as tending to show with sufficient precision the making of any contract, fails utterly to support the precise contract alleged and found. The only agreement which may be said to be even suggested by the proof is one to leave all of the property to the plaintiff. The agreement alleged and found, and the one which the court undertakes to enforce, is one to give the plaintiff a child's share of the estate, an agreement which the court interprets as one calling for a third of the estate.

[4] Without further elaboration, we repeat that the evidence is entirely insufficient to justify the finding which we have discussed. Accordingly, the judgment cannot be supported. We are not unmindful of the settled rule that the findings of a trial court upon conflicting evidence are conclusive here, and that all reasonable inferences are to be indulged to support the findings. This rule does not, however, justify the sustaining of a finding when it has not the support of substantial evidence.

It becomes unnecessary to consider other points made by the appellants.

The judgment is reversed.

We concur: SHAW, J.; LAWLOR, J.

174 Cal. 1

NORTH ALASKA SALMON CO. v. PILLSBURY et al., State Industrial Accident Commission. (S. F. 7432.)

(Supreme Court of California. Dec. 14, 1916.)

1. Master and Servant 🔑346—Workmen's Compensation—Nature of Liability.

Under Workmen's Compensation Act (St. 1913, p. 279), which is compulsory, the employer's liability to pay compensation arises from the law rather than from any agreement of the parties.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. 🔑346.]

2. Courts 🔑8—Extraterritorial Application of Statutes.

A statute is presumably intended not to have any extraterritorial application.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 18, 19; Dec. Dig. 🔑8.]

3. Master and Servant 🔑369—Workmen's Compensation—Injuries Outside State.

Under Workmen's Compensation Act, before its amendment by St. 1915, p. 1079, giving the commission jurisdiction over injuries occurring outside the state in certain cases, the commission had no jurisdiction over such injuries.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. 🔑369.]

In Bank. Proceeding for workmen's compensation by Oscar Anderson, opposed by the North Alaska Salmon Company. From an award by the Industrial Accident Commission, the employer applies for writ of review against A. J. Pillsbury, Will J. French and Harris Weinstock, as members of said Commission. Award annulled.

Wise & O'Connor, of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents. Chickering & Gregory, Ira A. Campbell, and McCutchen, Olney & Willard, all of San Francisco, amici curiæ.

SLOSS, J. Certiorari to review an award of the Industrial Accident Commission.

The petitioner, North Alaska Salmon Company, is a corporation engaged in the business of packing and selling salmon. Its packing operations are conducted in the territory of Alaska. Its office and principal place of business are in the city and county of San Francisco. Oscar Anderson was employed by the petitioner, under a contract made in San Francisco, for the season of 1914. He was injured while working in Alaska. The commission awarded him compensation. The only point made by the petitioner is that at the time of Anderson's injury the commission had no jurisdiction to allow compensation for injuries received beyond the limits of this state.

The case is before us on rehearing. Our former decision, upholding the jurisdiction of the commission, was based on the theory that the workmen's compensation law entered into and became a part of the contract of employment, and that, where such contract was made in this state, the statute fixed the rights of the parties with respect to any injury arising out of the employment, wherever such injury might occur.

[1] Upon further study, we are satisfied that this view is not tenable. The liability of the employer to pay compensation arises from the law itself, rather than from any agreement of the parties. The law operates upon a status, i. e., that of employer and employé, and affixes certain rights and obligations to that status. True, the relation of employer and employé has its inception in a contract, but, once the relation is created, its incidents depend, not upon the agreement of the parties, but upon the provisions of the law. Our decisions upholding the validity of this legislation have emphasized, and found support in, the proposition that the statute is one regulating the rights and obligations attaching to the status of employer and employé. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 699, 151 Pac. 398; Western Metal Co. v. Pillsbury, 156 Pac. 491. If the right to compensation rested upon contract, it would seem to follow that such right would exist only in cases of employment under agreements made after the passage of the statute. But it has never been supposed that any such limitation could be upheld. There is a manifest difference between a compulsory act, like ours, and elective acts, like the Roseberry Act of 1911 (St. 1911, p. 796) and various statutes in other states, under which the compensation provisions are dependent upon the election or consent of the employer and employé. It may well be said that the rights declared by an elective statute have their origin and sanction in the agreement of the parties to be bound by the statute. Under a compulsory statute, however, the correlative rights and obligations are not

founded upon contract. Nor do they correspond with the legal conception of a tort, since a liability is imposed without regard to the element of wrongdoing on the part of the person charged. The obligation is to be defined as a statutory one, attached by law to a given status.

The principle here involved was carefully considered and well stated by the Supreme Court of Alabama in Alabama G. S. R. Co. v. Carroll, 97 Ala. 126, 11 South. 803, 18 L. R. A. 433, 38 Am. St. Rep. 163. That case turned upon the applicability of the Employers' Liability Act of Alabama, abrogating certain common-law defenses, to an action in Alabama for injuries sustained in Mississippi. The contention that the Alabama law governed because it was a part of the contract of employment (which had been made in Alabama) was met and answered by the court upon convincing grounds. The conclusion reached is summarized in these words, which are entirely applicable to the situation now before us:

> "The duties and liabilities incident to the relation between the plaintiff and the defendant which are involved in this case are not imposed by and do not rest in or spring from the contract between the parties. The only office of the contract * * * is the establishment of a relation between them, that of master and servant; and it is upon that relation, that incident or consequence of the contract, and not upon the rights of the parties under the contract, that our statute operates. The law is not concerned with the contractual stipulations, except in so far as to determine from them that the relation upon which it is to operate exists. Finding this relation, the statute imposes certain duties and liabilities on the parties to it wholly regardless of the stipulations of the contract as to the rights of the parties under it, and, it may be, in the teeth of such stipulations."

See, also, Dormidy v. Sharon Boiler Works (C. C.) 127 Fed. 485.

[2] The question resolves itself, then, into one of the correct interpretation of our statute. We may assume, without undertaking to decide the point, that the Legislature has power to enact a statute providing that employers shall be liable to pay compensation to injured employés whose employment was created by this state, regardless of the place where the injury may have been sustained. So assuming, however, we are called upon to determine whether the Workmen's Compensation, Insurance, and Safety Act was designed to cover any injuries other than those occurring within the boundaries of California. Ordinarily the statutes of a state have no force beyond its boundaries. Sutherland, Statutory Construction (2d Ed.) § 13; Story, Conflict of Laws (8th Ed.) §§ 7, 22. Except within the domain committed to the control of the federal government, the states of the Union are "severally sovereign, independent, and foreign to each other in regard to their internal and domestic affairs." Stevens v. Brown, 20 W. Va. 450, 459. Although a state may have the power to legislate concerning the rights and obligations of its citizens with regard to transactions occurring beyond its boundaries, the presumption is that it did not intend to give its statutes any extraterritorial effect. The intention to make the act operative with respect to occurrences outside the state will not be declared to exist unless such intention is clearly expressed or reasonably to be inferred "from the language of the act or from its purpose, subject-matter, or history." Kenerson v. Thames Towboat Co., 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436; Gould's Case, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372; Merrill v. B. & L. R. Co., 63 N. H. 259.

[3] We find in the Workmen's Compensation, Insurance, and Safety Act, as it read at the time of the injury for which compensation was here awarded, nothing to indicate that the compensation provisions were intended to apply to injuries occurring in foreign jurisdictions. Section 12 of the act, the section which defines the conditions upon which the right to compensation rests, simply declares that liability for the compensation provided shall exist where the given conditions concur. Nothing is said about the place of injury. Nor is there in other portions of the act any language from which the intention to extend the operation of the statute beyond the territorial limits of the state may be inferred. On the contrary, the statute contains several provisions which may fairly be thought to manifest a contrary purpose. Thus section 12 declares that the liability for the compensation provided shall be "in lieu of any other liability whatsoever." As was said in Davis v. N. Y. & N. E. R. Co., 143 Mass. 301, 9 N. E. 815, 58 Am. Rep. 138:

> "It must certainly be the right of each state to determine by its laws under what circumstances an injury to the person will afford a cause of action."

Unquestionably the Legislature of Alaska has full authority to determine the conditions upon which liability shall exist for an injury sustained within the boundaries of that territory, and this right could not be limited by the circumstance that the injured person might be a nonresident of Alaska, and in the employment of another nonresident under a contract of employment made elsewhere. It will not be supposed that the Legislature of this state undertook to pass a law which would trench upon the sovereign powers of any other jurisdiction. But the Workmen's Compensation, Insurance, and Safety Act would embody such attempt if it were construed in such manner as to create, to the exclusion of any other liability, a liability to pay for injuries received in another jurisdiction. In other words, the fact that the compensation provided for in the act is in lieu of any other liability whatsoever is a strong indication that the Legislature had in mind only liability within the exclusive control of the Legislature of this state; that is to say, liability arising from occurrences within this state. Some force is added to this conclusion by a comparison of the provisions of the act with respect to subjects other than compensation. Several of these, dealing with such matters as safety regulations, supervision of places of employment, and investigation of industrial accidents, are expressly limited in their operation to this state. Sections 51[6], 56, 72[a]. The provisions looking to the safety and protection of workmen and those providing for compensation are correlative and component parts of a single scheme. It appearing that the commission's authority with reference to one branch of its duties is confined to objects and events within the state, it may well be concluded that the compensation provisions were intended to be operative to no greater extent. But, whether or not much weight is to be given to this consideration, certain it is that there is nothing in the act which by express words or clear implication manifests an intent to have it operate extraterritorially, and that, as already stated, the settled rules of interpretation prohibit our giving it any such effect. It may be noted, in this connection, that the Legislature of 1915 amended the act by adding to it a new section (75a) declaring that the commission should have jurisdiction "over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employé is a resident of this state at the time of the injury and the contract of hire was made in this state." Stats. 1915, p. 1101. This section was obviously not designed as a limitation upon the jurisdiction theretofore vested in the commission. It was intended, rather, as a grant of power. The fact that the Legislature deemed it necessary to declare specifically that the jurisdiction of the commission should extend to a certain class of cases of injuries arising beyond the state is more or less significant as indicating that the lawmaking body itself did not consider the original statute as covering extraterritorial injuries.

The question under discussion has been considered in other jurisdictions, but the authorities are not entirely in harmony. The Supreme Court of Connecticut has held that the statute of that state gave a right to compensation, even though the injuries had been sustained beyond the boundaries of the state. Kennerson v. Thames T. B. Co., 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436. A like ruling was made by an inferior court of New Jersey. Deeny v. Wright & C. L. Co. (Com. Pl.) 36 N. J. Law J. 121. And a later decision of the Supreme Court of New Jersey seems to reach the same conclusion. Rounsaville v. Cent. R. Co., 94 Atl. 392, 87 N. J. Law, 371. The statutes of both New Jersey and Connecticut, however, made the scheme of compensation dependent upon the election or consent of the parties to the employment, and the decisions cited are put on the ground that the rights of the parties are contractual—a position which cannot be applied to a compulsory statute like ours. It has also been held that the New York statute gives a right of compensation for injuries sustained beyond the borders of the state. Spratt v. S. & G. Co., 168 App. Div. 403, 153 N. Y. Supp. 505. But the New York statute, while compulsory, is one providing for the payment of compensation out of an insurance fund, and the conclusion of the court was based upon the circumstance that the amount of premiums is calculated upon the pay roll and number of men employed, "without regard to the fact that from time to time some of them work outside of the state." This ground of decision has no relevancy to the provisions of our law. A more recent decision is Gooding v. Ott (W. Va.) 87 S. E. 862, L. R. A. 1916D, 637, where it was held that compensation was payable under the West Virginia statute to the widow of a miner killed while working in Maryland; the mine in which he was employed being located on the boundary line between the two states. The conclusion of the court was founded upon the grounds that, the statute being elective, the rights of the parties rested upon contract, and that the particular language of the West Virginia act evidenced an intent to have the compensation provisions apply to all workmen except those "who are employed wholly without the state." On both grounds the case is readily differentiated from the one before us.

On the other hand, there is strong authority in support of the proposition that workmen's compensation statutes, in the absence of express declaration that they shall operate extraterritorially, are not to be given such effect. This has been the uniform course of ruling under the English statute (Hicks v. Maxton, 1 B. W. C. C. 150; Tomalin v. S. Pearson & Son, Ltd. [1909] 2 K. B. Div. 61; Schwartz v. Indiana Rubber, etc., Co., 1912, 2 K. B. Div. 299), and the holding has been the same in Massachusetts under the act of that state (Gould's Case, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372).

For these reasons we conclude that, under the statute as it read at the time of Anderson's injury, the commission had no jurisdiction to award compensation.

The award is annulled.

We concur: SHAW, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.; LAWLOR, J.

(174 Cal. 137)

BAYLY v. LEE. (S. F. 7102.)

(Supreme Court of California. Dec. 27, 1916. Rehearing Denied Jan. 25, 1917.)

1. Appeal and Error 🔑171(3)—Review—Objection Below.

Plaintiff cannot for the first time on appeal object that the denial in the answer was insufficient, where he tried the case on the theory that defendant's alleged failure to perform was in issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1056–1061; Dec. Dig. 🔑171(3).]

2. Appeal and Error 🔑1056(6)—Harmless Error—Exclusion of Evidence.

Exclusion of contract offered by plaintiff was harmless, it with the evidence admitted demonstrating the propriety of the nonsuit granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4193; Dec. Dig. 🔑1056(6).]

3. Contracts 🔑278(1)—Conditions—Payment of Tender.

D.'s undertaking to transfer stock to B. being conditioned on B. making a second payment, B., under Civ. Code, § 1439, could not demand performance till he had fulfilled such condition, requiring payment or tender.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1207–1213; Dec. Dig. 🔑278(1).]

4. Attorney and Client 🔑109—Duty Under Employment—Default.

Defendant, an attorney employed to enforce plaintiff's rights under contract of D. to transfer stock to plaintiff on plaintiff paying a certain sum, was not in default, plaintiff not having made the payment, or the tender, a matter in the control of him, and not of defendant, necessary to mature plaintiff's claim against D.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 221, 222; Dec. Dig. 🔑109.]

Department 1. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by William Bayly against Henry E. Lee. From an adverse judgment and order, plaintiff appeals. Affirmed.

Joseph K. Hutchinson, of San Francisco (Walter Slack, of San Francisco, of counsel), for appellant. Clayberg & Whitmore, of San Francisco, for respondent.

SLOSS, J. This action was brought to recover damages for breach of contract. The court granted defendant's motion for a nonsuit, and entered judgment accordingly. Plaintiff appeals from the jugment and from an order denying his motion for a new trial.

The complaint alleges that the defendant is an attorney at law, and that on December 2, 1909, the parties entered into a written agreement, whereby the plaintiff employed and retained the defendant as his attorney to enforce plaintiff's rights under a certain contract between said plaintiff and one Dolbear, dated November 1, 1905. It is alleged that the plaintiff paid the defendant $500 as partial compensation for the services thus to be performed; that the defendant wholly failed and neglected to do the things agreed to be done by him; that under the agreement between plaintiff and Dolbear plaintiff was to receive stock of the value of $50,000; and that Dolbear has become unable to transfer said stock or to pay the value thereof to the plaintiff. Judgment is asked for $50,500.

[1] The answer denies, among other things, that the defendant failed to perform his obligations under his agreement with plaintiff. It is true that the denial is expressed in an imperfect way. We cannot, however, agree with the appellant's contention that there is a total failure to raise an issue with respect to the performance by the defendant of his agreement. Furthermore, the record shows that the plaintiff tried the case upon the theory that defendant's failure to perform was in issue. Under these circumstances, this court will not entertain the suggestion, made for the first time on appeal, that the attempted denial was ineffectual for any purpose. Green v. L. S. & P. F. Co., 46 Cal. 408; Spiers v. Duane, 54 Cal. 176; Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419.

[2] At the trial the plaintiff offered in evidence a paper claimed to be a copy of the agreement of November, 1905, between himself and Dolbear. On defendant's objection, the paper was not admitted, and its exclusion is one of the errors assigned. The ruling, if erroneous, was, however, harmless. An inspection of the paper shows that, if it had been admitted, it would, with the other evidence in the case, have demonstrated the propriety of the ruling granting defendant's motion for a nonsuit. This contract was signed by Dolbear alone. By its terms he agreed to sell and deliver to Bayly, in consideration of the sum of $2,500, 5,000 shares of stock to be issued to him in a company to be incorporated for the purpose of taking over and exploiting certain mineral claims, or to assign to said Bayly an equivalent interest in the proceeds of said mining claims if the proposed incorporation should not be consummated. $1,250 was to be paid at the time of signing the contract, and the remainder when the contemplated transaction involving the claims should be completed. Bayly was not bound to pay the second $1,250, but was given merely an option to pay the same; it being agreed that Dolbear should be under no obligation in case Bayly did not make the payment at the time specified or on demand.

[3, 4] Dolbear's undertaking to transfer being conditional upon the payment of the second $1,250, Bayly was not in a position to demand performance until he made payment or tender of this amount. Civ. Code, § 1439. There is no evidence that such payment or tender was ever made. So far as the proof shows, the time never arrived when the plaintiff had any rights to enforce against Dol-

bear, or when the defendant, as plaintiff's attorney, could take steps to compel performance by Dolbear. The payment necessary to the maturing of plaintiff's claim against Dolbear was a matter in the control of the plaintiff, not of his attorney. Until plaintiff does what is necessary to establish a cause of action, he will not be entitled to ask the defendant to proceed in his behalf against Dolbear, by suit or otherwise. The evidence therefore fails to show that the defendant did not do all that he was required to do under the contract. This was one of the grounds specified in the motion for a nonsuit, and it was sufficient to justify the granting of the motion.

Various rulings on the admission of evidence are assigned as errors, but none of them could have any bearing upon the matter already discussed. There is no occasion, therefore, to consider them.

The judgment and the order appealed from are affirmed.

We concur: SHAW, J.; LAWLOR, J.

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173 Cal. 729

PEOPLE ex rel. AMESTOY ESTATE CO. v. VAN NUYS LIGHTING DIST. OF LOS ANGELES COUNTY et al. (L. A. 3594.)

(Supreme Court of California. Dec. 13, 1916. Rehearing Denied Jan. 11, 1917.)

1. HIGHWAYS 🔑120½, New, vol. 24 Key-No. Series — LIGHTING DISTRICTS — "TOWNS" — "VILLAGES."

Under Act March 20, 1909 (St. 1909, p. 551), authorizing the formation of lighting districts by unincorporated towns and villages, the formation of such districts is authorized only within the limits of unincorporated towns or villages, and no authority is given for the formation of a district, including large tracts of farm land not inhabited as a village; the word "town" meaning any large collection of houses and buildings, public and private, constituting a distinct place with a name, and the word "village" meaning any small aggregation of houses in the county, being, in general, less in number than in a town or city and more than in a hamlet.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Town; Village.]

2. HIGHWAYS 🔑120½, New, vol. 24 Key-No. Series — LIGHTING DISTRICTS — "AGRICULTURAL TERRITORY."

Under Act March 20, 1909 (St. 1909, p. 551), authorizing the formation of lighting districts in unincorporated towns and villages, a county board of supervisors could not on petition of the residents of a town or village embracing 64 acres of land, order the incorporation of a lighting district embracing over 70 square miles of territory and 50,000 acres sparsely settled and devoted to agricultural purposes, or vacant and unoccupied, in the country adjacent to such village or town.

3. STATUTES 🔑268—CURATIVE ACTS—EFFECT.

A curative act or a conclusive evidence clause in a statute is effective to cure all defects resulting from a failure to comply with provisions which are merely directory of the mode of the exercise of a power.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 360, 361; Dec. Dig. 🔑268.]

4. COUNTIES 🔑47 — COUNTY BOARD — CURATIVE ACTS—EFFECT.

Defects and omissions which go to the jurisdiction of the board of county supervisors to act, and which make their action absolutely void, cannot be cured by subsequent curative acts or conclusive evidence clauses.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 55; Dec. Dig. 🔑47.]

5. HIGHWAYS 🔑120½, New, vol. 24 Key-No. Series — LIGHTING DISTRICTS' INCORPORATION—VALIDITY.

Curative Act May 29, 1915 (St. 1915, p. 939), declaring that every lighting district established under the provisions of Act March 20, 1909 (St. 1909, p. 551), by resolution of board of supervisors, is a valid district from the date of such order, and that all proceedings be ratified, affirmed, and declared legal, is ineffective to validate the inclusion in such lighting district of large areas of farming lands.

6. CONSTITUTIONAL LAW 🔑283 — CURATIVE ACTS — CONSTITUTIONALITY — DUE PROCESS OF LAW.

The attempt to validate by a curative act, a tax levied by a pretended corporation having no legal authority over the property taxed, would, if given effect, be equivalent to the imposition of an obligation by statute without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 891, 892, 904–906; Dec. Dig. 🔑283.]

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Quo warranto on the relation of the Amestoy Estate Company against the Van Nuys Lighting District of Los Angeles County and others. Judgment for defendants, and plaintiff appeals. Reversed.

U. S. Webb, Atty. Gen., and Leonard B. Slosson and Edgar Sharp, both of Los Angeles, for appellant. John D. Fredericks, O'Melveny, Stevens & Millikin, and Walter K. Tuller, all of Los Angeles, for respondents.

SHAW, J. The court below sustained a general demurrer to the complaint, and the plaintiff refused to amend, whereupon judgment was given for the defendants.

The action is in quo warranto to determine the validity of the incorporation and organization of the Van Nuys lighting district of Los Angeles county. Said lighting district claims to be a public corporation organized under and in pursuance of the act of March 20, 1909 (Stats. 1909, p. 551). The other defendants are members of the board of supervisors of Los Angeles county, which board is, by section 11 of said act, given the authority to exercise the powers of districts within the county organized under the act. The object of the act, as stated in its title, is to allow unincorporated towns and villages to maintain systems of street lights on the public highways and to provide for the formation, management, and control of highway lighting districts.

The complaint alleges that the defendant district claims to be a lighting district formed in pursuance of the act, and that the supervisors of the county, claiming to be ex officio supervisors of said pretended lighting district, are purchasing equipment for lighting certain highways therein, and otherwise assuming to act under the authority of said law, and that, in that assumed capacity, they have levied a special tax upon the land within the district, including certain land owned by the relator, Amestoy Estate Company; that said defendant was never organized or established as provided by law, and is not a legally organized or existing lighting district. The proceedings had to organize the district are set forth at length. The territory within the boundaries of the district consists of about 50,000 acres of land, being approximately 13 miles in length and 6 miles in width. Within this territory are two unincorporated villages, one known as Van Nuys, occupying about 640 acres, and having about 350 inhabitants; the other known as Owensmouth, covering 320 acres, and having about 100 inhabitants. These two villages are 10 miles apart. The balance of the land of the district consists of farming lands, grazing lands, and unproductive mountain land. The entire population outside of said two villages does not exceed 300 people, and consists of persons living in houses widely separated, often several miles from the nearest neighbor. The relator owns 4,500 acres of land within the district upon which only 25 persons reside, and no part of it is within a mile of either of said villages.

[1] It is contended by appellant that the act authorizes the formation of lighting districts only within the limits of an unincorporated town or village, and hence that the formation of a district including 4,500 acres of land devoted to farming, and not inhabited as a village at all, is not within the authority given by the law. We think the point is well taken. The title of the act is as follows:

> "An act to allow unincorporated towns and villages to establish, equip and maintain systems of street lights on public highways; to provide for the formation, government and operation of highway lighting districts; the calling and holding of elections in such districts; the assessment, collection, custody and disbursement of taxes therein; and the creation of ex officio boards of supervisors."

Section 1 defines the meaning of certain words and phrases used in the act. Section 2 is as follows:

> "Any unincorporated town or village of this state may establish a highway lighting district for the purpose of installing and maintain a system of street lights on public highways, for the better protection of its residents, in accordance with the provisions of this act."

Section 3 provides that:

> "Upon the application, by petition, of twenty-five or more, taxpayers and residents of said town or village, to the board of supervisors of the county in which the said town or village is situated, praying for the formation of a public highway lighting district," the supervisors must proceed in the manner prescribed to call an election, and thereupon the district may be formed.

These provisions clearly show that the scope of the act, so far as the question of territory is concerned, is limited to unincorporated towns or villages, and that it does not include large areas of territory devoted exclusively to agricultural purposes, and not coming within any definition applicable to towns or villages. The words "town" and "village" are of common use and have a well-defined meaning. The word "town" is defined by Webster as:

> "In general, any large collection of houses and buildings, public and private, constituting a distinct place with a name and not incorporated as a city."

He defines a village as:

> "Any small aggregation of houses in the country, being in general, less in number than in a town or city and more than in a hamlet."

The word "town" is also defined as meaning, in popular use:

> "A large, closely populated place, * * * as distinguished from the country, or from rural communities." Denver v. Coulehan, 20 Colo. 471, 39 Pac. 425, 27 L. R. A. 751.

Also as:

> "An aggregation of inhabitants, and a collection of occupied dwellings and other buildings." Siskiyou, etc., v. Rostel, 121 Cal. 513, 53 Pac. 1118.

Also as:

> "A place where there are a number of adjacent occupied dwellings." Klauber v. Higgins, 117 Cal. 460, 49 Pac. 466.

There is no substantial difference between an unincorporated town and a village except that perhaps the latter is usually understood to be smaller than a town. With respect to the boundaries of such places, it is true that they are usually not well defined. The line where the village or town ceases and the country begins cannot usually be located with precision, although it is seldom difficult to locate it approximately.

[2] It is suggested that the statement in the title of the act that it is "to provide for the formation, government and operation of highway lighting districts" indicates that it was designed to authorize the formation of said districts anywhere within the county, whether within a town or village or elsewhere. But the title does not constitute the act. The only provision of the act authorizing the formation of said districts, so far as territory is concerned, is found in section 2, above quoted. This provides simply that "any unincorporated town or village of this state" may establish such district. It is true that it proceeds to say that the district may be established by such town or village for the purpose of maintaining lights on "public highways." But this is immediately followed by the statement that this is to be done for the better protection "of its residents," thus again, by necessary implication,

limiting the operation of the act to the confines of the town or village. This is further shown by the language of section 3, providing that the persons who petition for such district must be taxpayers and residents of said town or village. It cannot be seriously contended that language of that character can be expanded by construction so as to authorize the board of supervisors, on petition of the inhabitants of a town or village embracing 640 acres of land to order the incorporation of a lighting district embracing over 70 square miles of territory and 50,000 acres, sparsely settled and devoted to agricultural purposes, or vacant and unoccupied, situated in the adjacent country. The petitioners in the present case were all residents of the village of Van Nuys. We cannot conceive that the Legislature intended to authorize such a proceeding. Manifestly, the chief purpose of such an organization would be to provide for lighting the streets of the more closely populated region comprising the town or village. It would be unfair and unjust to compel the owners of agricultural lands receiving no material protection or benefit from such lights exceeding that of the general public to pay the greater part of the expense thereof, as would necessarily be the case if a district such as that here contemplated should be formed and maintained. The only fair and reasonable construction of the act is that districts for which it provides are intended to be limited territorially to the town or village whose residents and taxpayers petition therefor. Doubtless the board of supervisors would have much discretion upon the question whether or not any particular parcel of land could reasonably be included as part of such town or village. The courts should be loath to set aside the proceeding for error in this particular, and would not do so unless the unwarranted inclusion is clear. Here there can be no doubt. The area included without authority is so vast that it can only be regarded as a plain disregard of the statute.

We need not determine in this case whether or not the corporation was wholly void. It is enough that it was void in so far as the land of the relator is concerned. The lighting district and the defendants as ex officio its managing board were without authority to exercise any of the powers given to them by the act of 1909 and the amendments of 1913 (St. 1913, p. 447) thereof, upon or over the relator's land. To that extent, at least, the defendants claimed and usurped a corporate franchise which they did not lawfully possess.

The respondents call our attention to the act of May 29, 1915, effective August 8, 1915 (Stats. 1915, p. 939), declaring that every lighting district established under the provisions of the act of 1909, by resolution of the board of supervisors of the county, entered in its minutes, is a valid lighting district from the date of such order and that all proceedings and actions of such district under said law are ratified, affirmed, and declared to be legal. This district was formed in August, 1912. The judgment in this case was given April 24, 1913, and the appeal was filed in this court on July 21, 1913. Section 10 of the act of 1909 itself declares that the order establishing the district entered in the minutes of the board of supervisors is conclusive of the regularity of all prior proceedings and of the existence and validity of the district.

[3-5] A curative act or a conclusive evidence clause in a statute is effective to cure all defects resulting from a failure to comply with provisions which are merely directory of the mode of the exercise of the power. But defects and omissions which go to the jurisdiction of the board to act at all, and which make their action absolutely void, cannot be cured in this manner. Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920; Chase v. Trout, 146 Cal. 359, 80 Pac. 81; Kelly v. Luning, 76 Cal. 309, 18 Pac. 335; People v. Lynch, 51 Cal. 19, 21 Am. Rep. 677; Brady v. King, 53 Cal. 44; People v. Goldtree, 44 Cal. 323. In Fallbrook v. Bradley, 17 Sup. Ct. 56, 164 U. S. 174, 41 L. Ed. 369, the United States Supreme Court had under consideration the validity of proceedings for the formation of an irrigation district in this state and of the assessments made by such district. In all substantial particulars regarding this question the act was similar to the lighting district act here involved. The court recognized the fact that the formation of such districts involved two distinct features, one of which was the creation of a public corporation, and the other the levying of an assessment or special tax upon property benefited by the proposed improvement. With respect to the creation of the corporation the court said:

> "There is nothing in the essential nature of such a corporation, so far as its creation only is concerned, which requires notice to or hearing of the parties included therein before it can be formed. It is created for a public purpose, and it rests in the discretion of the Legislature when to create it, and with what powers to endow it."

See, also, People v. California Fish Co., 166 Cal. 606, 610, 138 Pac. 79.

With respect to the other consequences the court said:

> "In the act under consideration, however, the establishment of its boundaries and the purposes for which the district is created, if it be finally organized by reason of the approving vote of the people, will almost necessarily be followed by and result in an assessment upon all the lands included within the boundaries of the district. The Legislature thus in substance provides for the creation not alone of a public corporation, but of a taxing district whose boundaries are fixed, not by the Legislature, but, after a hearing, by the board of supervisors."

The court then proceeds to declare that, when the power to form such district is delegated to a local board or tribunal, it acts judicially in fixing the boundaries, and the parties whose lands are proposed to be included are entitled to a hearing upon the question of benefits, before the formation of the district, and to have their lands excluded if it appears that they are not benefited. Of like effect is Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; Parsons v. District of Columbia, 170 U. S. 52, 18 Sup. Ct. 521, 42 L. Ed. 943; Londoner v. Denver, 210 U. S. 385, 28 Sup. Ct. 708, 52 L. Ed. 1103; and Brookes v. Oakland, 160 Cal. 423, 117 Pac. 433. The act of 1909 provided for no hearing upon this question. In effect, it gave to 25 taxpayers and residents of any unincorporated town or village the power to determine what land should be included in the district to be formed, and made no provision for any inquiry as to benefits or change of the boundaries fixed by them in their petition or for any hearing upon the subject. Under the above decisions the attempt thus to form a local taxing district is without legality and void. This was expressly decided with respect to a similar statute in Moulton v. Parks, 64 Cal. 166, 30 Pac. 612, and Brandenstein v. Hoke, 101 Cal. 130, 35 Pac. 562. The conclusion necessarily follows that all proceedings imposing taxes upon the land of the relator are absolutely void because of the lack of jurisdiction to act in the matter. Under the decisions above cited the curative act of 1915 was ineffective to revive or validate the previous proceedings of the district. These points relating to the curative act have not been argued by counsel on either side.

There are other questions not argued which also may arise in the future progress of this case, and which we think it well to mention. It may be claimed that the validating act, though ineffective to legalize taxes previously levied, had the effect to create anew a corporation for municipal purposes embracing the entire district. If so, the question would arise whether such new corporation possessed the powers defined in the act of 1909, or was left without defined powers, as suggested in People v. California Fish Co., 166 Cal. 610, 138 Pac. 79. Furthermore, on May 21, 1915, practically all the territory included in this lighting district, except the 320 acres constituting the village of Owensmouth, was annexed to and became a part of the city of Los Angeles. Under its charter that city has full power and control of its streets, of all conduits and apparatus for the transmission of electricity therein, and of the granting of franchises for such purposes. City Charter, § 2, subd. 7, St. 1909, p. 1291; section 2, subd. 25, St. 1905, p. 994; section 31, St. 1889, p. 464; section 146, St. 1905, pp. 984, 999. As these matters come within the domain of municipal affairs, it may be doubted whether the Legislature has any power to provide for the creation of lighting districts, or to create them directly, within the boundaries of a city having such powers under a freeholder's charter. It may also be claimed that the validating act is, in effect, a mere evasion of the constitutional mandate against the creation of corporations for municipal purposes by special laws. Article 11, § 6. Upon all these questions we express no opinion.

[6] The attempt to validate a tax levied by a pretended corporation having no legal authority over the property taxed would, if given effect, be equivalent to the imposition of an obligation by statute without due process of law. For the reasons we have given, we think the court below erred in sustaining the demurrer to the complaint, and that the case should be remanded for further proceedings.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SLOSS, J.; MELVIN, J.; LAWLOR, J.

173 Cal. 687

BOSCUS et al. v. BOHLIG et al.

(S. F. 7149.)

(Supreme Court of California. Nov. 23, 1916. Supplementary Opinion Dec. 22, 1916.)

1. APPEAL AND ERROR 🔑1075—WAIVER OF ERRORS.

Where respondents who, as plaintiffs below, had judgment on the pleadings preferred to discuss the merits, their contention that appellants were not entitled to review will be treated as waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4253; Dec. Dig. 🔑1075.]

2. PLEADING 🔑350(3)—MOTION FOR JUDGMENT ON PLEADINGS—EFFECT.

A motion for judgment on the pleadings admits, in the same sense as does a demurrer, the truth of the allegations of the answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1075, 1077; Dec. Dig. 🔑350(3).]

3. PLEADING 🔑345(2)—ANSWER—DENIAL ON INFORMATION AND BELIEF.

In a proceeding to foreclose a mechanic's lien the verified complaint alleged that plaintiffs as copartners entered into a written contract with defendants, the owners of the property, to furnish plumbing and gas fitting work in a building for the sum of $2,500, that the work had been fully performed according to the contract, and that no part of the contract price, which was the reasonable value of the work, had been paid. Defendants denied on information and belief the due performance of the work, the alleged reasonable value of the work, and the filing of a lien which was averred. *Held* that, while plaintiffs' motion for judgment on the pleadings admitted all facts well pleaded, plaintiffs were entitled to judgment on the pleadings; defendants' denial on information and belief being frivolous and insufficient to put any matter in issue, because relating to matters as to which defendants must have had knowledge.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1056; Dec. Dig. 🔑345(2).]

4. MECHANICS' LIENS 🔑161(3)—RIGHT TO—VALUE OF WORK.

The provision of Code Civ. Proc. § 1183, that a mechanic's lien shall not exceed the reasonable value of the work, does not apply to contracts made directly with the owner;

and where the contract was made with the owner and the work accepted, the owner is liable for the full contract price and a lien for that amount may be procured.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 282; Dec. Dig. 🔑161(3).]

5. PLEADING 🔑126—ANSWER—DENIAL.

Where, in a proceeding to foreclose a mechanic's lien, plaintiff alleged due performance of the contract, defendants' denial of due performance of all the terms and conditions of the contract was insufficient to put any matter in issue, but was instead an admission of substantial performance of the contract.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 261–263; Dec. Dig. 🔑126.]

6. MECHANICS' LIENS 🔑78 — NOTICE — ACCEPTANCE.

Where one of the owners of land on which was constructed a building filed no notice of disclaimer pursuant to Code Civ. Proc. § 1192, and accepted the work, her acceptance conclusively establishes her knowledge of the work which may be constructive as well as actual, and so entitles materialmen, etc., to perfect liens on her portion of the land.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 111; Dec. Dig. 🔑78.]

7. INTEREST 🔑60—RIGHT TO—JUDGMENT.

Where contractors were entitled to interest accruing before judgment, it is proper for the judgment to add such interest to the principal so that the aggregate amount will thereafter draw interest.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 134–137; Dec. Dig. 🔑60.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by John M. Boscus and Peter J. Boscus, copartners, doing business as Boscus Bros., against John H. Bohlig and Lotta Bohlig, his wife and others, to foreclose a mechanic's lien. From a judgment for plaintiffs on the pleadings, the first-named defendants appeal. Affirmed.

W. T. Kearney and Phil J. Strubel, both of San Francisco, for appellants. P. A. Bergerot and A. P. Dessouslavy, both of San Francisco, for respondents.

MELVIN, J. Defendants appeal from a judgment entered on the pleadings, in an action to foreclose a mechanic's lien.

The complaint was verified. The allegations thereof were in brief that John H. and Lotta Bohlig were at all times specified the owners of certain described real property; that the former was at all times the reputed owner; that plaintiffs had entered into a written contract to furnish certain plumbing and gas fitting work in a building on said land for the sum of $2,500, to be paid in stipulated installments; that the work had been fully performed by the plaintiffs according to the contract; that no part of the contract price (which was alleged to be the reasonable value of the work) had been paid; and that a claim of lien against the property in due form had been filed within the time limited by statute at a cost of $1.90 for verification and recording. The prayer was the usual one in such cases.

The answer denied, on information and belief, the existence of the copartnership of plaintiffs, the due performance of the contract, the alleged reasonable value of the work provided for, and the filing of the lien. By one of the paragraphs of the answer defendants assert that John H. Bohlig at all times mentioned in the complaint was the owner of a described portion of the property in question, and that he and his wife, Lotta Bohlig, owned the remaining part of it. There was no denial of the execution of the contract, the completion of all that was thereby required, nor the acceptance on or about January 21, 1914, by both defendants of the work and building. It is to be noted that on information and belief defendants denied that "$2,500 or any other sum" was the reasonable value of the work, and that plaintiffs had "duly kept and performed all the terms and conditions of their said agreement."

[1] Respondents at the outset assert that the proceedings in the superior court may not be reviewed in the absence of a bill of exceptions (citing Hawley v. Kocher, 123 Cal. 77, 55 Pac. 696), and that the granting or denial of a motion for judgment on the pleadings is no part of the judgment roll (citing McAbee v. Randall, 41 Cal. 136, Douglas v. Dakin, 46 Cal. 49–52, and Hemme v. Hays, 55 Cal. 337). They prefer, however, to discuss the matter upon its merits, and regarding their preference as a waiver of the suggested point we will consider the pleadings in the light of the motion for judgment thereon which, according to the decree, was made and granted.

[2, 3] Appellant's first contention is that as the motion for judgment on the pleadings admits, in the same sense as does a demurrer, the truth of the allegations of the answer, and as that pleading denies the amount claimed or any amount is or was the reasonable value of the work performed and the materials furnished, the court should have overruled the motion, and should have compelled the plaintiffs to prove such reasonable value. It is true that the motion, like a demurrer, admits the truth of the facts pleaded in the answer, but by their answer defendants, by failing to deny, admit the facts pleaded in the verified complaint, namely, that $2,500 was the agreed contract price, that the work was completed by plaintiffs, and that it was accepted by the defendants. As against these solemn admissions their denial on information and belief that the work was of any value is so paltry as to amount to nothing at all. It requires no citation of authority to support the court in summarily disposing of such pleading, but authority is not wanting. In Loveland v. Garner, 74 Cal. 298–300, 15 Pac. 844, the court characterized denial upon information and belief

of certain matters which must have been within the knowledge of defendants as an indulgence "in a playful frivolity not consistent with the solemnity of sworn pleadings in a court of justice." In Gribble v. Columbus Brewing Co., 100 Cal. 67, 34 Pac. 527, a defendant in possession of a brewery had denied on information and belief that certain appliances were attached to the realty and had become fixtures. It was held that the denial was insufficient. In Mulcahy v. Buckley, 100 Cal. 484, 35 Pac. 144, the defendant made the same sort of a denial of an averment that a claim of lien had been filed, and it was held that positive denial is necessary where the pleader has knowledge or means of acquiring knowledge which might enable him to traverse or to admit the unequivocal averments in the complaint. A defendant must admit or deny facts alleged by the plaintiff or must show how it happens that he is destitute of knowledge concerning such facts. Brown v. Scott, 25 Cal. 189–196. Other authorities sanctioning the entry of a judgment on the pleadings when the answer is sham and frivolous are Hemme v. Hays, 55 Cal. 337; Felch v. Beaudry, 40 Cal. 439; Montgomery v. Merrill, 62 Cal. 385–393; San Francisco v. Staude, 92 Cal. 560, 28 Pac. 778; Benham v. Connor, 113 Cal. 168, 45 Pac. 258.

[4] But appellants insist that since section 1183 of the Code of Civil Procedure provides that a mechanic's or materialman's lien shall not in any case exceed the reasonable value of the work done and materials furnished, the question of reasonable value is always one to be determined by the court. The language of section 1183 upon which appellants rely does not apply to one contracting directly with the owner, but has reference to subcontractors. The contracting parties are bound by the terms of their agreement where as in this case the persons for whom the work was performed and the materials were furnished admitted the execution of the contract, the completion of the work, and its acceptance by them.

[5] The attempted denial that plaintiffs had duly kept and performed all the terms and conditions of their agreement was utterly insufficient. It amounted to an admission that substantially all of the terms and conditions of the contract had been duly met and executed. Jones & Laughlin Steel Co. v. Abner Doble Co., 162 Cal. 497–500, 123 Pac. 290. As was pointed out in the opinion in that case the omission of a single rivet or bolt would satisfy the denial.

[6] Appellants say that since the land belongs in part to Lotta Bohlig, as shown by their verified answer, and no claim is made that she authorized or knew of the performance of the work, the judgment in its application to her is erroneous. There is no merit in this contention. No personal judgment against her was asked or given, but her undivided interest in the easterly 19 feet of the lot upon which the building was placed was properly subjected to the lien. If she had knowledge of the construction of the building she was responsible. Section 1192, Code Civ. Proc. She must have had such knowledge for she accepted the completed work. Constructive knowledge is as potent as actual cognizance of the performance of the work. Harmon Lumber Co. v. Brown, 165 Cal. 193–197, 131 Pac. 368; Gentle v. Britton, 158 Cal. 328–332, 111 Pac. 9. The circumstances admittedly true under the pleadings show both actual and constructive notice to Mrs. Bohlig of the building of the house. There was no pleading of any notice of disclaimer filed pursuant to section 1192, and as the filing of such notice is matter of defense (West Coast Lumber Co. v. Newkirk, 80 Cal. 275–277, 22 Pac. 231), the fact that she accepted the finished work is conclusive upon the question of her knowledge.

[7] Appellants contend and respondents concede that an error in the allowance of interest was made by the court in entering judgment. Interest on the full sum of $2,500 was allowed from the date of the completion of the work, but half of this amount was not payable until 30 days later. By failing to recognize this fact the court allowed excessive interest in the sum of $8.50. This error may be corrected by inserting in the judgment in lieu of the words, "with legal interest thereon from January 21, 1914, to the date hereof, making in all the sum of $2,581.16," the following:

> "With legal interest, as to $1,250 thereof, from January 21, 1914, to February 26, 1914, and as to the whole thereof from February 26, 1914, to the date hereof, making in all the sum of $2,572.66."

It was proper that by the judgment interest due prior thereto should be added to the principal, and that the aggregate amount should thereafter draw interest. Corcoran v. Doll, 32 Cal. 82–88; 22 Cyc. 1568.

This is a frivolous appeal made for delay, and therefore damages should be awarded (section 957, Code Civ. Proc.), even though the judgment will be amended by this court to correct a trifling error. Rountree v. I. X. L. Lime Co., 106 Cal. 62, 39 Pac. 16; 11 Cyc. 238. One of the counsel for appellants in his oral argument, after discoursing of a husband's duty to defend his wife's interests both in the trial court and here, says he cannot conceive that a husband should be penalized for defending in this case or for joining in this appeal. We do not see how even the high obligations which a husband owes to his wife nor the most knightly protection which he may feel bound to accord her and her property can excuse this altogether indefensible appeal which has needlessly occupied the time of this court and of counsel, and has delayed the closing of this litigation.

With the modification above suggested the judgment is affirmed, with costs to respondents, and in addition thereto $100 to be paid by appellants to respondents for the frivolous appeal.

We concur: HENSHAW, J.; LORIGAN, J.

Supplementary Opinion.

In Bank.

PER CURIAM. It is ordered that the opinion herein be modified by striking therefrom the last paragraph, commencing with the words "This is a frivolous appeal," and ending with the words "delayed the closing of this litigation."

It is further ordered that the judgment heretofore given be modified to read as follows: "With the modification above suggested the judgment is affirmed, with costs to respondents."

(174 Cal. 122)

In re VANCE'S ESTATE. (S. F. 7745.)

(Supreme Court of California. Dec. 23, 1916. Rehearing Denied Jan. 22, 1917.)

1. WILLS 🔑130—OLOGRAPHIC WILLS—REQUISITES AND SUFFICIENCY.

Under Civ. Code, § 1277, defining an olographic will as one that is entirely written, dated, and signed by the hand of the testator, the omission of any of the three requirements is fatal.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 336, 338–340; Dec. Dig. 🔑130.]

2. WILLS 🔑130—OLOGRAPHIC WILLS—REQUISITES AND SUFFICIENCY.

A purported olographic will, to comply with the requirement that it be dated, must designate a certain day, month, and year.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 336, 338–340; Dec. Dig. 🔑130.]

3. WILLS 🔑130—OLOGRAPHIC WILLS—REQUISITES AND SUFFICIENCY.

In an olographic will, the testator may use abbreviations in expressing the date.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 336, 338–340; Dec. Dig. 🔑130.]

4. WILLS 🔑130—OLOGRAPHIC WILLS—REQUISITES AND SUFFICIENCY.

While an olographic will must bear a designation in the testator's hand, and the day, month, and year, it is not necessary that the date so given shall be that upon which the paper was in fact written.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 336, 338–340; Dec. Dig. 🔑130.]

5. WILLS 🔑130—OLOGRAPHIC WILLS—REQUISITES AND SUFFICIENCY.

In an olographic will, a date which is incomplete because lacking a statement of the day, month, or year, does not satisfy the statutory definition; so that where the will bore the date March 22, one thousand, the discrepancy was so great that it was not entirely dated by the hand of the testator, and the will was invalid.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 336, 338–340; Dec. Dig. 🔑130.]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceedings in the matter of the estate of Robert A. Vance, wherein certain heirs, after probate of an instrument as the olographic will, filed a petition to revoke the probate. From a judgment dismissing the petition, the petitioners appeal. Reversed.

Clarence Coonan and Nat Schmulowitz, both of San Francisco, for appellants. Robert J. McGahie, Joseph H. Mayer, and George D. Perry, all of San Francisco, for respondents.

SLOSS, J. On October 16, 1914, a paper was admitted to probate as the olographic will of Robert A. Vance, deceased. Within due time, certain heirs of said decedent filed their petition for the revocation of the probate, alleging that the paper was not dated except in the manner following:

> "I have subscribed my name and affixed my seal this 22nd day of March, in the year of our Lord one thousand."

To this petition the executor and certain beneficiaries demurred. Their demurrers were sustained, and, the contestants declining to amend, the court gave judgment dismissing the petition for revocation of probate. The petitioners appeal.

[1] From the testimony on the original application for probate, it appears that the instrument was in fact written by Vance in the year 1910. The single question is whether the words "this 22nd day of March in the year of our Lord one thousand" constitute a sufficient dating. Section 1277 of the Civil Code defines an olographic will as one "that is entirely written, dated, and signed by the hand of the testator." The omission of any of these requirements is fatal.

> "The Legislature has seen fit to require three things to concur, for the execution of an olographic will, viz. that it be written, dated, and signed by the hand of the testator. We are not at liberty to hold that the Legislature intended any one of these requirements to be of greater or less importance than the others." Estate of Martin, 58 Cal. 530.
>
> "It must be entirely written, it must be entirely dated, and it must be entirely signed by him." Estate of Billings, 64 Cal. 427, 1 Pac. 701.

Not only, therefore, will the instrument fail of validity as an olographic will if it bear no date at all (Estate of Martin, supra), but the same result will follow if the date be partly written by the hand of the testator and partly printed. In Estate of Billings, supra, the instrument bore the words "April 1st, 1880." The words "April 1st" were written by the deceased, the figures "1880" were printed. It was held that probate must be denied. So in Estate of Plumel, 151 Cal. 77, 90 Pac. 192, 121 Am. St. Rep. 100, where the paper was dated "January 12, 1904"; the figures "190" in the year date being printed.

[2] It is well settled that the paper, in order to comply with the requirement that it

be dated, must designate a certain day, month and year. In Estate of Price, 14 Cal. App. 462, 112 Pac. 482, the paper read "Dated this ——— day of ———, 1906." The ruling was that this did not meet the demand of the statute. The case is approved in Estate of Carpenter, 156 Pac. 465, L. R. A. 1916E, 498, recently decided in this court; our holding being that a paper bearing the figures "10 1912" is not dated. The statute of Louisiana with reference to olographic wills is similar to our own, and the decisions in that state, too, are to the effect that a paper is not dated unless it contains a statement of the day, the month, and the year. Fuentes v. Gaines, 25 La. Ann. 85; Heffner v. Heffner, 48 La. Ann. 1088, 20 South. 281; Succession of Robertson, 49 La. Ann. 868, 21 South. 586, 62 Am. St. Rep. 672.

[3] The testator may use abbreviations in expressing the date. A will dated "Nov. 22/97" shows plainly enough that the date in the writer's mind was the 22d day of November, 1897, and is entitled to probate. Estate of Lakemeyer, 135 Cal. 28, 66 Pac. 961, 87 Am. St. Rep. 96. So where the date was "4-14-07" (Estate of Chevallier, 159 Cal. 161, 113 Pac. 130), the court saying that:

> "It would be difficult to find one at all versed in business or practical affairs who would not readily construe these numerals to mean April 14, 1907."

[4] While the will must bear a designation, in the testator's hand, of the day, the month, and the year of execution, it is not necessary that the date so given shall be that upon which the paper was in fact written. In Estate of Fay, 145 Cal. 82, 78 Pac. 340, 104 Am. St. Rep. 17, the instrument bore the date "May twenty-fifth, eighteen hundred and fifty-nine." The evidence showed that the instrument could not have been written in the year 1859, but that it was probably written in the year 1889. It was held that the error did not affect the validity of the will; the ground of the decision being that the statute does not require that the instrument be "truly dated" or "correctly dated," but merely that it be dated.

[5] This brief review of the decisions points the distinction upon which the question in the present case turns. A date which is incomplete, because lacking a statement of either the day, the month, or the year of execution, does not satisfy the statutory definition of an olographic will. But the instrument, if it bear a statement of the day, the month, and the year, is not invalidated because one or more of these elements may be incorrectly given. The respondents contend that Vance's will, like that of Fay, contains everything necessary to a date, and that the words "one thousand" do designate a year, although incorrectly. We think, however, that the acceptance of this claim would require a strained and unreasonable view of the situation. The true date of the paper, if fully expressed in the form adopted by the writer, would have been the "22d day of November, in the year of our Lord one thousand nine hundred and ten." Undoubtedly the writing of the words "one thousand" alone was due to an inadvertence of some kind. But these words form no more than a part of the complete date in the mind of the writer. Taking into consideration the nature, even more than the extent, of the discrepancy between the year given and the year of actual execution, the only fair inference is that Vance failed to complete the date which he had begun to write. It is as if, stating the year in figures instead of words, he had written "November 22, 1 ," or "November 22, 19 ." This would clearly have been an insufficient date. Succession of Swanson, 131 La. 53, 58 South. 1030; Id., 132 La. 606, 61 South. 685. In the Fay Case the words "eighteen hundred and fifty-nine" represented a complete date. The date was not, to be sure, that of the actual writing of the instrument, but it did contain everything necessary to specify a date as that upon which the testator declared the paper to have been written. Here, on the other hand, the words "one thousand" described, not a year which the testator intended to describe as that of the execution of his will, but only a part of the designation of a year, the rest having been, for some unknown reason, omitted. Stating it otherwise, in the Fay Case all that was needed to make the given date correspond to the true date was to change the erroneous word "fifty" to "eighty." Here the date given could not be made correct by any such substitution. To make it agree with the true date, we should have to add words to it; that is, we should have to add "nine hundred and ten" to the words "one thousand." We think it cannot fairly be said that the paper was "entirely dated by the hand of the testator." The demurrer to the petition should therefore have been overruled.

The judgment is reversed.

We concur: SHAW, J.; LAWLOR, J.

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174 Cal. 110

MESMER v. UHARRIET et al. (L. A. 3705.)

(Supreme Court of California. Dec. 22, 1916.)

1. EASEMENTS 🔑18(2)—CREATION—WAY OF NECESSITY—LAND SURROUNDED BY GRANTOR'S LAND.

When a grantor conveys land shut off from access to the highway by his remaining lands or partly by his land, and partly by that of a stranger, a way of necessity arises over the adjoining land of the grantor and is vested in the grantee as an appurtenance to the estate granted.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 51; Dec. Dig. 🔑18(2).]

2. EASEMENTS 🔑18(1)—CREATION—WAY OF NECESSITY—DECREE OF PARTITION.

Where, under decree of partition, one of the parcels set off in severalty is entirely inclosed by others and shut off from access to the highway, a right of way of necessity arises over the adjoining parcel and is vested in the allottee of the inclosed parcel as an appurtenance to his estate, under the theory that each allottee is the grantee of the interest of the various cotenants in parcel set off to him.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 50, 52, 55; Dec. Dig. 🔑18(1).]

3. EASEMENTS 🔑61(9½)—WAY OF NECESSITY—SELECTION—FINDINGS.

Findings that access to the land of the plaintiff had been obtained indifferently over any of three routes, one over the land of defendants, and two over the land of other owners, and which are entirely vague with regard to the time during which the way over the land of the defendants is used, do not support a conclusion that a right of way across the land of defendants was selected and used in any such definite way as to impress an easement on the land.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 147, 148; Dec. Dig. 🔑61(9½).]

4. EASEMENTS 🔑61(9½)—WAY OF NECESSITY—NECESSITY.

Findings that a roadway would be practicable and accessible for travel from plaintiff's land to the public highway over a route much shorter than that fixed over defendants' land in the decree, but that a creek bordering plaintiff's land and obstructing the shorter route would require some improvement, and would be unavailable in time of storm or flood without finding of the expense that it would be required to bridge the creek or finding of the length of time during which travel would be impeded by flood or storm in the absence of such bridge, the evidence being that the heaviest rains would render the creek unpassable for about a day and a half, do not show any such difficulty in taking the nearer road as to justify the imposition of the way of necessity upon the land of the defendant.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 147, 148; Dec. Dig. 🔑61(9½).]

5. EASEMENTS 🔑22—BONA FIDE PURCHASER—NOTICE.

Civ. Code, § 19, provides that notice of circumstances sufficient to put a prudent man upon inquiry is constructive notice of whatever he might have learned by prosecuting such inquiry. Section 3530 provides that which does not appear to exist is to be regarded as if it did not exist. The court found that defendants purchased land paying full value, that when they examined the land before buying it they found it fenced on three sides, and separated on the fourth from plaintiff's land by an irrigation ditch which was not bridged, and that there was no roadway over the land from plaintiff's parcel sufficiently well marked to give notice of a right of way, that their abstract of title showed no easement over the land, and that they had no actual notice that the plaintiff claimed such easement, and that at the time of such purchase there was on record a map which showed that plaintiff's lot was landlocked by the land purchased by defendants and other lands all of which had been previously partitioned from one tract. *Held*, that the recorded map of the original tract as partitioned was not constructive notice to defendants that plaintiff was entitled to a way of necessity over defendants' land, and that defendants were purchasers for value without notice, actual or constructive, of an easement, and took the land free from any such easement if it had existed.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 60; Dec. Dig. 🔑22.]

Department 1. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Joseph Mesmer against Maria Uharriet and others. From a judgment for plaintiff and an order denying a motion for new trial, defendants appeal. Reversed.

J. Wiseman Macdonald, of Los Angeles, for appellants. D. K. Trask, Trask, Norton & Brown, and Edgar K. Brown, all of Los Angeles, for respondent.

SLOSS, J. The plaintiff is the owner of a tract of land containing something over 7 acres situate in Los Angeles county. The defendants are the owners of a tract containing 50 acres, adjoining plaintiff's holding. Both parcels were originally a portion of the Rancho La Ballona, which in May, 1868, was partitioned by decree of the district court of the first judicial district of the state of California. By that decree the tract now owned by plaintiff was partitioned to the heirs of Augustine Machado. Title subsequently passed to Andres Briswalter, upon whose death the property passed to Louis Mesmer under decree of distribution filed in May, 1887. The plaintiff, Joseph Mesmer, has succeeded to the interest of Louis Mesmer.

The tract now owned by the defendants was, by the decree of partition, set off to Macedonio Aguilar. Through various mesne conveyances it passed in 1887 to Martin Uharriet and Pedro Uharriet. The defendants other than Martin succeeded to the interest of Pedro upon his death in 1909. The land of defendants lies to the north of plaintiff's land. By the decree of 1868 various other portions of the Rancho La Ballona, adjoining plaintiff's parcel on the east, south, and west, were partitioned to other cotenants.

The present action was brought to establish the right of plaintiff to an easement or way across the defendants' 50-acre tract from plaintiff's land to a road leading to the city of Los Angeles. The complaint was based upon the theories, first, that plaintiff was entitled to a way of necessity across defendants' land, and, second, that plaintiff had acquired a right of way across such land by prescription. The court made findings from which it concluded that plaintiff was entitled to a way of necessity as claimed. The findings do not support the claim of a way by prescription. The judgment was that plaintiff is entitled to a way of necessity of the width of 15 feet along a described course, running 1,500 feet or more in length over defendants' land, "so long as it may be necessary to gain access to and egress from the public highway." The defendants appeal from the judgment and from an order denying their motion for a new trial.

A public road, access to which is thus given by the judgment, runs to the west of the land of defendants. There is another road to the south of plaintiff's land and separated from it by parcels partitioned by the decree of 1868 to co-owners who are not parties to the present action. The first-mentioned road is known as First street, the other is described in the record as roadway "X." Between the land of plaintiff and that of defendants is an irrigation ditch. Between the land of plaintiff and that of the owners on the south is a creek known as Ballona creek. The distance from plaintiff's parcel to roadway "X" is about 350 feet.

[1, 2] When a grantor conveys land shut off from access to a road by the grantor's remaining land, or partly by his land and partly by that of a stranger, a way of necessity arises over the adjoining land of the grantor. Taylor v. Warnaky, 55 Cal. 350; Carey v. Rae, 58 Cal. 159; Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879; Barnard v. Lloyd, 85 Cal. 132, 24 Pac. 658. Such right is vested in the grantee as an appurtenance to the estate granted. Kripp v. Curtis, supra. A way of necessity follows in like manner from a decree of partition, under which one of the parcels set off in severalty is entirely inclosed by others. The effect of such partition is to convey the interest of the various cotenants in the particular parcels to the allottees of those parcels. Each is, therefore, a grantor and a grantee, and the one to whom an inclosed piece is set off has the same rights against the others that he would have if they had joined in a voluntary conveyance to him. Blum v. Weston, 102 Cal. 362, 36 Pac. 778, 41 Am. St. Rep. 188.

It would seem to follow, therefore, that upon such partition the holder of the inclosed parcel has an equal and like right against each former cotenant whose land prevents his access to a highway. In the case of a way of necessity arising from a conveyance by a single grantor, it is said in Kripp v. Curtis, supra, that "the grantor may, in the first instance, designate the way to be pursued, and in the event of his failure so to do, the grantee may choose it for himself." It may be doubted whether this rule applies to a case of partition, where the right is against one of several grantors, but not against any particular one more than any other. Other things being equal, it is difficult to see why the owner of one of the surrounding parcels should assume the burden of the easement to the advantage of the others, or why the holder of the inclosed parcel should be entitled to select a particular neighbor and place the burden upon his land. Where there is but a single grantor, the right of way runs over his land, and his land alone. The designation of the route, whether by grantor or grantee, goes merely to the particular location of the easement upon that land. In case of a partition, however, a right of designation would enable the holder of the inclosed piece to select one of several tracts equally bound in the first instance, and thus make it bear the entire disadvantage of an onerous restriction. Where the partition decree fails to provide roads, it may be that the location of ways of necessity should be fixed by a subsequent proceeding in which the owners of all of the parcels which might be affected are brought in, and compensation may be provided to be paid to the owners of the parcel burdened with the easement by those who are relieved.

[3] It is not, however, necessary in this case to definitely resolve the doubts above suggested. Let it be assumed that the grantee, i. e., the predecessor of plaintiff, had the right, in the absence of any designation by the other parties to the partition, to select the line of egress from his land. It is claimed that such right was exercised in this case by the selection and use of a way along the line defined by the judgment in the court below. We think this position is not supported by either the findings or the evidence. The complaint alleges that at the time of the partition a roadway along this line was opened and laid out for the benefit of the grantees of the tract now owned by plaintiff. This allegation is denied by the answer. The court finds that up to the year 1886 there was a traveled way by which persons coming to the 50-acre parcel now belonging to defendants crossed that parcel to other ranches (not including the land of plaintiff) beyond, and that from this traveled way there was a turnout across the irrigating ditch on to the property owned by the plaintiff. This road, apparently, was not the one described in the complaint, for the finding goes on to declare that in 1886 a portion of the traveled way was closed and from that time forward "the traveled way was reverted to the land described" in the complaint. There is no finding, however, of the length of time, prior to 1886, during which any such way was used. A further finding states that for a few years access was had to plaintiff's land from the highway "X," across a tract of land belonging to other parties to the partition decree. There is still another finding that for some years plaintiff obtained access to his property across a third parcel southwesterly of his land. These findings, we think, do not support the conclusion that a right of way across the land of defendants was selected and used in any such definite way as to impress an easement on that land. The findings are entirely vague with regard to the time of beginning and the duration of the period during which such way had been used. In the past, access to the land seems to have been obtained indifferently over any of three routes, one over the land of the defendants and two over land of other owners. The judgment has the effect of imposing upon the land of the defendants the burden of a roadway 1,500 feet in length, and relieving from the easement other lands having the same relation to that of plaintiff. In view of the

fact that all of these parcels had been used for the purpose of reaching plaintiff's land, we think neither the plaintiff nor the court had the right to arbitrarily select the land of defendants and make it alone bear this burden.

[4] It is argued, in support of the judgment, that the topographical conditions were such that a passage over the land of appellants was the only feasible line of travel from plaintiff's land, and that therefore the way of necessity was over this land. There is some conflict in the authorities as to what constitutes a "necessity" sufficient to raise an implied grant of a right of way. Some of the cases hold that the right arises only in case of strict necessity; that it does not exist where the party has another way out, even though such other way can be used only at great inconvenience or expense. Washburn on Easements (4th Ed.) 259. Other cases adopt the more liberal rule that the necessity giving rise to the easement must be only a "reasonable necessity," and that the party claiming the right is required to show, merely, that no other way could be made without labor and expense "excessive and disproportionate to the value of the property." Pettingill v. Porter, 8 Allen (Mass.) 1, 85 Am. Dec. 671; Oliver v. Pitman, 98 Mass. 50. In this court it has been held that a party was not entitled to a way of necessity where he had a right of travel over a road, although such road was rendered impassable by a ditch and slough which could be filled up only by the expenditure of $1,000. Carey v. Rae, supra. See, also, Kripp v. Curtis, supra, where it is said that the right does not exist "except in cases of strict necessity." But if we take the rule to be as declared in Pettingill v. Porter, supra, the findings here do not show any such unreasonable expense or difficulty in reaching the road "X" over the lands south of plaintiff's parcel as to establish a necessity for going over the land of the defendants rather than that of other neighbors. The findings are that a roadway would be practicable and accessible for travel from plaintiff's parcel to roadway "X" over a route much shorter than that fixed in the judgment, but that there is a creek bordering plaintiff's land on the south, which at times is wholly inaccessible and is grown up to willows, and that a way to the south would require some improvement and would be unavailable in time of flood or storm. There is no finding of the expense that would be required to bridge the creek to overcome the hindrance of flood or storm, nor of the relation which this expense would bear to the value of the plaintiff's property. Nor is there any finding of the length of time during which travel would be impeded by flood or storm in the absence of such bridge. There is evidence to the effect that the heaviest rains made the creek impassable for about a day and a half. The facts found do not show any such difficulty in taking the nearer road as to justify the imposition of the burden upon the land of the appellants.

[5] Apart from all the foregoing considerations, we think the appellants are entitled to prevail upon their claim that they were purchasers of their land for value without notice of any claim on the part of plaintiff to an easement over the same. The court's findings were that the Uharriets purchased the 50-acre tract in 1887 for $15,000, which was the full value of the property at that time, that they examined the land before buying the same and saw that it was fenced on three sides, that on the fourth side it was separated from plaintiff's land by an irrigating ditch which was not bridged, that the only entrance to the land from First street was by a gate which had been kept locked, and that there was no roadway over the land to plaintiff's parcel sufficiently well marked to give notice of any claim of a right of way between the two parcels. The court goes on to find that said purchasers procured an abstract of title before they bought the land, and that said abstract showed no right of way or easement over the land; that the purchasers had no actual notice that the plaintiff or any of his predecessors in title had a claim to any right of way or easement over the defendant's land, but that at the time of said purchase there was on record a map of Rancho La Ballona as partitioned, which showed that the property owned by the plaintiff was landlocked and without access to any public highway, "and that this record gave notice to all the subsequent purchasers of any portion of the Rancho La Ballona * * * that said land was entitled to a way of necessity across the other land set apart to other owners in said partition suit. That the defendants are chargeable with constructive notice of said right." The declaration that defendants are chargeable with constructive notice is perhaps a conclusion of law. Whether regarded as a legal conclusion or an inference of fact, we think it involves an undue extension of the doctrine of constructive notice. A purchaser of land for value takes subject only to interests in the land of which he has actual notice or which appear of record. The rule applies as well to easements as to claims of a greater interest. The finding discloses that the Uharriets had no actual notice of any claim on the part of plaintiff or his predecessors to a right of way across the 50 acres, and that there was nothing on the ground to show the existence of any way or road. The instruments in the chain of title did not contain any grant or reservation of such easement. The finding or conclusion of constructive notice is based solely upon the fact that both parcels had been included in a partition, by which the land now owned by plaintiff was left surrounded by other parcels. Under the views already expressed, the information imparted by this fact was merely that the plaintiff's land might have a right of way over some

one of the parcels adjoining it. It is true that notice of circumstances sufficient to put a prudent man upon inquiry is constructive notice of whatever he might have learned by prosecuting such inquiry. Civ. Code, § 19. But it cannot be said that such a man would have been called on to prosecute any further inquiry than that made by the purchasers in this case. They knew (or must be held to have known) that the 7-acre parcel of plaintiff was so situated that it might, from the year 1868, have had an easement over any one of several parcels of land adjoining it. Purchasing one of those parcels almost 20 years later, they made an examination of the ground which indicated that the right, if it existed, was not over the tract which they proposed to buy. We do not think that they were bound to examine the records affecting the various other parcels adjoining plaintiff's land, or those parcels themselves, in order to ascertain whether the plaintiff had an outlet over any of these. They were entitled to rest upon the want of any record showing affirmatively that a right of way existed over the 50 acres, coupled with the physical conditions indicating that there was no such right. "That which does not appear to exist is to be regarded as if it did not exist." Civ. Code, § 3530. On the facts found the court should have concluded that the Uharriets were purchasers for value without notice, actual or constructive, of an easement, and that they therefore took their land free from any such easement if it had ever existed. As between the owners of the 7-acre tract who allowed so many years to elapse without asserting their rights in such manner as to make their claim of easement a matter of record, and the innocent purchasers of land not appearing to be burdened, the interests of the latter are more deserving of consideration.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; LAWLOR, J.

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174 Cal. 118

KATO et al. v. BUSICK, Superior Court Judge, et al. (Sac. 2564.)

(Supreme Court of California. Dec. 22, 1916.)

1. PROHIBITION 🔑13—RELIEF—MOOT QUESTION—APPOINTMENT OF RECEIVER.

Where a receiver appointed to harvest a crop had completed the harvest, distributed the proceeds to the owners, except the share in controversy, which he had turned over to a trustee in bankruptcy of one of the claimants as required by the federal court, and had been discharged by the court appointing him, the validity of his original appointment is a moot question, and prohibition will not issue to determine that question.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 62; Dec. Dig. 🔑13.]

2. STIPULATIONS 🔑14(1)—EFFECT.

While the parties cannot by stipulation confer jurisdiction on a receiver, a stipulation that the receiver might harvest and sell a crop and distribute the proceeds, except the share in dispute which was to be deposited in a bank, makes the receiver an agent for the parties to the stipulation.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24, 28; Dec. Dig. 🔑14(1).]

In Bank. Original application by S. Kato and others against Charles O. Busick, as Judge of the Superior Court for the County of Sacramento, and others, for a writ of prohibition. Petition dismissed.

Louis P. Dunkley, of San Francisco, for petitioners. Thomas B. Leeper, of Sacramento, for respondents. Fred J. Harris, of Sacramento, for receiver.

MELVIN, J. [1] Respondents moved to dismiss a petition for a writ of prohibition upon the grounds that the receiver against whom the writ was asked had been discharged as such receiver; that the harvesting of the crop which petitioners asked to have prevented had been accomplished and the proceeds distributed to the proper parties; that petitioners had consented to the continuation of the receivership; that the matter involved in the receivership proceeding had been fully settled and terminated; and that the whole controversy had become a moot question.

It appears without contradiction that on December 10, 1915, M. Itoo commenced in the superior court of the county of Sacramento an action against M. Yamane, C. Nagasue, and R. Koike. An attachment was issued, and the sheriff levied upon a certain growing crop of onions in San Joaquin county. Subsequently Kato, for himself and as agent for one Wakamoto and Toshi Koike (the last named being the wife of R. Koike), filed a third party claim. The sheriff thereupon demanded and Itoo, the plaintiff, at once deposited $1,100 for the sheriff's protection against said third party claim. The plaintiff subsequently made a motion for the appointment of a receiver to harvest, sell, and account for the crop of onions. The motion was granted. One M. P. Barnes was appointed and qualified as receiver, and the sheriff put him in possession of the crop. At the time the receiver was appointed the sheriff had refused to take the responsibility of harvesting the crop, and the third party claimants had refused to gather the onions while the attachment was in existence.

The third party claimants, S. Kato, Y. Yakamoto, and Toshi Koike (wife of R. Koike), petitioned this court for a writ of prohibition and an order to show cause why such writ should not issue was made. The matter was argued and is still pending. On August 9, 1916, before the return day fixed by the order to show cause the attorneys for the receiver, the plaintiff and the third party claimants respectively entered into a stipulation reciting the facts that Kato claimed 40 per cent. and Mrs. Koike and Wakamoto each 30 per cent. of the crop held by the receiver, and agreeing that the receiver should harvest, market, and sell the crop as in said order provided, and should pay the money received, after subtracting the costs of harvesting, etc., as follows: Forty per cent. to Kato, 30 per cent. to Wakamoto, and 30 per cent., the amount claimed by Mrs. Koike, to some bank on deposit to abide the order of the superior court in the matter of the receivership. The stipulation contained the following paragraph:

> "It is distinctly understood that this stipulation shall in no event or under any circumstances be construed or taken as a consent to the appointment of said receiver by the parties hereto, or that they waive any legal right to appeal from or move to set aside said order appointing said receiver, and that the parties hereto reserve the right to take any steps that they may be advised to contest or oppose said order appointing said receiver, and this stipulation is entered into with the express purpose of facilitating the harvesting of said crop of onions."

Under this stipulation the receiver proceeded to gather and sell the crop.

R. Koike filed a petition in bankruptcy, and on August 19, 1916, Hon. M. T. Dooling, judge of the District Court of the United States, made an order staying proceedings in the case of Itoo v. R. Koike et al., and on the 28th of the same month this order was modified in such manner as to continue Mr. Barnes as receiver in the harvesting and marketing of the crop. The order also required him to turn over the assets to Mr. William T. Hawkins, referee in bankruptcy, and to file his account of such receivership with the said referee.

On September 25, 1916, Judge Busick made and entered an order, as judge of the superior court of the state of California in and for the county of Sacramento, approving the receiver's report. This order recited that, as authorized by stipulation of all the parties claiming to own the property, the receiver had released and surrendered all of it except the interest owned by R. Koike, that the receiver had $1,160.32 on hand belonging to said Koike, and that both court and receiver had been served with an order of the District Court of the United States which has been described above. The court ratified the conduct of the receiver in releasing all of the property except the Koike interest, ordered him to turn over the remaining assets in his hands to the referee in bankruptcy, and decreed that upon so surrendering said assets he should be discharged as receiver, and his bond should be exonerated. On the 27th of September, 1916, another order was made and signed by Judge Busick reciting the receiver's due obedience to the former order and formally releasing him from any further liability.

[2] From the foregoing facts it is evident that no good reason exists for deciding whether or not the original appointment of the receiver was justified. It is contended that no stipulation could invest the receiver with jurisdiction to act if the court was originally without such jurisdiction. This is true, but nevertheless the stipulation was broad enough to make the receiver the agent for the third party claimants. The paragraph which we have quoted reserving the right to question the receiver's authority does not in the slightest degree detract from his right to gather and sell the crop under the stipulation. He did everything except deposit the share claimed by Mrs. Koike in bank, and that he could not do, because it was impounded by the federal court. If this money belongs to Mrs. Koike, she may recover it from that court. The issuance of a writ of prohibition now by this court would accomplish nothing. It would merely require the receiver to desist from gathering and selling the crop and from dealing with the assets. But he has gathered the crop, has accounted for the assets, and he and the court have lost all control of the subject-matter of the receivership.

The contention is made that under the authority of Havemeyer v. Superior Court, 84 Cal. 327–389, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192, it makes no difference that the property has passed out of the possession of both court and receiver, that the writ should issue, and that this court may not take cognizance of the payment of the money claimed by Mrs. Koike into the District Court of the United States. The citation does not support the contention. The court there merely held that, although the writ does not run against ministerial officers, and although the property was in the custody of the receiver, the possession of the receiver was that of the court; he being a mere instrument of that tribunal. It was accordingly decided that the writ of prohibition runs to the court and operates directly upon the court, but indirectly upon the receiver. In the case at bar there is no property in the custody of the court and no receiver against whom the writ could operate.

The questions raised by the petition are therefore moot questions, and the petition for the writ should be, and accordingly is, dismissed.

We concur: ANGELLOTTI, C. J.; LORIGAN, J.; SLOSS, J.; HENSHAW, J.

(174 Cal. 133)

PEOPLE v. WINKLER. (Cr. 1996.)

(Supreme Court of California. Dec. 26, 1916.)

1. INTOXICATING LIQUORS 🔑205(1) — CRIMINAL PROSECUTION—INDICTMENT.

Indictment charging that defendant took an order for sale and delivery to prosecutor of alcoholic liquor in no-license territory was not sufficient to charge an offense under Local Option Law (St. 1911, p. 599) § 15, making it unlawful within such territory to solicit orders, take orders, or make agreements for the sale or delivery of intoxicating liquors; since the words "for the sale or delivery," etc., qualify all three of the acts.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 225; Dec. Dig. 🔑 205(1).]

2. Intoxicating Liquors 🔑205(1) — Criminal Prosecution—Indictment.

Indictment charging that defendant took an order for sale and delivery to prosecutor of alcoholic liquor in no-license territory, the words "taking an order from" being treated as surplusage, and the act nowhere prohibiting the delivery of liquor, charges the single offense of a sale under St. 1911, p. 599, § 13, which makes it unlawful to furnish, distribute, or give away alcoholic liquors in no-license territory except in special cases specified in section 16.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 225; Dec. Dig. 🔑 205(1).]

3. Intoxicating Liquors 🔑236(11)—Criminal Prosecution — Sufficiency of Evidence.

In a prosecution for the sale of intoxicating liquors in no-license territory, in which it appeared that the prosecutor signed an order designating defendant his agent to purchase the liquor in license territory, evidence *held* to justify a jury finding that the transaction was bona fide and what defendant represented it to be.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 313–315; Dec. Dig. 🔑 236(11).]

4. Intoxicating Liquors 🔑169—Purchase by Agent.

If the accused acted as the agent of the prosecuting witness purchasing liquors in license territory, and delivering them to him in no-license territory, he was not guilty of a violation of the local option law.

[Ed. Note.—Ror other cases, see Intoxicating Liquors, Cent. Dig. §§ 187, 188; Dec. Dig. 🔑 169.]

5. Criminal Law 🔑1173(2)—Review—Reversible Error.

In a prosecution of a violation of the local option law, where it appeared that the prosecutor at defendant's request signed an order designating defendant his agent for the purchase of goods in licensed territory, the refusal to give an instruction that if defendant in purchasing liquor outside of the no-license territory described in the indictment acted as the agent of the prosecuting witness, having no interest in and deriving no profit from the transaction, he was not guilty of selling such liquors to the prosecuting witness was reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3165; Dec. Dig. 🔑1173(2).]

In Bank. Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

J. S. Winkler was convicted of a violation of the local option law, and his motion for new trial denied, and he appeals. Reversed.

George R. Freeman and Frank Freeman, both of Willow (George R. Freeman, of Willow, of counsel), for appellant. Ben F. Geis, Dist. Atty., of Willow, U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

SLOSS, J. The defendant having been convicted of a violation of the local option law (Stats. 1911, p. 599), appeals from the judgment and from an order denying his motion for a new trial.

The indictment charged that the defendant on or about the 20th day of November, 1914, in the county of Glenn, did "take an order from, sell, and deliver to one M. Hamilton, alcoholic liquor," within a supervisorial district which was no-license territory.

[1] The defendant demurred to the indictment on the ground that it charged more than one offense, and that the several offenses were not stated in separate counts. Pen. Code, § 954. Section 13 of the act makes it unlawful to "sell, furnish, distribute, or give away," within the boundaries of any no-license territory, any alcoholic liquors, except in certain cases specified in section 16. Section 15 makes it unlawful, within such territory, "to solicit orders, take orders or make agreements for the sale or delivery of alcoholic liquors." The claim is that the indictment charges a sale under section 13, and also the taking of an order under section 15. It is not necessary to decide whether the offenses described in these sections may properly be joined in a single count. We are satisfied that the indictment did not contain the elements necessary to constitute a charge of "taking an order" under section 15. Three acts are there declared unlawful—i. e., soliciting orders, taking orders or making agreements "for the sale or delivery of alcoholic liquors." The words "for the sale or delivery," etc., qualify all three of the acts.

[2] The indictment merely charges that the defendant took an order from Hamilton, and sold and delivered liquors to him. There is no attempt to allege that he took an order "for the sale or delivery of liquor." Since the act does not, in section 13 or elsewhere, prohibit the "delivery" of liquors, the pleading charges nothing more than a sale under section 13, and the case should have been submitted to the jury on the issue of sale alone. The words "taking an order from" may well be treated as surplusage. In this view, the indictment charges but a single offense.

Was the defendant properly convicted of the offense of selling intoxicating liquor within no-license territory? There is little or no dispute regarding the facts. Winkler conducted a general merchandise store at Hamilton City in Glenn county. This was no-license territory under the law. The city of Chico, in Butte county, a few miles distant, was "wet" territory. M. Hamilton, named in the indictment as the person to whom the sale was made, was a detective employed to discover violations of the local option law. Hamilton asked the defendant Winkler to procure for him at Chico a bottle of whisky, and deliver it to him at Hamilton City. The defendant stated that he did not make a business of it, but did it for some of his customers. He requested Hamilton to sign a blank form or order which, when filled out and signed, read as follows:

> "John Daley, 426 Third Street, Chico, Cal.:
>
> "I hereby purchase from you at your store in Chico one bottle beverage. I hereby appoint J. S. Winkler my special agent for the transportation of these goods from your store, 426 Third street, Chico, to my home, and you are hereby authorized and instructed to deliver them to him for me at ——.
>
> "[Signed] D. O. Mills."

(The name "D. O. Mills" was assumed by Hamilton.)

At the same time, Hamilton handed Winkler $1, the price of the whisky. Winkler went to Chico to attend to business of his own, obtained the bottle of whisky from Daley, the person named in the order, paying him the dollar, returned to Hamilton City, and handed the bottle of whisky to Hamilton. There was evidence that the order signed by Hamilton was on a prepared form, on which the name and address of Daley were printed. The name of Winkler, and the words "one bottle beverage" were written in. It was also testified that Winkler had a number of these blanks in his possession.

[3, 4] The court refused to give three instructions requested by the defendant. These instructions presented, in different forms, the proposition that if the defendant, in purchasing the liquor outside of the no-license territory described in the indictment, acted on behalf of and as the agent of the prosecuting witness, having no interest in the liquor, and deriving no profit from the transaction, he was not guilty of "selling" such liquor to the prosecuting witness. No instructions of similar purport were given by the court. The defendant was entitled to have the jury charged on these lines, even if the instructions as framed were subject to the rather technical and minute criticisms suggested by respondent. State v. Turner, 83 Kan. 183, 109 Pac. 983. It may be that the evidence warranted an inference, on the part of the jury, that the course of procedure adopted by Winkler was a mere pretext for covering sales of liquor made by him either for himself or for Daley, and that in fact he was not an agent of the purchaser. But under the evidence, the jury might have found that the transaction was bona fide and precisely what Winkler represented it to be. The statute prohibits, in section 13, the sale of alcoholic liquors. It does not prohibit their purchase. More specifically, it does not prohibit one from purchasing intoxicating liquors outside of no-license territory, and bringing them within such territory for his own consumption. If a man may do this personally, he may do it through an agent. Hamilton had the right to buy liquor in Chico and bring it to Hamilton City for his own use. If he did this through Winkler, acting as his agent, neither he nor the agent was guilty of a violation of the law. This conclusion is supported by the uniform current of authority. We cite a few cases. State v. Lynch, 81 Ohio St. 336, 90 N. E. 935, 28 L. R. A. (N. S.) 334; Strickland v. State (Tex. Cr.) 47 S. W. 720; Reed v. State, 3 Okl. Cr. 16, 103 Pac. 1070, 24 L. R. A. (N. S.) 268; Partin v. Commonwealth, 140 Ky. 146, 130 S. W. 968; Lee v. Commonwealth, 143 Ky. 355, 136 S. W. 624; Simpson v. Commonwealth, 151 Ky. 442, 152 S. W. 255; State v. Collins, 53 Kan. 100, 36 Pac. 56, 24 L. R. A. 212; State v. Turner, 83 Kan. 183, 109 Pac. 983; Davis v. State, 53 Tex. Cr. R. 373, 109 S. W. 938; Evans v. State, 55 Tex. Cr. R. 450, 117 S. W. 167.

[5] It was the defendant's right to have the jury pass upon this question of agency, under instructions that, if he was acting solely as the agent of the purchaser of the whisky, he could not be convicted of making a sale of it to such purchaser. The refusal to give such instructions was highly prejudicial.

The judgment and the order denying a new trial are reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.; LAWLOR, J.

(174 Cal. 148)

SMITHSON v. ATCHISON, T. & S. F. RY. CO. (Sac. 2260.)

(Supreme Court of California. Dec. 28, 1916.)

1. Courts 🔑97(5)—Decisions of United States Courts as Controlling in State Courts.

The decisions of the Supreme Court of United States are controlling in the construction of the federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657–8665), in actions thereunder brought in state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 332; Dec. Dig. 🔑97(5).]

2. Master and Servant 🔑228(2)—Injuries to Servant—Federal Employers' Liability Act—Construction—"Another Statute."

In federal Employers' Liability Act, § 3 (U. S. Comp. St. 1913, § 8659), providing that, in an action brought against a common carrier under it, no employé "shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé," the words "any statute" mean another federal statute, and do not include the statutes of a state.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 671; Dec. Dig. 🔑228(2).]

3. Commerce 🔑8(5)—Federal Employers' Liability Act—State Statute.

In an action under the federal Employers' Liability Act, all state laws in regard to the matters with which it deals are superseded, and St. 1911, p. 910, § 2, providing that no minor under the age of 18 years shall be employed between 10 o'clock in the evening and 5 o'clock in the morning, although not conflicting with the federal act, could not be given effect even as a state police regulation.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. 🔑8(5).]

4. MASTER AND SERVANT 🔑228(1)—INJURIES TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—CONTRIBUTORY NEGLIGENCE.

As the defense of contributory negligence is open to a defendant in a servant's action for injuries under the federal Employers' Liability Act, instructions depriving the defendant of this defense in such case were erroneous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 670; Dec. Dig. 🔑228(1).]

5. APPEAL AND ERROR 🔑171(3)—RESERVATION IN LOWER COURT—GROUNDS FOR REVIEW—OBJECTION.

In a railroad servant's action for injuries under the federal Employers' Liability Act, where the answer did not deny an allegation that no signal was given by plaintiff for the engine which caused the injury to move upon a turntable, but the denial was taken by both parties upon the trial as an accepted fact and issues joined with objection, neither party will be allowed to raise the question in the appellate court for the first time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1056–1061; Dec. Dig. 🔑171(3).]

6. MASTER AND SERVANT 🔑286(5)—INJURIES TO SERVANT—QUESTION FOR JURY.

In a railroad servant's action for injuries under the federal Employers' Liability Act, the weight of the evidence upon the question of defendant's negligence *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1020, 1021; Dec. Dig. 🔑286(5).]

In Bank. Appeal from Superior Court, Stanislaus County; L. M. Fulkerth, Judge.

Action by Warren Smithson, by his guardian ad litem, T. A. Smithson, against the Atchison, Topeka & Santa Fé Railway Company. From a judgment for plaintiff and from an order refusing a motion for a new trial, defendant appeals. Reversed.

U. T. Clotfelter and A. H. Van Cott, both of Los Angeles, for appellant. Cushing & Cushing, of San Francisco, and Hatton & Scott, of Modesto (Erwin E. Richter, of San Francisco, of counsel), for respondent.

HENSHAW, J. This action was brought by Warren Smithson, a minor, by his guardian ad litem, to recover damages from defendant for injuries sustained by plaintiff while in its employ. Plaintiff at the time of the action was 17 years of age, well, active, and in possession of all his faculties. He was employed by defendant at its roundhouse at Riverbank, Cal., in the capacity of night-hostler helper; that is to say, his employment was in the nighttime, and he was the assistant or helper of a hostler whose duty it was to take engines which had finished their work, run them into the roundhouse, where they were looked over and put in condition for their next trips. Outside of the roundhouse was a turntable for the reception of engines which were there turned to face any desired direction. At an elevation over this turntable was a "cab" or station where was a lever by which the motive power of the turntable was controlled. The rails leading from the roundhouse extended on to this turntable. It was a part of the duty of the helper to adjust the turntable so that these rails ran true with the rails upon which was to come the approaching engine. This truing up of the rails was known as "spotting" the turntable. When the turntable was thus "spotted," it became the helper's duty to signal the night hostler in the engine that all was in readiness for him to run his engine on the table. The usual signal was given by moving from right to left the lighted lantern which the helper carried. It is contended by appellant that another customary signal was given by the helper placing his lantern in a particular location upon the girder of the turntable and that the latter signal was given in this instance. It is charged by respondent that the hostler in control of the engine backed his engine on to the turntable without receiving any signal from plaintiff. Plaintiff's feet were caught and crushed by the approaching engine. The injuries necessitated partial amputation of both feet and crippled him for life. The jury awarded him damages in the sum of $26,000. From the judgment which followed, and from the order of the court refusing its motion to grant a new trial, defendant appeals.

The action is admittedly brought under the provisions of the federal Employers' Liability Act. The principal question presented upon this appeal arises out of the provisions of section 3 of this act and the applicability to its provisions of a certain statute of this state. Section 3 of the federal Employers' Liability Act (U. S. Comp. St. 1913, § 8659) provides that in any action brought against any common carrier under it no employé "shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé." Public No. 100, H. R. 20310. Act approved April 22, 1908.

At the time of this accident there was upon the books of this state a statute declaring as follows:

> "No minor under the age of eighteen years shall be employed or permitted to work between the hours of ten o'clock in the evening and five o'clock in the morning." Stats. 1911, p. 910, § 2.

This respondent was injured at about midnight. The court instructed the jury as follows:

> "You are further instructed that under a certain statute of California in effect during the month of September, 1912, it was provided that 'No minor under the age of eighteen years shall be employed or permitted to work between the hours of ten o'clock in the evening and five o'clock in the morning.'

"You are further instructed that said statute of the state of California is a 'statute enacted for the safety of employés' as said words are used in the federal Employers' Liability Act, providing that no employé who may be injured under the circumstances there stated shall be held to have been guilty of contributory negligence where the violation of such statute contributed to his injuries.

"You are further instructed that under the laws of this state it was unlawful at the time of plaintiff's employment for defendant to employ or permit minors under the age of 18 years to work between the hours of 10 o'clock in the evening and 5 o'clock in the morning, and if you believe from the evidence that plaintiff at the time of his injuries was a minor under the age of 18 years, and was at said time being employed or permitted by defendant to work between the hours of 10 o'clock in the evening and 5 o'clock in the morning, if you believe from the evidence that such employment or permission to work during said night hours contributed to his injuries, you will find plaintiff not guilty of contributory negligence."

[1, 2] In justice to the trial judge, it should be stated that at the time of the trial of this action there were but few decisions construing the scope and effect of the phrase "any statute" as that language is employed in the federal Liability Act. The trial court took the view that the language of the Supreme Court of the United States in Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, defining "any statute" to mean any federal statute, was obiter and adopted the construction of the statute laid down in Doherty's Liability of Railroads to Interstate Employés, p. 119, to the effect that "any statute" includes the statutes of a state. Support of this view was also found in the decision of the Supreme Court of the state of Washington in Opsahl v. Northern Pacific R. R. Co., 78 Wash. 197, 138 Pac. 681. But the later decisions of the Supreme Court of the United States, which are, of course, controlling upon the question, completely eliminate this matter from the domain of controversy. These decisions are numerous, are uniform, and adopt and reaffirm the declarations of the Seaboard Air Line Case. There is need to cite and quote but from few of them.

In De Atley v. Chesapeake, etc., Ry. Co. (D. C.) 201 Fed. 591, it is declared that the federal Employers' Liability Act "was intended to cover every act of negligence for which a common carrier engaged in interstate commerce might be liable to its employés in such commerce"; and further that this act, "making common carriers engaged in interstate commerce liable for injuries to employés, supersedes all other common-law and statutory liabilities on the part of such carriers."

In Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176, it is declared that since the passage of the federal Employers' Liability Act "this act is paramount and exclusive," and "we may not piece out this act of Congress by resorting to the local statutes of the state of procedure or that of the injury."

In St. Louis, etc., Co. v. Hesterly, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. Ed. 1031, it is declared that:

> "The federal Employers' Liability Act supersedes state laws in the matters with which it deals, including liability of carriers while engaged in commerce between the states."

This was the holding in answer to the declaration of the Supreme Court of the state of Arkansas that the state law was only supplementary to the federal Employers' Liability Act.

In Wabash Railway v. Hayes, 234 U. S. 86, 34 Sup. Ct. 729, 58 L. Ed. 1226, it is said:

> "Had the injury occurred in interstate commerce, as was alleged, the federal act undoubtedly would have been controlling, and a recovery could not have been had under the common or statute law. * * * In other words, the federal act would have been exclusive in its operation, not merely cumulative. Mondou v. N. Y., N. H. & H. R. R. Co., 223 U. S. 1, 53, 55 [32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44]; St. Louis, etc., Ry. Co. v. Seale, 229 U. S. 156, 158 [33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156]; North Carolina R. Co. v. Zachary, 232 U. S. 248, 256 [34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159]; Seaboard Air Line Ry. v. Horton, 233 U. S. 492 [34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475]."

In Toledo, etc., R. Co. v. Slavin, 236 U. S. 454, 35 Sup. Ct. 306, 59 L. Ed. 671, the Ohio statute abolished the rule of the common law as to the assumption of risks occasioned by defects in tracks, while the federal statute left that common-law rule in force. Over objection the law of the Ohio statute was delivered to the jury and was held to be error upon the authority of Seaboard Air Line, etc., Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475.

In Chicago, etc., Ry. v. Wright, 239 U. S. 548, 36 Sup. Ct. 185, 60 L. Ed. 431, the action was brought under the federal Employers' Liability Act, and instructions touching negligence were given in conformity with the law of the state of Nebraska. It was declared that, as the federal Liability Act "is exclusive and supersedes state laws upon the subject, it was error to submit the case to the jury as if the state act were controlling."

It is unnecessary to cite the corresponding decisions of the state courts, since uniformly, as in duty bound to do, they follow the decisions of the Supreme Court of the United States. It is sufficient here to say that the Supreme Court of the state of Washington thus felt compelled to, and did, reverse its decision in the Opsahl Case in the later case of Lauer v. Northern Pacific Ry. Co., 83 Wash. 465, 145 Pac. 606.

[3] Respondent's second position is that, even if the statutes of a state be not included in the language of the federal Employers' Liability Act, nevertheless this particular statute is of such character that it may be

employed with and as a supplement to the provisions of the federal act as being a state police regulation and as being in no wise in conflict with the provisions of the federal act. A reading of the decisions already cited will establish the untenableness of this position; but, if more need be added, it is found in the conclusive language of the Supreme Court of the United States in the case of Prigg v. Commonwealth of Pennsylvania, 16 Pet. 539, 617 [10 L. Ed. 1060]:

> "If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that the state Legislatures have a right to interfere, and as it were, by way of complement to the legislation of Congress, to prescribe additional regulations and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is, as the direct provisions made by it. * * * The will of Congress upon the whole subject is as clearly established by what it has not declared, as by what it has expressed."

[4] In this complaint plaintiff set forth his duties and the conditions and circumstances under which he was called upon to perform them: He "spotted" the turntable from the cab by means of the lever. Then, in order to ascertain whether the "spotting" had been correctly done, it was necessary for him to leave the cab and go to a position alongside of the tracks. Finding the tracks properly adjusted, he then signaled the hostler to run his engine onto the table. This table had been but recently put in operation, was not well balanced, and the balance was carelessly and negligently maintained by the piling of sacks of sand upon one end of the table. In the night the table was in total darkness, saving when there was flashed upon it the small bull's-eye lantern carried by plaintiff. These piled sacks in the nighttime gave to the table an additional hazard, in that one was liable to stumble over them in the dark. The failure adequately to light this turntable, in conjunction with the sacks of sand piled upon it, is charged as negligence. In order to signal the hostler, it was necessary for the plaintiff to walk across the turntable. Plaintiff was in the act of picking up his lantern preparatory to signaling the hostler when the hostler carelessly and negligently and without receiving any signal backed his engine onto the turntable. Plaintiff, in endeavoring to escape the engine tender first approaching him, in the darkness stumbled over the sacks and was thrown across one of the turntable tracks and was thus run over and injured. One of the defenses was contributory negligence, a defense open to appellant under the federal Liability Act, a defense of which it was deprived by virtue of the instructions which the court gave. The injury thus sustained by appellant is manifest.

[5] Something further needs to be said in contemplation of the new trial which must be ordered. One of the defenses which defendant sought to establish was that the hostler in backing his engine did so in compliance with the signal given him by plaintiff himself. Upon this the complaint charged in the following language:

> "While the plaintiff was so engaged in picking up said lantern and preparing to signal, said hostler carelessly and negligently and without receiving any signal from the plaintiff drove said engine upon said turntable."

And the answer made was:

> "Defendant denies that while the plaintiff was engaged in picking up his said or any lantern, or preparing to give the signal to the said or any hostler, the said or any hostler carelessly or negligently drove said engine upon said turntable."

Respondent argues that here is a complete failure upon the part of appellant to deny that no signal was given. Unquestionably, in the matter of this denial the answer is susceptible of improvement; but by both parties upon the trial it was taken as an accepted fact that issue was joined upon this proposition, and much evidence pro and con was admitted without objection upon the question. It is a familiar principle that, the case having been tried upon this theory without objection, neither party will be allowed to present it in this court for the first time. Tulley v. Tranor, 53 Cal. 274; Horton v. Dominguez, 68 Cal. 642, 10 Pac. 186; Illinois Bank v. Pacific Ry. Co., 115 Cal. 297, 47 Pac. 60; Gervaise v. Brookins, 156 Cal. 110, 103 Pac. 332.

[6] Appellant further argues that no evidence of legal sufficiency was adduced to show any negligence on its part. It is not disputed that the plaintiff himself furnished evidence upon all these matters of asserted negligence, but the answer is made that the evidence is incredible. There are exceptional cases, such as that of Blankman v. Vallejo, 15 Cal. 639, County of Sonoma v. Stofen, 125 Cal. 35, 57 Pac. 681, A. T. & S. F. Ry. Co. v. Baker (Ind. T.) 104 S. W. 1182, and People v. Milner, 54 Pac. 833, 122 Cal. 171, where, in effect, it is declared that the judgment of a court is not to be based on or controlled by the testimony of a witness testifying to a fact inherently impossible. But this case does not come within that category. The weight of the evidence upon the question of the defendant's negligence was for the jury under proper instructions of the court.

The judgment and order appealed from are reversed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; LORIGAN, J.; SHAW, J.; SLOSS, J.

174 Cal. 140

WOLF et al. v. GALL et al. (S. F. 7592.)

(Supreme Court of California. Dec. 27, 1916. Rehearing Denied Jan. 25, 1917.)

1. APPEAL AND ERROR 🔑488(2)—EFFECT OF APPEAL—PROHIBITIVE INJUNCTIONS.

An appeal does not stay the force of a prohibitive injunction, but the lower court has full power to punish a violation thereof pending the appeal; since such an injunction requires no execution for its enforcement, but acts directly without process on the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2278; Dec. Dig. 🔑488(2).]

2. APPEAL AND ERROR 🔑488(2)—EFFECT OF APPEAL—MANDATORY INJUNCTIONS.

An appeal suspends and renders inoperative mandatory injunctions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2278; Dec. Dig. 🔑488(2).]

3. APPEAL AND ERROR 🔑460(1)—EFFECT OF APPEAL.

An appeal can operate as a supersedeas or stay only by arresting the enforcement by the court below of the judgment appealed from.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2217–2221, 2225, 2245; Dec. Dig. 🔑460(1).]

4. QUIETING TITLE 🔑1—PURPOSE OF ACTION.

Action to quiet title is a development of the bill of peace of the court of chancery, the main purpose of which was to prevent repeated attempts to litigate a title, and to protect the real owner of the right against the annoyance and expense incidental to a multiplicity of suits.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 1, 2; Dec. Dig. 🔑1.]

5. QUIETING TITLE 🔑49—RELIEF.

In action to quiet title, the relief awarded may vary according to the circumstances of the case.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 98, 99; Dec. Dig. 🔑49.]

6. QUIETING TITLE 🔑52—FORM OF JUDGMENT.

A decree, declaring that plaintiff is the owner of the property and enjoining defendant from further setting up a claim thereto, is a proper form of judgment in action to quiet title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 99, 102, 103; Dec. Dig. 🔑52.]

7. APPEAL AND ERROR 🔑488(2)—VIOLATION—EFFECT OF APPEAL.

Where, in action to quiet title, the judgment declares defendants the owners, and enjoins plaintiffs from making claim to the property, the injunctive provision is not suspended or rendered inoperative by appeal from the judgment, for the injunction is purely prohibitive and not mandatory, and is not incidental to the relief sought, but is an inherent part of the relief itself, and under Code Civ. Proc. § 356, tolling the statute of limitations during continuance of an injunction, plaintiffs lose no right by being restrained from commencing action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2278; Dec. Dig. 🔑488(2).]

Angellotti, C. J., and Lorigan, J., dissenting.

In Bank. Action by Arturo Wolf and another against Charles Funkenstein Gall and others. Judgment for defendants. Application for writ of supersedeas prayed to be directed against defendants. Order to show cause discharged.

See, also, 163 Pac. 346, 350.

Theodore A. Bell and Denson, Cooley & Denson, all of San Francisco, for petitioners. J. R. Pringle, Leon Samuels, and Edgar D. Peixotto, all of San Francisco, for respondents.

SLOSS, J. Pending an appeal from the judgment in the above-entitled cause, the superior court undertook to punish Arturo Wolf, one of the plaintiffs, and his attorneys, Messrs. George Lezinsky and Theodore A. Bell, for contempt of court. The alleged contempt consisted of the institution of a new action, in violation of the terms of an injunction embodied in the judgment from which the appeal had been taken. The present proceeding is an order, issued on the application of Arturo Wolf, to show cause why a writ of supersedeas should not issue to prevent the enforcement of said judgment.

The action of Wolf v. Gall was brought to quiet title to certain property in the city and county of San Francisco. All of the parties claim under Tobe Funkenstein, deceased. The plaintiffs, Arturo Wolf and Maria Julia Wolf, assert ownership of an interest in the property as heirs of said Tobe Funkenstein. The defendants, also heirs of the decedent, claim ownership of the property by virtue of a deed alleged to have been executed to them by said Tobe Funkenstein in her lifetime.

The court found that the plaintiffs and defendants were the heirs of Tobe Funkenstein, but that said decedent was not the owner of the property at the time of her death; she having conveyed the same to the defendants as tenants in common. The title to the property was found to be in the defendants. The judgment, following the findings, declares that the defendants are the owners in fee simple of the property in dispute, and that the plaintiffs have no right, title, or interest therein. It is further adjudged and decreed that the plaintiffs and all persons claiming under them be perpetually restrained and enjoined from making any claim to the property involved in the action. The judgment was entered on August 7, 1914. On October 9, 1914, plaintiffs took an appeal therefrom to this court. The appeal is still pending.

On January 17, 1916, Arturo Wolf, by his said attorneys, Theodore A. Bell and George Lezinsky, commenced in the superior court a new action against the same defendants and their successors. In his complaint he alleged that he was an heir of Tobe Funkenstein, and that she was at the time of her death the owner of the same property involved in the present action. By said complaint he assailed the validity of the deed of December 21, 1907, which is the basis of the title claimed by the defendants. The commencement of this second action constitutes the contempt found to have been committed by the petitioner and his attorneys.

That the institution of the second action is in direct disobedience of the terms of the injunction embraced in the judgment is neither questioned nor open to question. It is equally clear that Wolf's attorneys, who, as it appears, had knowledge of the terms of the judgment, are liable, equally with their client, for the commission of any act forbidden by said judgment.

The sole question is whether the provision enjoining the plaintiffs is suspended or rendered inoperative by virtue of the pendency of an appeal from the judgment.

[1-3] It is conceded on all sides that the injunction under discussion is purely prohibitive. By a line of decisions beginning with the early history of the state, the rule has been settled that an appeal does not stay the force of a prohibitive injunction, and that the lower court has full power to punish a violation of such injunction pending the appeal. Merced M. Co. v. Fremont, 7 Cal. 130; Heinlen v. Cross, 63 Cal. 44; United R. R. v. Superior Court of C. & C. of San Francisco, 155 Pac. 463. It is otherwise where the injunction is mandatory. The reason for this distinction is found in the inherent nature of an order which merely restrains or prohibits affirmative action. An appeal can operate as a supersedeas or stay only by arresting the enforcement by the court below of the judgment appealed from. Dulin v. Pac. W. & C. Co., 98 Cal. 304, 33 Pac. 123. A prohibitive injunction requires no execution for its enforcement. It acts "directly without process upon the defendant." Heinlen v. Cross, supra. In the case of a mandatory injunction, on the other hand, the contempt proceeding is a kind of process to carry into execution the affirmative command embodied in the judgment.

With respect to the effect of an appeal there are, then, two classes of injunctions: (a) Prohibitive injunctions, which remain operative and must be obeyed notwithstanding an appeal; and (b) mandatory injunctions, which are suspended and rendered inoperative by the appeal. The petitioner contends, however, for the recognition of a third class, viz. injunctions which, although prohibitive, are "incidental," and these, it is claimed, are taken out of the settled rule governing the effect of an appeal from a prohibitive injunction and are given the characteristics of a mandatory injunction. The injunction in the case at bar is asserted to be merely incidental to so much of the decree as declares that the defendants are the owners of the property. We think the supposed distinction between "incidental" and other prohibitive injunctions is without the support of either authority or principle. The argument is rested in the main upon one or two sentences taken from the opinion in Foster v. Superior Court, 115 Cal. 279, 47 Pac. 58. It is true that it was there said that the injunction was merely incidental to the judgment determining Smith's right to act as a director, but the very next passage in the opinion declares that the injunction, although couched in terms of prohibition, was in effect mandatory. If the injunction was mandatory, its effect was, of course, stayed by an appeal, and the description of it as "incidental" was at once unnecessary to the decision and insufficient for its support. The case has been cited in this court to support the proposition that a mandatory injunction is suspended by an appeal (Clute v. Sup. Ct., 155 Cal. 15, 99 Pac. 362, 132 Am. St. Rep. 54; United Railroads v. Superior Court, 155 Pac. 467), and has generally been regarded as resting on the ground that the injunction there in question was mandatory. In Mark v. Superior Court, 129 Cal. 1, 61 Pac. 436, a case cited by petitioner, the word "incidental" is also used in discussing the question whether a part of an injunctive order was stayed by an appeal; but in that case the judgment was an entirety, and the portion claimed to be prohibitive was not separable from the remainder, which was plainly mandatory. A careful reading of the entire opinion shows that the court regarded both branches of the injunction as being in reality mandatory. Neither of these cases therefore should be regarded as authority for the view that the operative effect of a strictly prohibitive injunction can, in any case, be stayed by appeal; and, if the true ground for upholding the power of the trial court to enforce a prohibitive injunction pending an appeal be that such injunction requires no process for its enforcement, it can, in principle, make no difference whether the injunction constitutes the main relief sought or is merely incidental thereto. Probably most injunctions, especially those granted pendente lite, are incidental to the protection, declaration, or establishment of some disputed property right. The rule that a prohibitive injunction is, and that a mandatory injunction is not, enforceable pending an appeal, is simple and logical, though not perhaps always easy to apply. The recognition of an additional distinction between different kinds of prohibitive injunctions would bring new difficulties and complications into a situation which has come to be well understood in our practice. It is not apparent that any substantial benefit would be accomplished. In the present case, for example, the practical effect of accepting petitioners' claim would merely be to multiply litigation over an issue which might, and should, be finally determined in the action already pending on appeal.

[4] Furthermore, the injunction here granted was not in fact incidental to the main relief sought. It was a substantial and inherent part of the relief. The plaintiffs and defendants were seeking to have title quieted against each other. The action to quiet title, under our practice, is a development of the bill of peace of the court of chancery. The main purpose of this proceeding was to pre-

vent repeated attempts to litigate a title, and to protect the real owner of the right against the annoyance and expense incidental to a multiplicity of suits. It was upon these considerations that the court of chancery "has granted perpetual injunctions to restrain further litigation, and thus has in some degree put that restraint upon litigation which was the policy of the ancient law in real actions." 1 Pomeroy, Eq. Jur. (3d Ed.) § 248. "The obvious design of such a bill," says Story (2 Eq. Jur. [13th Ed.] § 853), "is to procure repose from perpetual litigation, and therefore it is justly called a bill of peace. * * * The obvious ground of the jurisdiction of courts of equity in cases of this sort is to suppress useless litigation and to prevent multiplicity of suits."

Certain restrictions upon the maintenance of such suits have been removed by statutory provisions like those embodied in section 254 of the Practice Act, in force before the enactment of the Codes, and the similar but somewhat broader provisions of section 738 of the Code of Civil Procedure. The nature and purpose of the statutory action are, however, essentially the same as those of the old bill of peace. Curtis v. Sutter, 15 Cal. 259; Angus v. Craven, 132 Cal. 691, 64 Pac. 1091. In Curtis v. Sutter, supra, the court, speaking through Field, C. J., says that:

> "There is no difficulty in so conducting a suit, under the statute, as to fully protect the legal rights of the parties, and at the same time to secure the beneficial result afforded by a court of equity in bills of peace—which is repose from further litigation."

[5-7] The plain and direct manner of giving this repose is by enjoining the defeated parties from asserting a hostile claim. Such injunction is in no sense incidental to the relief sought. It is an inherent part of the relief itself. The judgment in an action for the quieting of title need not, to be sure, take the form of an injunction. The relief awarded may vary according to the circumstances of the case. 17 Ency. Plead. & Prac. 363. But a decree like the one in the case before us, declaring that the plaintiff is the owner of the property and enjoining the defendant from further setting up a claim thereto, is a proper form of judgment. Brooks v. Calderwood, 34 Cal. 563. The injunction was a legitimate part of the relief granted, and the court below is authorized to enforce obedience to it pending the appeal.

To the suggestion that the plaintiff may lose valuable rights by being restrained from commencing actions which, if the judgment should be reversed, they will appear to have been entitled to bring, it may be answered that their position will not be impaired by the lapse of time. The statute of limitations does not run during the period when the commencement of an action is stayed by injunction. Code Civ. Proc. § 356.

The order to show cause is discharged.

We concur: SHAW, J.; HENSHAW, J.; MELVIN, J.; LAWLOR, J.

ANGELLOTTI, C. J. (dissenting). I dissent. The facts are fairly stated in the prevailing opinion.

The real question presented is whether the provision of the judgment enjoining the plaintiffs from making any claim to the property involved in the action is in force and operative pending the appeal taken from the whole judgment, which judgment, by reason of such appeal, is not as yet final. The claim of defendants that it is so operative and in force, notwithstanding the appeal, is based upon the settled doctrine of this court that an appeal does not stay the force of a prohibitory injunction. The question whether this is the situation when the prohibitory order is simply a part, as here, of an ordinary judgment quieting title in an action brought under section 738, Code of Civil Procedure, to determine adverse claims to real estate, has never been squarely decided by this court. It was expressly eliminated from consideration in Lake v. Superior Court, 165 Cal. 182, 188, 131 Pac. 371. There is no suggestion that there was any foundation in the pleadings for injunctive relief other than the allegations of title. The character of an injunctive portion of a judgment in such a case has been referred to in several cases. The propriety at all of such an injunctive provision in a decree in an action to quiet title has been questioned, but it is settled that it is entirely proper for the reasons hereinafter referred to. In Brooks v. Calderwood, 34 Cal. 566, it was said:

> "The very object of the suit was to determine whether the defendants *had any just claim or title to the premises as against plaintiff*, and settle the question forever. The court has determined that they have none, and we see no reason why it may not make its judgment effectual by restraining the defendants from further setting up *a false claim. It has been judicially determined that defendants have no just claim, estate, or interest in* a portion of the land, and, as to that portion, there is no reason why the plaintiff should be permitted to be further harassed by them." (The italics are ours.)

Again in Kittle v. Bellegarde, 86 Cal. 556, 25 Pac. 55, in reply to the objection that in such an action an injunctive provision against executing deeds in pursuance of a certificate of sale was inappropriate and unwarranted, it was said:

> "The injunction was merely ancillary to the principal relief, and was proper, if necessary to *make that relief effectual.*" (Again the italics are ours.)

And in Lake v. Superior Court, supra, 165 Cal. at page 191, 131 Pac. 371, it was substantially said that the injunctive provision to enforce the rights adjudicated in the judgment was both permissible and proper.

The idea clearly appears to be that in such actions the real and substantial object is to determine the title, and the injunctive provision is designed solely to enforce the rights determined by the judgment as to title, and can have no other effect. Its whole basis is the judgment in regard to title, it must stand or fall with that judgment, and it would seem necessarily that its effect must be suspended by anything that suspends the effect of the judgment as to title. To enforce it by contempt proceedings pending an appeal from that judgment is in effect to enforce the provisions of the judgment as to title while the same remains absolutely ineffectual by reason of the appeal. In view of the pending appeal, we have no final adjudication as to title as yet. The matter is still sub judice. I am unable to see that the case of Foster v. Superior Court, 115 Cal. 279, 47 Pac. 58, is not absolutely in point in principle. There was a contest of an election for directors of a corporation between two persons. It was determined by the superior court that Smith was elected, and the judgment so declaring also enjoined the other directors from interfering with Smith in the exercise of his office as such director. An appeal having been taken from the judgment, Foster, one of the other directors, excluded Smith from participation in a meeting of the directors, and was adjudged guilty of contempt for so doing. On certiorari proceedings, this court said:

> "The action of the superior court in the present case was a proceeding 'upon the judgment' from which the appeal had been taken, and was instituted for the purpose of enforcing a compliance therewith. * * * The injunction, in the judgment, against the interference with Smith's right to act as a director, was but ancillary to the judgment determining that he had such right, and was merely incidental thereto. * * * As that portion of the judgment declaring that Smith was elected was suspended by the appeal, the injunctive portion of the judgment, being merely incidental thereto, was also suspended, and the power of the court to enforce any portion of its judgment by inflicting punishment for its violation was stayed. An enforcement of this portion of the judgment would operate to carry the decree into effect."

It is true that it was also said that the injunction was, in effect, mandatory; but there can be no question as to the views of the court to the effect that it was suspended by the appeal from the judgment regardless of whether it was mandatory or prohibitory.

My conclusion in no degree infringes the rule that an appeal does not stay the force of a prohibitory injunction. What I have said shows the distinction between the cases in which it has been so held, and such cases as this. The only prohibitory relief here given is that deemed essential to make the decree as to title when it shall have become final broad enough to accomplish its object and fully protect those in whose favor it was given. It rests on no other foundation than the decree as to title, and is an inseparable part and incident of that decree.

To my mind it is entirely clear that enforcement of the provision of the judgment enjoining the plaintiffs from making any claim to the property involved in the action is stayed by the appeal from the judgment, and that plaintiffs are entitled to a writ of supersedeas as prayed. Were it not for the fact that so many of my learned associates have come to a different conclusion, I would say that this is so clear as not to admit of question.

I concur: LORIGAN, J.

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174 Cal. 126

GLOUGIE v. GLOUGIE et al.

(S. F. 7495.)

(Supreme Court of California. Dec. 23, 1916. Rehearing Denied Jan. 22, 1917.)

1. JUDGMENT 🔑338—EQUITABLE RELIEF — ERRONEOUS JUDGMENT—REMEDY.

A judicial error, if any, in setting aside an interlocutory decree for an accounting because defendants had been denied their right to answer the amended complaint, is not correctible under Code Civ. Proc. § 473, authorizing the court to relieve from a judgment on the grounds of mistake, inadvertence, or excusable neglect, but is to be remedied by motion for new trial, or by appeal from a judgment, and, as to erroneous conclusions of law, etc., by motion under section 663 for the vacation of the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 721; Dec. Dig. 🔑338.]

2. JUDGMENT 🔑386(6)—INTERLOCUTORY ORDER—MOTION TO SET ASIDE—LACHES.

In an action for an accounting and for breach of trust, etc., where defendants, after the entry of an interlocutory decree for plaintiff, participated in the sessions of the commissioner, sought a determination favorable to themselves, and did not attempt to set aside an interlocutory decree for plaintiff under Code Civ. Proc. § 473, on the ground of mistake, surprise, excusable neglect, etc., until nine months after its entry, they were guilty of laches, as an application on that ground must in all cases be made within six months, and in every case made within a reasonable time; and where it did not move to vacate a final judgment until an unexplained delay from February 9th until April 24th, it was also guilty of laches.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 742; Dec. Dig. 🔑386(6).]

3. PLEADING 🔑248(17)—AMENDMENT—CONFORMITY TO PROOF—NEW CAUSE OF ACTION.

In an action for an accounting and for a breach of trust upon a complaint originally charging that the breach of trust grew out of the fact that, after having taken possession of the property as security for advancements, there was a subsequent executory agreement by defendants to purchase the property, an amendment to conform to the proof and to allege that a breach of trust had been committed growing out of the fact that plaintiff had made over his property to the defendants as security for advancements made by them did not set up a new and distinct cause of action; as the fundamental equitable consideration was whether there was a breach of trust by virtue of which defendants were inequitably retaining possession of property rightfully belonging to plaintiff.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 697; Dec. Dig. 🔑248(17).]

4. PLEADING 🔑253—AMENDED COMPLAINT—ANSWER.

Where an amended complaint or amendments to a complaint are filed, no answer thereto is necessary, as the issues tendered by the complaint are taken as denied without pleading, having been already tried by the court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 744–751; Dec. Dig. ⚷253.]

In Bank. Appeal from Superior Court, Fresno County; W. M. Conley, Judge.

Action by A. V. Glougie against C. A. Glougie and others. From an order setting aside an interlocutory decree for an accounting made in the action, and from the final decree after the accounting in favor of plaintiff, defendants appeal. Order reversed.

C. K. Bonestell, of Fresno, for appellant. M. B. & E. M. Harris, Short & Sutherland, and Carl E. Lindsay, all of Fresno, for respondents.

HENSHAW, J. This is an appeal from an order of the court setting aside an interlocutory decree for an accounting which it had made in the action and the final decree entered after that accounting, which final decree was a judgment in favor of the plaintiff.

The relevancy of the following facts will be the better understood by carrying in mind the nature of this appeal: Plaintiff brought his action against his two brothers and their wives, alleging that he was the owner of and conducting a general merchandise business in the town of Sanger. Becoming financially involved, his brothers came to his rescue and compromised and paid his financial obligations with the money of the wife of one of them. In the matter of these adjustments they took over the charge and conduct of the business, and were in such control when they orally agreed with plaintiff to buy his business for a specific sum upon named terms and times of payment. This agreement was oral, but was accompanied by a further promise to have it duly executed in writing. This the defendants have refused to do, and they refuse also to restore the business to plaintiff. He therefore prayed for a judgment decreeing that they held the business in trust and for an accounting. The answers of defendants were limited to denials of the vital matters of the complaint. Trial was had. At the conclusion of the taking of the evidence, the judge, expressing the view that the evidence established to his satisfaction that the defendants had taken over the property in trust, but under a trust rather in the nature of security for their advancements than under the asserted executory sale, authorized the filing of an amended complaint to conform to the proofs. This amended complaint, as the court's order shows, was first submitted to it, and its filing was permitted under the court's declaration:

> That "this is a proper case in which to allow an amendment to the complaint upon the ground asked for by plaintiff, and that the proposed amended complaint will have the effect of causing the allegations thereof to correspond to the proof on the trial."

The amended complaint adopted the view which the court had taken of the proof established by the evidence, and alleged that the business was turned over to the defendants as security for the repayment of such amounts of money as they might be called upon to expend upon behalf of the plaintiff. The defendants interposed a general demurrer to the complaint, together with a motion to strike it from the files upon the ground that it charged upon a new cause of action. Upon July 22, 1913, the court overruled this demurrer without leave to answer, and denied the motion to strike out the amended complaint. Six days thereafter the court filed its findings and interlocutory decree, declaring the plaintiff entitled to an accounting and appointing a referee for the purpose. The referee held sessions, at which all parties were present, took evidence, and filed his report upon January 7, 1914. Following this report, on February 9, 1914, the court filed its written decision in favor of the plaintiff and gave him final judgment for the sum of $18,786. One month thereafter the defendants served and filed their notice of intention to move for a new trial, and on April 13, 1914, they also perfected an appeal from the final judgment. In the same month, on April 24, 1914, defendants for the first time gave notice of their intention to apply to the court for an order vacating and setting aside the interlocutory decree and the final judgment under section 473 of the Code of Civil Procedure. The grounds of "mistake, inadvertence, surprise, and excusable neglect" are the following: (1) The court was without jurisdiction to render the interlocutory decree and the final judgment because the court in overruling the general demurrer to the amended complaint "did not fix any time within which said defendants would be required to answer said amended complaint"; (2) no notice of the overruling of the demurrer was ever at any time "served" upon the defendants or their attorneys; (3) therefore the defendants were not and never have been in default for failure to answer the amended complaint; and (4) the action not being at issue, by reason of the fact that no answer to the amended complaint was on file, the findings, the interlocutory decree, and the judgment are void. This application came on to be heard on May 2, 1914, and was granted by order of court setting aside both the interlocutory decree and the final judgment on August 5, 1914. In the January following this court, on motion of plaintiff, dismissed the defendants' appeal from the final judgment for want of prosecution, and at about the same time the trial court dismissed defendants' motion for a new trial; no bill of exceptions or statement having been prepared and settled within the time allowed by law. In January also the plaintiff applied to the trial court for an order vacating its order of August 5, 1914, setting aside the interlocutory decree and final judgment, upon the ground that at the time the order of August 5th was made an appeal was pending from the final judgment, and the trial court was therefore without jurisdiction to make that order. This motion was granted, and thereafter, on March 3, 1915, the trial court permitted the defendants to renew their application and motion previously made, as above stated, for relief under section 473, Code of Civil Procedure, asking a vacation of the interlocutory decree and final judgment. It did so upon the ground that, as its previous order vacating these decrees had been made while an appeal was pending in this court, it was absolutely without jurisdiction to make the order, which order was therefore a nullity, and the whole matter consequently stood as if no order had ever been made upon the application; that the effect of the appeal was to suspend, and not destroy, the jurisdiction of the court, which jurisdiction revived upon the coming down of the remittitur from this court dismissing the appeal. Thereupon the court again made its order vacating and setting aside the interlocutory decree and final judgment, and it is from this last order that this appeal is taken.

[1] Manifestly what the court did in granting this motion for relief was based upon its own concept that defendants were entitled, as of strict legal right, to answer the amended complaint, and that the court committed legal error in refusing to accord them that right. But, aside from the proposition advanced by this appellant, and well founded in principle and on authority, that a judicial error such as this is not correctible under section 473, Code of Civil Procedure, but is to be remedied by motion for new trial or by appeal from the judgment, and as to a certain limited kind of error by motion under section 663, Code of Civil Procedure (Egan v. Egan, 90 Cal. 15, 27 Pac. 22; O'Brien v. O'Brien, 124 Cal. 422, 57 Pac. 225; Canadian Co. v. Clarita Co., 140 Cal. 672, 74 Pac. 301), and aside also from consideration of the further proposition that, in view of the uncontradicted facts above stated, it is extremely difficult to perceive how the discretion of the court could be invoked upon any theory of mistake, inadvertence, surprise, or excusable neglect, two fundamental propositions may be considered, both of which sustain appellant's contention that this order must be reversed.

[2] The first of these is the tardiness of the application for relief. It was in July, 1913, that the court entered its interlocutory decree in favor of plaintiff. Without regard to the right of defendants to receive notice of this, it is manifest that they explicitly waived whatever right they had by appearing at all of the hearings of the commissioner, at which hearings evidence was taken. The commissioner filed his report upon January 7, 1914. The final judgment was given on February 9, 1914. It was not until April 24, 1914, that the defendants gave notice of their intention to apply to the court for an order vacating and setting aside both the interlocutory decree and the final judgment. It was nine months after the entry of the interlocutory decree before they made their first effort to set it aside. Not that only, but during the time that elapsed, they participated in the sessions of the commissioner, sought a determination favorable to themselves upon the accounting, and only after they failed and after final judgment had been given against them did they take this procedure. And yet it was vital to the relief which they sought that the interlocutory decree should be set aside, since the interlocutory decree fixed the final rights of the parties, saving as to the amount of the monetary judgment to be given. Application for relief under section 473 must be timely made. It must in all cases be made within six months, and in every case must be made within a reasonable time. Smith v. Pelton Water Wheel Co., 151 Cal. 394, 90 Pac. 934. As concerns the motion to vacate the interlocutory decree, it was actually not made until after nine months; while touching the application to vacate the final judgment, aside from the consideration to which we have already adverted, there was the utterly unexplained delay from February 9th to April 24th, a delay which, under the proved circumstances of this case, establishes beyond peradventure the laches of the defendants.

[3] The second proposition is that the court did not err in refusing leave to the defendants to answer the amended complaint. It will not be questioned but that, where permission to amend to conform to the proofs is given, this does not authorize the setting up of new, distinct causes of action not originally pleaded. Such is the decision in Bowman v. Wohlke, 166 Cal. 121, 135 Pac. 37, Ann. Cas. 1915B, 1011, relied upon by respondents here. But the distinction between that case and others of like kind and the one at bar becomes obvious upon the slightest consideration. In the Wohlke Case an entirely new and distinct cause of action based upon a tortious act not complained of was embodied in the amendments to the complaint which the court had permitted. In the case at bar there was no inclusion for the first time of any new cause of action. The cause of action in both the original and in the amended complaint was the same. Plaintiff sought relief for the same breach of trust. The difference between the two causes of action consisted merely in this: That with the evidence of all the parties before it the court concluded that a breach of trust had been committed, but that the breach of trust grew out of the fact that the plaintiff had made over his property to the defendants as security for advancements made by them, whereas the original complaint charged that the breach of trust grew out of the fact that after having taken possession of his property as security for advancements there was a

subsequent executory agreement entered into by virtue of which the defendants were to purchase the property. In both cases the fundamental equitable consideration was the same, namely: Was there a breach of trust by virtue of which the defendants were inequitably retaining possession of property rightfully belonging to plaintiff? If so, they were bound to account for their trusteeship. So manifest is this that we think nothing more need be added upon the point, saving to say that the amended complaint permitted to be filed in this instance comes most clearly and appositely within the contemplation of the law as discussed in McDougald v. Argonaut Land Co., 117 Cal. 87, 48 Pac. 1021, where this court says:

> "Amendments made to the complaint after trial, and for the purpose of making it conform to the proof, must rest upon such proof, and cannot go beyond it. They are not made for the purpose of framing issues for the trial, but to supply some technical defect, or, perhaps, upon the supposition that certain issues have been tried which are different from those framed by the pleadings. The supposition is that they have been tried as though such issue had been made."

[4] The same case affords authority, if authority be needed, for the familiar proposition that, when such an amended complaint or amendments to a complaint are filed, no answer thereto is necessary. The issues tendered by the complaint are taken as denied without pleading; they having already been tried by the court.

The order appealed from is therefore reversed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.

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32 Cal. App. 76

WILEY B. ALLEN CO. v. WOOD.

(Civ. 1538.)

(District Court of Appeal, Third District, California. Nov. 14, 1916. Rehearing Denied by Supreme Court Jan. 11, 1917.)

1. Appeal and Error 🔑870(6)—Orders Appealable—Denial of New Trial.

Though there is no longer any appeal from an order denying a new trial, the court may, under Code Civ. Proc. § 956, providing that on appeal from judgment the court may review an order on motion for new trial, consider the points made in the purported appeal from denial of new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3497; Dec. Dig. 🔑870(6).]

2. Principal and Agent 🔑99—Ostensible Agency.

The application of the rule of ostensible agency or authority depends on the acts or conduct or words of the principal, and not on the agent, and the principal will be bound by those acts of his agent which the principal has given other persons reason to suppose are done by his authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 254–261; Dec. Dig. 🔑99.]

3. Corporations 🔑399(6) — Ostensible Agency—Evidence.

That a sales manager was authorized to receive money for his company and deliver receipts therefor in its name does not reasonably warrant the conclusion that he was authorized to adjust his own personal indebtedness to a debtor of the company by substituting himself as and for the debtor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1588, 1608; Dec. Dig. 🔑399(6).]

4. Corporations 🔑399(6) — Ostensible Agency—Evidence.

Nor does the fact that he was authorized to accept secondhand pianos in part payment for new pianos sold by him imply authority in him to receive in payment of debts due the company property other than coin.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1588, 1608; Dec. Dig. 🔑399(6).]

5. Sales 🔑477(4) — Conditional Sales — Action—Demand for Action Brought.

Where a piano was sold under a conditional sale and the purchaser defaulted, and the seller brought replevin, demand for payment after action, when no payment was made, did not waive the seller's right to immediate possession.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1414; Dec. Dig. 🔑477(4).]

Appeal from Superior Court, Sacramento County; Chas. O. Busick, Judge.

Replevin by the Wiley B. Allen Company against Thama M. Wood. Judgment for defendant, and order denying new trial, and plaintiff appeals. Reversed and remanded, and appeal from order denying new trial dismissed.

Fred J. Goble, of San Francisco, for appellant. White, Miller, Needham & Harber, of Sacramento, for respondent.

HART, J. This is an action in replevin and arises out of a conditional sale of a piano to the defendant by the plaintiff. The contract for the sale was reduced to writing, and was entered into by the parties at the city of Sacramento on the 5th day of June, 1913, and the agreement was so dated. The agreement is, in substance, as follows: That the defendant was to pay the plaintiff the sum of $1,000, at the latter's office, in the city of San Francisco, for said piano as follows: A "Star Piano Oak," etc., valued at $300; $200 on the 5th day of June, 1913, and $20 or more every month thereafter, beginning on July 1, 1913, with interest at the rate of 8 per cent. per annum on balance remaining unpaid, interest payable at expiration of the contract. The agreement expressly stipulates that the title to the said piano shall remain in the plaintiff "and under its direction until paid for in full"; that should there be any default by the defendant in the payment of any one of the monthly installments as above specified, "then the whole amount of this contract becomes at the option of the Wiley B. Allen Company immediately due and payable, it being elective with the Wiley B. Allen Co. to enforce payment or retake the said instrument." The contract contains many other provisions which are not particularly material to the questions submitted by this appeal. The complaint alleges that on the 10th day of April, 1914, the defendant made a payment of $40 on said piano under the terms of said agreement, but that since the payment of the said sum of $40 on said date, the defendant has wholly failed and refused to make any other or further payments in accordance with the terms of the said contract; that after the payment of the said sum of $40, further monthly payments in the sum of $20 each became due, and that the plaintiff made demand upon the defendant for the payment thereof, and that the defendant failed and refused, and still fails and refuses, to pay the same; that the defendant refused, prior to the commencement of this action, to proceed further with said agreement. It is alleged that the total amount paid by the defendant on said piano under the terms of the said agreement is $690 and no interest, and that, at the time of the commencement of this action, there was due the plaintiff under the said agreement the sum of $310 and interest, amounting, to September 1, 1914, to the sum of $38.81. The prayer is for a return of the piano, or in case return thereof cannot be had, for the sum of $1,000, the alleged value thereof. The answer admits the agreement, and that title to the piano remained in the plaintiff, but that such title was, at all times since the execution of said written agreement, subject to the rights thereunder of the defendant; denies all the other vital averments of the complaint, and alleges that the total amount paid by defendant on said piano under said agreement is the sum of $990. After filing the answer, the defendant filed the following supplemental answer:

> "Now, the defendant above named, and by her supplemental answer to the amended complaint signed by Mr. Goble on file herein avers as follows: That subsequent to the commencement of this action, plaintiff waived any and all forfeitures claimed under the amended complaint in this action, and under the contract set forth as Exhibit 1 to the amended complaint herein, in this, to wit: That after the commencement of this action, plaintiff has, from time to time, and monthly, rendered and furnished to defendant statements by the terms of which the plaintiff claims that defendant is still indebted to plaintiff for the purchase price of said piano."

[1] The cause was tried before a jury, and verdict found in favor of the defendant. Upon the verdict so returned judgment was entered, and the plaintiff appeals from the judgment, and also presents a purported appeal from the order denying it a new trial. There is no longer an appeal from an order denying a motion for a new trial, and the purported appeal therefrom in this case is therefore void. But the points made before the trial court in support of the motion for a new trial may be reviewed on the appeal from the judgment. Code Civ. Proc. § 956; Torney v. Miller, 160 Pac. 858.

The controversy between the parties here arises over an alleged payment of the sum of $300 by the husband of the defendant on the piano in question.

The general facts are: At the time the piano was sold to the defendant, one Lyle P. Conner was the manager of the Sacramento branch of the plaintiff's business. Conner, it appears, was indebted to one E. A. Janssen, and the last named was indebted to W. G. Wood, the defendant's husband, in the sum of $300. Janssen had caused Conner's automobile and other property to be attached and his salary to be garnished in an action to recover his indebtedness against Conner. On the 28th day of January, 1914, the three parties above named, in pursuance of negotiations previously had and then pending, entered into a written contract, whereby it was agreed that the several accounts between said parties were to be adjusted as follows: Wood was to cancel as satisfied the indebtedness of Janssen to him in the sum of $300 in consideration of a credit in a like sum by Janssen on the indebtedness due to the latter from Conner, and the latter, in consideration of said transaction, was to credit the piano account of the defendant with the sum of $300. This arrangement was carried out, so far as Janssen and Wood were concerned. As to Conner, while he executed and delivered to Wood a receipt for the sum of $300 as a payment on account in the piano transaction between the plaintiff and Mrs. Wood, it transpired that he did not enter a credit in the piano account in the books of the plaintiff of the $300 so claimed to have been paid thereon, or make any other record in the appropriate books of the concern of said transaction.

The plaintiff claims that Conner was wholly without authority to enter into the agreement above referred to for and on behalf of it, and that therefore the agreement, so far as it purports to bind it, is entirely without force. The defendant, on the other hand, submits that there are two propositions upon either of which or both the judgment should be sustained: (1) That the evidence at least shows that there was ostensible authority in Conner to accept a payment on account of the debt due the plaintiff from the defendant for the piano under the arrangement provided by the tripartite agreement, so far as that transaction related to Conner and the defendant's husband; (2) that, after the filing of the complaint in this action, the plaintiff made several demands upon the defendant for the payment of installments under the contract for the sale of the piano which were overdue, and that by making such demands, the plaintiff waived its right to a forfeiture of the contract and the moneys already paid thereunder; that, therefore, the plaintiff lost its right to retake possession of the piano; and that its sole remedy is in the recovery of whatever might be the balance due on the contract for the sale of the instrument.

W. G. Wood, the husband of the defendant, testified that he conducted the negotiations on behalf of his wife for the purchase of the piano as well as those resulting in the execution of the agreement between himself, Janssen, and Conner; and the general tenor of his own testimony would seem to warrant no other conclusion than that the arrangement entered into between him and Conner, as stipulated in the tripartite agreement, whereby he was to obtain for the defendant a credit of $300 on her piano account with the plaintiff, was wholly founded upon and solely induced by the mere representation of Conner that he (Conner) was entitled to receive from the plaintiff certain commissions, which he could and would transfer to the credit side of the defendant's piano account in consideration of the said tripartite agreement. Wood testified, in part:

"I acted for my wife, the defendant, in the purchase of this piano. * * * The original price was $1,000. * * *"

Direct examination:

"Q. What information have you as to Mr. Conner's agency for the company during the time the receipts were given? A. I simply knew he was their local manager in Sacramento. * * * Q. At the time this $300 receipt was given to you, Mr. Conner represented to you, did he not, that he had that credit with the company, in excess of that amount? A. Yes. Q. Did he also represent to you that he would transfer that credit to your account? A. He did. Q. Did he afterwards tell you that he had done so? A. No. I do not know that we ever discussed it afterwards. Q. He gave you this receipt at that time? A. He gave me the receipt for $300."

On cross-examination:

"Q. You stated that Mr. Conner told you that he had $300 due commission from the Wiley B. Allen Company at the time? A. Yes. Q. At the time he gave you that receipt for $300, which is in evidence? A. He told me he had more than that coming; he was working on a salary and on a commission; his commissions on the books were considerably more than that. Q. Did you know, as a matter of fact, whether he had any commission due him or not? A. I was not in a position to know anything about that. Q. Did you take any steps to find out? A. No. Q. Did you make any inquiries from any other source at all to find out whether he had any commissions coming to him? A. No. While I am not sure he had; I accepted his word."

The witness then proceeded to say that: While he was prepared to pay Conner $300 cash—that is to say, to receive into his physical possession from Janssen the $300 and then turn it over to Conner—there was no actual money exchanged or paid to Conner. "I agreed on this transaction," he continued, "principally on account of being that it would enable Conner to straighten out his affairs with Janssen. His automobile was under attachment; he stated that this was the only way in which he could straighten out his affairs; I should judge the payment was just as good that way as any other. * * * I do not know whether the Wiley B. Allen Company got it or not. I did not concern myself whether they got that $300."

The witness (W. G. Wood) testified that the negotiations leading to the agreement between himself, Janssen, and Conner were pending or in progress in the month of December, 1913. Under date of December 16, 1913, said Wood addressed the following letter to the plaintiff, at the latter's office in the city of San Francisco:

"Gentlemen: In reply to your favor of the 9th inst., addressed to my wife, I wish to say that the payments for this month and last were not made on account of the fact that I have been waiting for an account of Mr. Conner's, your Sacramento agent, to be adjusted. I have sufficient interest in this account to offset the balance due, and I have been holding payments per agreement with Mr. Conner pending the settlement of this account. I asked him some time ago to explain the situation to you, but I judge he has failed to do so."

Evidently in reply to the above letter, the plaintiff addressed the following to W. G. Wood:

"Dear Sir: Your letter of the 16th received. Mr. Conner is employed by us on a straight salary and his personal obligations have nothing to do with the company's account. If Mr. Conner is indebted to you, we would suggest that you proceed in the customary manner to make your collection. We hardly feel that we can consent to allow our account to run unpaid for this reason. The matters are not related to one another in any way. The installments now due on the account to $40.00, and we would greatly appreciate your check to bring this up to date.
"Yours very truly,
"The Wiley B. Allen Company."

The above testimony clearly shows, as before stated, that the $300 transaction between Conner and Wood was entirely a personal affair between them; that Wood relied wholly upon the representations made by Conner that there was, at the time of said transaction, due the latter from the plaintiff commissions which were sufficient in amount to enable Conner to credit the defendant's piano account with the sum of $300, and that Conner would so credit said account. In brief, the testimony unquestionably shows that the "three-cornered" agreement involved nothing more than the adjustment or settlement of personal accounts between the three parties thereto, and that Conner's position in the transaction amounted only to an agreement by him to assume, in consideration of Wood's settlement of the attachment suit instituted by Janssen against him (Conner), personal liability for a portion of the balance due from the defendant to the plaintiff. There is absolutely no evidence, either of a direct or circumstantial character, showing, or tending to show, that the plaintiff knew of the arrangement entered into between Conner and W. G. Wood prior to or at the time of the making of the agreement, or that it sanctioned or approved or ratified said arrangement thereafter. To the contrary, the letters passing between W. G. Wood and the plaintiff, noted above, not only show that the plaintiff repudiated the arrangement which was the basis of the tripartite agreement, so far as it concerned Conner and W. G. Wood, but that the latter himself must have viewed said agreement as involving a matter entirely between and personal to himself and Conner.

The defendant claims, however, that there is evidence clearly supporting the proposition that Conner had ostensible authority to bind the company to the arrangement into which he entered with W. G. Wood. The evidence so referred to is of the following facts: That Conner was "designated as the Company's manager"; that the company furnished Conner with business cards upon which were printed the name of the company and the words, "L. P. Conner, Manager"; that Conner was, in the sale of pianos, authorized to accept secondhand pianos as in part payment for the pianos sold, and that in the transaction with the defendant he did accept a secondhand piano as in part payment for the piano sold. It is hence argued that, having those "broad and general powers" necessarily implied from the fact that he was plaintiff's manager, and having the power to accept property (secondhand pianos) in the place of coin in payment for pianos by him sold, Conner was apparently vested with authority by his principal to bind the company to any arrangement which he might make in relation to contracts for the sale of pianos; or, speaking concretely, he was ostensibly authorized to make for the company the arrangement to which he and Wood agreed. After calling attention to the facts thus referred to, counsel for the defendant proceed to say that:

> "It is true, as appellant asserts, that an agent cannot trade his principal's credit for his own advantage, but where the agent represents that he has paid the principal or has credited the principal with the amount on the agent's claim against the principal, the debtor has a right to rely and act thereon. This is especially true where the agent is a collecting agent and has been held out as such. The receipt in this case came from one who was accustomed to collect and give receipts, and his statement that he had paid his principal is binding on the principal."

[2] The application of the rule of ostensible agency or authority depends primarily upon the acts or conduct or words of the principal, and not upon the acts or conduct or words of the agent. The rule is that a principal will be bound by those acts of his agent which he has given other persons reason to suppose are done by his authority, but, as suggested, such authority arises by implication, and can only spring from the words, acts, or conduct of the principal.

The rule, which involves the doctrine of estoppel, and which, when invoked in proper cases, stands as a shield against the working of unjust injury to third parties, is stated as above, and as so stated applied in the cases cited by the attorneys for the defendant as in purported support of their theory of the facts of this case, viz.: Leavens v. Pinkham & McKevitt, 164 Cal. 242, 248, 128 Pac. 399; Robinson v. A. F. Co., 17 Cal. App. 212, 219, 119 Pac. 388; Stevens v. Selma Fruit Co., 18 Cal. App. 242, 250, 123 Pac. 212; Spoon v. Sheldon, 27 Cal. App. 765, 770, 151 Pac. 150; Bank v. Cerf, 147 Cal. 393, 81 Pac. 1081.

[3] There is, as we view the record, absolutely no evidence showing that the plaintiff, by any act or conduct or words spoken, held out to the public or to the defendant that Conner was authorized for the company to settle any of the accounts of the plaintiff in the manner indicated by the tripartite agreement. The fact that Conner was authorized as manager of the company to receive money for it from its patrons and execute and deliver receipts therefor in its name cannot reasonably be said to warrant or justify the inference or the conclusion that he (Conner) was authorized to adjust or settle his own personal indebtedness to a debtor of the company by substituting himself as the debtor of the company in the place and stead of the party owing the debt. The authority to execute a receipt for money paid to him for the company does not imply authority to make settlements with debtors of the company on a basis different from that prescribed by the company's contracts with its debtors, or to deliver receipts for money in the company's name when none is actually paid.

[4] Nor does the fact that Conner was authorized to accept secondhand pianos as in part payment for a new piano sold through him by the company imply authority in him to receive in payment of the debts due to the company property other than coin. The company's business is that of selling pianos, and it is of so common a practice for piano dealers to take and make some allowance for an old instrument when making a sale of a new one that it can justly be declared to be a matter of common knowledge that such is the established custom, and that the taking of an old piano as part payment for a new instrument of that character is one of the recognized common practices of the business of selling pianos. Hence, we repeat, the circumstance that, in selling a piano to the defendant, the plaintiff accepted from her a secondhand piano in the trade or as in part payment for the new piano, is not to be regarded as evidence from which the defendant or her husband or the public generally was justified in forming the belief, or even the remotest impression that Conner was vested with the authority as the plaintiff's agent to cancel or satisfy the defendant's indebtedness to the company by assuming himself, for a consideration entirely personal to himself, personal liability for such indebtedness.

[5] As to the second point made by the defendant, we can find no occasion for holding that the plaintiff forfeited its right to retake possession of the piano in question because it made demands upon the defendant after the commencement of this action for the payment of installments under the contract and in which she was in arrears. The contract between the plaintiff and the defendant was for the sale of the piano, a mere conditional sale, and the title to the instrument remained in the plaintiff. As the Supreme Court said, in considering a

contract precisely similar to the one here, in Hegler v. Eddy, 53 Cal. 597:

> "The rules of forfeiture do not seem to have any application to the question of the right to the possession of the property. Forfeiture involves both the idea of losing property by a delinquent party, and the transfer of it to another without the consent of the delinquent. Here the ownership was not transferred; for it remained in the plaintiff and his assignors; nor was the right of possession transferred; for the defendant had only such right to the possession as the contract gave, which was merely the right to the use and possession until default should be made in the payment of installments. The plaintiff's right to the possession comes from his ownership of the property; and this right, while he remains the owner, is merely suspended, by virtue of the contract, until the defendant shall make default in paying the installments, and thereupon his right of possession ceases; but it cannot be said to be transferred to the plaintiff."

See Pac. Carbonator Co. v. Haydes & Son, 26 Cal. App. 607, 147 Pac. 988.

The act of instituting this action by the plaintiff to regain possession of the piano constituted the exercise of its right of election under the contract to retake the instrument, and it would appear to be most unreasonable, even if the rules of forfeiture were applicable to such contracts as the one involved here, to hold it to be true, as a legal proposition, that the effect of submitting statements to the defendant, showing the installments due and overdue, would be to destroy the right of election already exercised. Of course, if the defendant had, after the commencement of this action, paid all installments due on demands therefor made by the plaintiff after the complaint herein was filed, then an entirely different situation would be presented. But there is no evidence that she did this, or offered to do it.

For the reasons stated herein, the judgment is reversed, and the cause remanded.

The appeal from the order denying a new trial is, as above declared, void, but to avoid any possible confusion which might arise from a failure to make any disposition thereof, the order is that said appeal be, and the same is hereby, dismissed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(32 Cal. App. 45)

RAUER'S LAW & COLLECTION CO. v. HARRELL. (Civ. 1576.)

(District Court of Appeal, Third District, California. Nov. 13, 1916. Rehearing Denied by Supreme Court Jan. 11, 1917.)

1. Bills and Notes 🔑518(1)—Actions—Evidence—Conditional Liability — "Underwrite."

In action on notes, evidence *held* to warrant the jury in concluding that liability on the notes was conditioned upon tender or delivery of bonds which defendant had undertaken to "underwrite," that is, if defendant failed to sell the bonds referred to, he would take such bonds as he did not sell, and that such bonds were not tendered or delivered because stockholders holding two-thirds of the subscribed or issued capital stock had not filed with the secretary their written assent to their issuance, as required by Civ. Code, § 359, subd. 5.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1816, 1817, 1819, 1820; Dec. Dig. 🔑518(1).]

2. Bills and Notes 🔑518(1)—Actions—Evidence.

In such action, evidence *held* not to show that defendant was responsible for stockholders' nonconsent to bond issuance.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1816, 1817, 1819, 1820; Dec. Dig. 🔑518(1).]

3. Bills and Notes 🔑445—Actions—Anticipatory Breach—Intention Not Communicated.

That at one time defendant concluded not to go ahead with the transaction, but that his state of mind was not communicated to the payee, was not such repudiation of his obligation as to release the payee from performance on its part, under Civ. Code, §§ 1439, 1440, relating to conditional obligations and providing that if a party to such obligation gives notice to another, before the latter is in default, that he will not perform, and does not retract such notice before the time at which performance on his part is due, such other party may enforce the obligation without previously performing.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1311–1329; Dec. Dig. 🔑445.]

4. Appeal and Error 🔑1058(1)—Harmless Error—Exclusion of Evidence.

The exclusion of the minutes of the payee corporation pertaining to the issuance of the bonds was not prejudicial, where later the resolution authorizing the bonds, covering the same matter, was introduced.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200; Dec. Dig. 🔑1058(1).]

5. Witnesses 🔑275(3) — Cross-Examination—Latitude.

Plaintiff's contention being that 3,400 shares of the payee company's stock were issued to plaintiff, which gave him power to secure consent of two-thirds of the stockholders to the issuance of bonds, and defendant's contention being that such stock was issued merely to be delivered as a bonus for the bonds, it was error to sustain objections to questions on cross-examination whether defendant ever offered to return the shares to the company, and whether he had ever written a letter to the company advising his disposition of the stock, etc., since full latitude should have been given to test the probability or improbability, of defendant's account of this transaction.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 969; Dec. Dig. 🔑275(3).]

6. Appeal and Error 🔑1048(7)—Harmless Error—Restriction of Cross-Examination.

Such restriction of cross-examination, however, *held* not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4160; Dec. Dig. 🔑1048(7).]

7. Bills and Notes 🔑493(3)—Performance of Condition by Payee—Burden of Proof.

The burden was on plaintiff to show affirmatively that defendant by his conduct prevented the payee company from getting out its bond issue.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1652–1654, 1656–1660, 1662; Dec. Dig. 🔑493(3).]

8. CONTRACTS 🔑313(2) — ANTICIPATORY BREACH.

In order to justify the adverse party in treating renunciation as a breach, the refusal to perform must be of the whole contract, or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1279; Dec. Dig. 🔑313(2).]

9. CONTRACTS 🔑313(1) — ANTICIPATORY BREACH—ELECTION.

Renunciation of a contract by a party does not, ipso facto, constitute a breach, but the adverse party has the election whether or not to treat it as a breach.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1279; Dec. Dig. 🔑313(1).]

10. TRIAL 🔑252(12)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action on notes conditioned on delivery of bonds, an instruction that, if issuance of the bonds was never authorized, plaintiff could not recover was not erroneous as failing to submit defendant's alleged conduct in preventing the company from issuing the bonds, where there was no substantial evidence of such alleged conduct.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 604; Dec. Dig. 🔑252(12).]

11. EVIDENCE 🔑86 — PRESUMPTIONS — EFFECT.

Presumptions, although disputable, have such force as may, in some instances, outweigh positive evidence against them, and sometimes require clear and convincing evidence to overcome them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 107, 108; Dec. Dig. 🔑86.]

12. APPEAL AND ERROR 🔑1064(1)—HARMLESS ERROR—INSTRUCTIONS.

In action upon notes, an instruction that the presumption that a consideration passed for the execution of the instruments, being a disputable presumption, was the weakest and least satisfactory evidence, while erroneous, was not prejudicial, where the fact was admitted out of which the presumption arose, namely, that defendant did execute the notes.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. 🔑1064(1); Trial, Cent. Dig. § 553.]

13. TRIAL 🔑252(12)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In action upon notes given to a corporation, it was not error to instruct that the fact defendant was paid a salary for his services as secretary of the company constituted no consideration for the notes, where there was no evidence indicating that his salary in any way induced defendant to make the notes.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 604; Dec. Dig. 🔑252(12).]

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by the Rauer's Law & Collection Company against A. J. Harrell. From judgment for defendant and order denying new trial, plaintiff appeals. Affirmed.

Wm. Tomsky and A. H. Jarman, both of San Francisco, for appellant. Farnsworth & McClure and James M. Burke, all of Visalia, for respondent.

CHIPMAN, P. J. Plaintiff brought the action to recover judgment on two promissory notes. In the first cause of action it is alleged that defendant made and executed his promissory note for the sum of $34,000 at the city and county of San Francisco, dated September 22, 1913, payable on January 2, 1914, to the order of the maker at the Savings Bank & Trust Company of San Francisco; that at said time and place defendant indorsed said note and delivered the same to the Pacific Coast Salt Company; that thereafter and prior to the commencement of this action and after the maturity of said note, the said Pacific Coast Salt Company "assigned said claim and demand to plaintiff, who ever since has been and now is the owner and holder thereof," and no part of said sum mentioned in said note has been paid. As a second cause of action it is alleged that defendant on September 22, 1913, made and executed his certain promissory note for the sum of $5,000 payable one day after date to the order of the maker at the Savings Union Bank & Trust Company of San Francisco. Similar averments follow as to indorsement and delivery to the Pacific Coast Salt Company, assignment by said company to plaintiff, and nonpayment, as in the first cause of action. This note bore no date, and, as appeared, was executed June 16, 1913. A general and special demurrer was overruled, and defendant filed a second amended answer; admitted the execution on September 22, 1913, of the note set forth in the first cause of action, but denied that he delivered said note to said Salt Company; alleged that no consideration was ever paid to or received by defendant for said promissory note, and that the same was signed by defendant without any consideration therefor; denied, on information and belief, the alleged assignment of said note by the Salt Company to plaintiff, and denied that plaintiff is the owner and holder thereof; denied that defendant owes plaintiff, or any other person, anything on account of said note set forth in the first cause of action, and alleged in that behalf the said note was made without any consideration; answering the second cause of action, admitted the execution of the $5,000 note, but denied its indorsement or assignment to the Salt Company, and denied that the note was made on September 22, 1913, and denied its assignment by the Salt Company to plaintiff, and that plaintiff is the owner and holder thereof; denied any indebtedness thereon; and alleged that said note was made without any consideration; for a further and separate answer and defense to each of said notes, alleged that said notes mentioned in said first and second causes of action were made pursuant to the following agreement between W. C. Wilcox, president and manager of said Pacific Coast Salt Company and defendant:

"This agreement, made and entered into this 16th day of June, 1913, between W. C. Wilcox, the party of the first part, and Jasper Harrell, the party of the second part, W. C. Wilcox being of the city and county of San Francisco, and Jasper Harrell being of the city of Visalia, Tulare county, state of California, witnesseth: That the party of the first part agrees to give his proxy for all of the common stock now held by him, in the Pacific Coast Salt Company. It is understood and agreed, that the salary of the secretary and treasurer is to be $100.00 per month, payable in United States gold coin, and the railroad fares to and from San Francisco for the purpose of attending directors' meetings; the party of the second part agrees to purchase five thousand dollars worth of seven per cent. income debenture bonds subject to the subscription of fifty thousand dollars ($50,000.00) of these bonds to be called by the Savings Union Bank & Trust Company, to be held there in trust for the Pacific Coast Salt Company and to be dispersed according to the directors of the Pacific Coast Salt Company for the purchase of salt property and the erection of a refinery.

"Witness our hands and seals this 16th day of June, nineteen hundred and thirteen.

"W. C. Wilcox.
"A. J. Harrell.

"The party of the first part further agrees to accept as collateral to secure payment of the debenture bonds, any of the standard bonds now held by the party of the second part, no expense to be incurred by the party of the second part. At the maturity of the debenture bonds, the party of the first part will return the bonds put up as collateral by the party of the second part.

"W. C. Wilcox,
"A. J. Harrell."

That said Wilcox was at all times mentioned in the answer president of said Salt Company, and said agreement was executed on its behalf by said Wilcox; that on or about September 19, 1913, the following agreement was signed by defendant:

"Subscription Agreement.

"The undersigned hereby severally subscribe, each for himself, in the amounts set opposite our respective names, for the seven per cent cumulative income debenture bonds of the Pacific Coast Salt Company, secured by a trust indenture of the properties now owned or that may hereafter be acquired by said company during the life of said debenture.

"It is understood that the principal shall become payable in twenty (20) years after date and interest payable semiannually on the first of January and July, and if earned, otherwise to the extent that the net earning of the company will permit the remainder of such interest to accumulate and become payable with the principal of said debentures.

"W. C. Wilcox	$2,000.
"F. C. Cardwell	$1,000.
"A. J. Harrell	$5,000.
"Otto Spenker	$1,000.
"John Boyce	$1,000.
"F. C. Hanscheldt	$1,000.
"Mtth. Weisser	$5,000."

That said promissory note of $5,000 was signed by defendant pursuant to said last above agreement, and was to cover the amount of the subscription of said defendant under said agreement aforesaid, and not otherwise, "and was intended for a subscription for five cumulative income debenture bonds of the Pacific Coast Salt Company for $1,000 each, secured by a trust indenture as in said agreement stated, and in that behalf said defendant alleges that the bonds so subscribed for by defendant were never, nor were any thereof ever, delivered to or received by defendant, or ever offered to defendant, and defendant alleges on information and belief that no bonds, of any kind or description, of said Pacific Coast Salt Company, were ever made or issued under or pursuant to the terms of said agreement aforesaid, or otherwise, or at all"; that on or about September 19, 1913, "an agreement herein referred to as 'Exhibit B,'" was signed by said A. J. Harrell and by said Pacific Coast Salt Company, a copy of which said agreement is as follows:

"This agreement, made and entered into by and between A. J. Harrell, of Visalia, state of California, and the Pacific Coast Salt Company, organized under the laws of the state of California and having its principal place of business in the city and county of San Francisco, witnesseth: That, whereas, the said Pacific Coast Salt Company, is desirous of issuing, and is about to issue, one hundred (100) bonds of one thousand dollars ($1,000.00) each, and to sell and dispose of fifty (50) of said bonds for $1,000.00 each, for the purpose of raising money to erect a plant and purchase salt lands, and to erect a plant thereon for the purpose of refining salt; and whereas, there have been subscribed of the said fifty bonds of one thousand dollars each, sixteen (16) bonds for which the company has the notes of subscribers in the aggregate sum of sixteen thousand dollars ($16,000.00); and whereas, the said A. J. Harrell is willing to underwrite the balance of said fifty thousand dollars ($50,000.00) issue, to wit: Thirty-four bonds of one thousand dollars each: Now, therefore, it is agreed between the parties hereto as follows: That the said company upon the issuance of said bonds will deliver to the said A. J. Harrell thirty-four (34) thereof in consideration of a promissory note by said A. J. Harrell in the sum of thirty-four thousand dollars ($34,000.00); that said promissory note together with the said notes covering the sixteen thousand dollars ($16,000) already subscribed, shall be deposited with the Savings Union Bank & Trust Company of San Francisco, for the purpose of the trust herein to be created by said company. That the said A. J. Harrell agrees to sell said bonds for the company, receiving in consideration of said sale the accrued interest due thereon at the time of said sale. That the company promises and agrees to pay all preliminary expenses of the issuance of said bonds, and all the preliminary and other expenses, including commissions of agents incurred in the sale thereof, and to assist in every possible way to make a market for the said bonds. That as fast as said bonds are sold, the said moneys obtained from the sale thereof shall be deposited by said Harrell in some bank or banks, designated by him, until the full number of bonds which he hereby assumed to sell shall have been sold, and thereupon said moneys shall be delivered to the Savings Union Bank & Trust Company of San Francisco, to be applied by said bank in accordance with the trust agreement hereafter to be made by said Pacific Coast Salt Company for the issuance of said bonds. It is further agreed that no moneys realized from the sale of said bonds after the same has been deposited with the banks designated by said Harrell, shall be withdrawn therefrom, except upon the joint order of the said A. J. Harrell and the directors of the Pacific Coast Salt Company.

"In witness whereof, the parties hereto have executed this contract the 19th day of September, 1913. A. J. Harrell. Pacific Coast Salt Co., by W. C. Wilcox, President & General Mgr. A. E. Matteson, Asst. Secty. [Seal.]"

That said promissory note of $34,000 was signed by defendant "pursuant to said agreement referred to herein as 'Exhibit B' and hereinbefore set forth" and said note "was intended to be delivered only as in said agreement, 'Exhibit B,' stated and not otherwise, and only upon delivery to said A. J. Harrell of 34 bonds of $1,000 each of said Pacific Coast Salt Company as provided in said agreement, and in that behalf said defendant alleges that said 34 bonds were never, nor were any thereof ever, delivered to or received by defendant, or ever offered to defendant, and defendant alleges on information and belief that no such bonds and no bonds of any kind or description of said Pacific Coast Salt Company, were ever made or issued by said Pacific Coast Salt Company, and said defendant further alleges that there was no consideration for said agreement referred to as 'Exhibit B.'" Defendant prays that each of said notes be declared void and be canceled, and that plaintiff take nothing by his action. The cause was tried by jury, and defendant had the verdict, whereupon judgment was entered that plaintiff take nothing by this action, and that defendant recover his costs. Plaintiff appealed from the judgment under the alternative method.

The Pacific Coast Salt Company (hereinafter called the Salt Company) was incorporated for the purpose of carrying on the business of manufacturing salt, etc., and had its principal place of business at San Francisco. It took over the assets and business of the Dento Salt Company, formerly doing business in the city of Stockton. The present controversy arose out of defendant's connection with the Pacific Coast Salt Company. The president and manager of the Salt Company, W. C. Wilcox, met defendant in Stockton on or about June 15, 1913. Defendant had read, or there was read to him, a letter written by Mr. Welch, president of the Savings Union Bank & Trust Company of San Francisco, of date April 14, 1913, in which Welch stated what he understood were the plans of the Salt Company for "financing certain projects." These plans were stated to be: (1) To raise $50,000 to be placed with the bank and to be disbursed "for the acquisition of real estate and the erection thereon of buildings for the purpose of a salt refinery"; (2) "to raise the money through the issue of what is known as 'income debentures,' of which this company [the bank] will be the trustee," and to be secured by the Salt Company's property. The letter then explains what is meant by "income debentures" and the form they should take, and like matters, inclosing "a form of subscription blank." The form of "subscription agreement" subsequently prepared and used is attached to defendant's answer and, at the time of the meeting between Mr. Wilcox and defendant, had been signed by W. C. Wilcox, $2,000 and F. C. Cardwell, $1,000. Wilcox and defendant went to San Francisco, and on June 16, 1913, entered into the agreement set out in the answer, by which Wilcox agreed to give defendant his proxy for all the common stock then held by him, and by which defendant agreed to purchase $5,000 worth of the bonds subject to the subscription of $50,000 of these bonds to be called by the Savings Union Bank & Trust Company. At the same time and as part of the same transaction, as the evidence was, defendant signed the "subscription agreement" for $5,000 of the bonds, and executed the $5,000 note sued upon. (The complaint alleged the date of this note as September 22, 1913.) Additional subscriptions for bonds were subsequently obtained by Wilcox, aggregating the sum of $16,000 as shown by the agreement.

In the early part of September, 1913, Wilcox went to Visalia, defendant's home, to consider further with him the matter of completing the subscription agreement. Defendant, as the result of this conference, took from his safe deposit box in a Visalia bank, stocks, and bonds amounting to $40,000, and sent them by express to the San Francisco trust company above referred to, and defendant and Wilcox went to San Francisco. Upon going to the trust company, defendant and Wilcox were told that the trust company would not accept anything but money in carrying out the proposed plan of financing the company. Defendant withdrew his securities from the trust company, and they do not appear further in the case. Wilcox and defendant then went to the office of Attorney Fairall, who drew up for them what is called the "underwriting agreement" of September 19, 1913, set forth in the answer. At the same time, Wilcox and defendant entered into the following agreement, referred to for convenience as the "control agreement":

"This agreement, made and entered into by and between A. J. Harrell, of Visalia, Tulare county, state of California, and W. C. Wilcox of the city and county of San Francisco, state of California, witnesseth: Whereas, the said W. C. Wilcox owns a majority of the shares of the capital stock of the Pacific Coast Salt Company; and whereas, the said A. J. Harrell has entered into an agreement with the Pacific Coast Salt Company this day for underwriting thirty-four (34) bonds of one thousand dollars ($1,000.00) each, to be issued by the said Pacific Coast Salt Company: Now, therefore, it is agreed that the said W. C. Wilcox shall vote the stock of said Pacific Coast Salt Company for the purpose of electing directors thereof as shall be directed by the said A. J. Harrell and there shall be elected, besides the said W. C. Wilcox, four other directors selected and chosen by the said A. J. Harrell and said A. J. Harrell shall have control of said stock owned by the said W. C. Wilcox in the said Pacific Coast Salt Company for and during the full period of time that the said bonds of the said Pacific Coast Salt Company shall be an outstanding obligation against the said A. J. Harrell.

"In witness whereof, the parties hereto have executed this contract this 19th day of September, 1913.
A. J. Harrell [Seal.]
"W. C. Wilcox [Seal.]"

The note for $34,000, dated September 22, 1913, the evidence tended to show, was signed at the same time as the "underwriting agreement," and the "control agreement." About the same time there was issued to defendant 3,400 shares of the Salt Company's stock of the par value of $10 each.

On September 23, 1913, a meeting of the Salt Company directors was held, at which a resolution was passed ratifying the "underwriting agreement." Certain directors resigned, and directors acceptable to defendant were chosen in their stead, namely: Defendant and Charles Gibson of Visalia. Geo. A. Macdougald was elected to fill a vacancy. These three were chosen, at defendant's suggestion, and on October 14, 1913, defendant's wife was made a director. Defendant was elected secretary and treasurer at the September meeting, and was voted a salary of $100 per month, to commence immediately. Director Gibson was not present, and as the action of a full board was required to authorize the bond issue, no action was then taken. On the following day, September 24, 1913, Attorney Fairall prepared a letter of instruction to the trust company at the request of Wilcox and defendant, in which were inclosed the subscription notes of the various subscriptions for the first $16,000, including defendant's note for $5,000, and also the other note for $34,000. It was stated in the letter that these notes were placed with the trust company "at the present time for safe-keeping and the company will hereafter, as soon as the bond issue has been authorized, give you more particular instructions. * * * Proceedings are now being taken by the Pacific Coast Salt Company to authorize a bond issue of $160,000, $50,000 of which will be taken by the makers of the several notes which are inclosed herewith, in the amounts specified in said notes respectively." The trust company was requested to acknowledge receipt of this letter "by letter addressed to the Pacific Coast Salt Company." On September 26, 1913, a letter was sent by the Salt Company to each of the subscribers of bonds. It stated that subscriptions to the amount of $50,000 had been taken, and the notes of the subscribers placed in the hands of the trust company. Remittance was requested of the amount of the respective subscriptions, and it was stated that as soon as all the money is paid in, $50,000, bonds will be issued to the subscribers, and meanwhile the trustee "will issue temporary certificates for the amount of money received from each subscriber," exchangeable for bonds when issued. Defendant had knowledge of the issuance of this letter. There seems not to have been any important business transacted by the Salt Company after this letter went out until October 14, 1913, when it became possible to have a full attendance of the board of directors. Meanwhile, however, defendant was in San Francisco and in and out of the company's office attending to such duties as were required of him as secretary and treasurer. On October 14, 1913, a resolution was introduced by defendant and passed by an unanimous vote, authorizing a bond issue of $160,000, and setting forth its object and the character and form of the bond, etc. A letter, signed by defendant as secretary, was sent out to the stockholders of the Salt Company informing them of the passage of the above resolution; that the first issue of $50,000 has been subscribed and notes for the same placed with the trust company, and "requesting the stockholders to sign the inclosed authorization and have the same acknowledged before a notary public and mailed to the company immediately," and inclosing a copy of the resolution. The amount of the bonded indebtedness was fixed at $160,000—an increase from the original amount contemplated—after a full discussion of the probable needs of the company.

Defendant continued in the discharge of his duties as secretary, and also visited Stockton for the purpose of selling bonds. On November 5, 1913, he drew $150 and left the office of the company, going to Visalia, as he testified, "to try to get subscriptions to the bonds," and did not again return to the company's office.

Up to this point, so far as the Salt Company was called upon to act, it had apparently done all it could towards the issue of the bonds. The directors had authorized the issue, and the stockholders had been notified and their ratification requested.

Under the law, however, no bonds could be issued until stockholders holding two-thirds of the subscribed or issued capital stock had filed with the secretary their written assent to the bond issue. Subdivision 5, § 359, Civ. Code.

No meetings of the directors were had in the months of November and December, 1913, or January and February, 1914. The minutes show Directors Wilcox and Collins present and the remaining directors absent, and, no quorum being present, the meeting adjourned. This action was brought on February 5, 1914, and at the regular meeting in March, 1914, the resignations of Directors Gibson, Macdougald, Mrs. Harrell and defendant were accepted and others elected in their places.

At the bringing of the action the consent of two-thirds of the stockholders to the bond issue had not been obtained, and no bonds had been issued, nor has such consent been since obtained nor have any bonds been issued since so far as the evidence shows.

Arriving at Visalia, defendant consulted his attorney, and, being advised that he "was getting the worst of it" he made no effort to sell bonds and made up his mind to go no further with the enterprise. On cross-examination he testified:

"Q. Did you ever intend to do anything after talking with your attorney in November, towards the selling of bonds or obtaining subscriptions? A. I did not. Q. So that your mind, after talking with your attorney in November, 1913, was made up that you would never carry out your agreement made on the 19th day of September, 1913? A. He told me that I was getting the worst of it. Q. Your mind was then made up that you would never go ahead with it? A. He told me that I was getting the worst of it, and, of course, I would not go ahead with it. Q. When you say 'of course, I would not go ahead with it,' you mean that your mind was made up then that you would never go ahead and complete the agreement? A. Why, certainly; yes, sir."

About November 25, 1913, defendant went to San Francisco and met Dr. Wilcox at the Olympic Club. Defendant testified on his cross-examination:

"I phoned Dr. Wilcox to meet me at the Olympic Club. I handed him my resignation as a director and also as secretary and treasurer. Q. When you handed it to Dr. Wilcox, did you give him any reason why you wanted to resign? A. I believe that I did. Q. What did you say? A. I have forgotten the exact reason now that I gave him, but something about—I have forgotten the exact reason; I cannot remember it now. Q. Did you give him the true reasons? A. No, sir. Q. I wish that you would refresh your memory and tell the court and jury the reason that you gave Dr. Wilcox for wanting to resign as a director and as secretary and treasurer. A. I have got no way to refresh my memory right now. I have forgotten.

"Mr. Jarman: Q. Did you testify in respect to the following questions found on page 77 of your deposition, as follows: 'Q. Did you give Mr. Wilcox a reason why you handed in your resignation at that time? A. Yes, sir. Q. What was the reason? A. I did not give him the correct reason because I did not like to say anything to him about it. Q. What was the reason that you told him? A. Let's see. I told him—well, I was in trouble with my wife, having trouble with my wife and one thing another, and I wanted to get out of the Salt Company. Q. You told Mr. Wilcox that you were having trouble with your wife, and that you wanted to get out of it so that she could not get hold of your property? A. Yes, sir.' Q. Didn't you give those answers to those questions on the taking of your deposition in this courtroom on the 31st day of October? A. May I see the deposition? Q. Certainly (hands deposition to witness). A. Yes, sir; I believe that I testified to that. Q. That is correct, is it? A. Yes, I guess that it is."

Of this meeting, Dr. Wilcox testified:

"Mr. Jarman: After the 5th or 6th of November, 1913, when did you next see the defendant? A. The 25th of November in San Francisco, in the Olympic Club. Q. Who was present? A. Mr. Harrell and myself. Q. What did Mr. Harrell say to you at that time? A. He said that—oh, after having a little conversation and coming right down to the business end of it, he said that he was having some trouble with his wife and that he would have to resign from the company and he gave me to understand— Q. State what was said. A. He said that it would be temporary. And I asked him in relation to the bond business that we were on with the company, and he says, 'Well, that will have to stand.' He says, 'For the time being, as I am having trouble with my wife, and I do not care to be mixed up with anything right now, as I must get the securities out of my hands.' He says, 'I am going back to Visalia and going to work on a ranch at $45 a month,' I think he said. I says, 'Well, what are you going to do about the bonds of the company? Are you going to get them out, or anything?' He says, 'They will have to stand.' He says, 'I won't have anything to do with them now.' Q. Is that the sum and substance of the conversation at the Olympic Club? A. That is about all there was. And we got on the train and went to Stockton the same day, I think it was."

Witness Wilcox thus describes their visit and final meeting which was about December 2, 1913:

"Mr. Jarman: Did you see Mr. Harrell again after the 25th of November? A. Along the early part of December. Q. Answer my question yes or no. A. Yes, sir. Q. When was it? A. The 2d of December. Q. When did you see him? A. At Visalia. Q. And where in Visalia? A. At his ranch. Q. Was there anybody else present? A. Oh, there was other people on the ranch there, but he and I were talking together. Q. What was said at that time, if anything, in reference to the bond issue of the company? A. Well, I told him that we had some land, the Matteson property in Alameda county, that we wished to purchase, and that we would have to raise $10,000. I showed him the certificates of the deposit that I had collected from the bond men, and I told him that we had to have some more money, and for him to help us out and fulfill his contract. He says, 'I can raise the money over around Exeter or Lindsay.' He says, 'I will let you know in five days exactly what I will do. I will telephone to you.' And I described the properties to him over there, and told him about it; and told him the importance of doing something in regard to this bond issue, and he gave the same reasons then. He says: 'I can't do anything.' He says, 'I haven't got anything.' He says, 'Everything is out of my name.' He says, 'I am simply working on a salary.' Q. Was that all that Mr. Harrell said about giving the $10,000? A. He told me that he was going to get it and let me have it in five days. Q. Did you ever hear from him after December 2d? A. No, sir; not from Mr. Harrell. Q. Did he ever send you $10,000 or any part of the money? A. No, sir."

Wilcox testified that he wrote a letter to Harrell shortly after December 2, 1913, but received no reply. This letter was not introduced, nor its contents shown. He also testified that about March 20, 1913, he learned, but how does not appear, that defendant would not carry out his agreement. It may be remarked that neither in the pleadings nor in the evidence is there any suggestion of fraud, misrepresentation, or concealment on the part of the Salt Company or respondent. Appellant's contention is that the Salt Company did not fail in any respect to comply with this agreement; that the contract was breached by respondent; that respondent failed to establish that said notes were signed without consideration; that the delivery of bonds was not a condition precedent to liability because (a) not contemplated or intended by the parties; (b) even if necessary, performance was prevented by defendant; (c) any duty to render performance was discharged by defendant's repudiation of liability.

Defendant's contention is: First, "that the Salt Company had not carried out its agreement, and that the consideration of the notes had failed by reason of the failure of the Salt Company to issue or tender any bonds"; second, that the "respondent had done nothing to hinder or prevent the Salt Company from carrying out its agreement, which was to issue and tender the bonds."

Recurring to the September transaction, defendant testified that he never received any consideration for the $34,000 note. On his cross-examination for the purpose of showing otherwise, he was interrogated as to the 3,400 shares of the Salt Company's stock that was issued to him. He was asked what he paid for it, and answered:

> "I never paid anything for it; it was not my stock.
>
> "Mr. Jarman: It was not what? A. It was not my stock. Q. It was not your stock? A. No, sir. Q. Where is that stock now? A. To the best of my belief, it is in the Pacific Coast Salt Company's safe. * * * Q. Did you ever have that stock certificate in your possession? A. Yes, sir. Q. Well, now, what did you do with it? A. To the best of my knowledge, I put it in the safe of the company's office. * * * Q. When was the last time that you saw that stock in the safe of the Pacific Coast Salt Company? A. The day I put it there. Q. That is the last time that you ever saw it? A. Yes, sir. Q. You have had it since? A. No, sir; not to my knowledge. * * * Q. Did you transfer that stock at that time to anybody? A. No, sir. Q. Did you indorse it and deliver the certificate to anybody at that time? A. No, sir. Q. Did you ever return that stock to Mr. Wilcox or to the Pacific Coast Salt Company? A. I left it in their safe all the time."

On redirect examination, he testified:

> "Q. What was said in relation to the issuing of this 3,400 shares of stock of the Pacific Coast Salt Company to you? A. Why, Mr. Wilcox and I held a little conversation about that, and he said that when these bonds were sold, so much stock was to be given to each person that bought a bond, as a bonus, and that this block of stock was to be distributed to the different buyers of bonds, as a bonus."

Objection being made to his answering whether this stock was given him as consideration for the note, he was permitted to state "anything else that was said." He testified:

> "Well, he (Wilcox) simply stated that it was understood and talked over that this stock was to be offered to anybody that would buy a bond, as a bonus to go with the bonds, and because they never used the stock of the company, and was to be issued to the—this was a bonus that was to be given to everybody, was to be taken from this 3,400 shares of stock that I had; it just covered the bonds, just enough stock as a bonus for the bonds."

Mr. Wilcox testified:

> "I told him that the stock was his, and he could have it for the consideration of entering into this underwriting agreement, and that this was his profit in it. Nothing was paid to or received by the Pacific Coast Salt Company for the issuance of this stock."

Upon this issue of fact the testimony was sharply in conflict. The jury had the right to accept defendant's statement as true, and we see no reason why under the settled rule we should not also accept it.

There was evidence that the instruments of assent to the bond issue of holders of 11,537½ shares were executed, but it was not shown, nor was it claimed, that this was two-thirds of the subscribed or capital stock of the Salt Company. And as already stated, no bonds were ever issued or tendered to defendant so far as appears in the record.

[1] It seems to us that when these various agreements and the evidence otherwise introduced are fairly considered, the jury were justified in concluding therefrom that tender or delivery of the bonds called for by defendant's agreements, if not a condition precedent, was a condition concurrent to his liability on these notes, and unless, as contended by plaintiff, performance was prevented by defendant, there was a failure of consideration, and his liability was at an end. Concededly the bonds were never issued, and, of course, could not be and were not tendered or delivered. Section 1439 of the Civil Code provides:

> "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able * * * to fulfill all conditions concurrent so imposed upon him or the like fulfillment by the other party, except as provided by the next section."

This latter section (1440) provides:

> "If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party."

The bond issue depended for its legality upon the consent of two-thirds of the stockholders, and while it is admitted that such consent was not obtained, appellant urges: First, that defendant prevented the securing of this consent; and, second, that plaintiff was discharged from any duty to tender bonds by defendant's repudiation of his liability.

The $5,000 note was given as part of the transaction under which the first agreement of June 16, 1913, and the "subscription agreement" were executed. At that time no bonds had been authorized by the Salt Company, and the subscription by subscribers was "subject to the subscription of fifty thousand dollars of these bonds to be called by the Savings Union & Trust Company." The addendum to the Wilcox-Harrell agreement had reference to this proposed issue and this "call" by the Savings Union Bank. We have seen that defendant withdrew the securities contemplated by the addendum, and that feature of the transaction was ended. This note bore the following indorsement:

> "This note is subject to a subscription of $50,000.00, 7% debenture bonds, when same will be due and payable. Subject to agreement entered into this 16th day of June, 1913."

It bore no date, and while it was made payable on its face one day after date, it was in fact payable only subject to the agreement referred to, and was given and was payable upon the condition that $50,000 of the company's bonds were subscribed. Only

$16,000 were subscribed, and under the indorsement on this note, it never became payable, and there was a failure of consideration.

In September defendant entered into certain other agreements which referred to this $5,000 note, although it remained subject to the agreement of June 16, 1913. The first of these agreements of September 19, 1913, the so-called "underwriting agreement," was between defendant and the Salt Company. By this agreement, the proposed bond issue was increased to $100,000, or 100 bonds of $1,000 each, of which it was proposed to sell 50 bonds of $1,000 each, and it was therein recited that "there had been subscribed 16 bonds" for which the company has the notes of subscribers, in the aggregate the sum of $16,000, including defendant's note for $5,000. It was also recited that defendant was willing "to underwrite the balance of said $50,000 issue, to wit, 34 bonds of $1,000 each," and it was agreed that upon the issuance of said bonds the Salt Company "will deliver to the said A. J. Harrell thirty-four (34) thereof in consideration of a promissory note by said A. J. Harrell in the sum of thirty-four thousand dollars ($34,000); that said promissory note, together with the said notes covering the sixteen thousand dollars ($16,000) already subscribed, shall be deposited with the Savings Union & Trust Company for the purpose of the trust herein to be created by said company." Then follows a provision that defendant "agrees to sell said bonds for the company, receiving in consideration of said sale the accrued interest due thereon at the time of said sale." The company was to pay all expenses of the issuance of the bonds, commissions, etc., and to assist in marketing the bonds. The moneys obtained from the sale were to be deposited by defendant in some bank, and, upon the sale of the full number of bonds "which he hereby assumed to sell," was to be delivered to the Savings Bank and applied "in accordance with the trust agreement hereafter to be made" by said Salt Company, "for the issuance of said bonds."

The second agreement between defendant and Wilcox, called the "control agreement," recited that "the said W. C. Wilcox owns a majority of the shares of the capital stock of the Pacific Coast Salt Company," and referred to the fact that defendant had entered into the last above agreement, and stated that:

> "It is agreed that the said W. C. Wilcox shall vote the stock of said Pacific Coast Salt Company for the purpose of electing directors thereof as directed by the said A. J. Harrell, and there shall be elected besides the said W. C. Wilcox, four other directors selected and chosen by the said A. J. Harrell and the said A. J. Harrell shall have control of the said Pacific Coast Salt Company for and during the full period of time that said bonds of said Pacific Coast Salt Company shall be outstanding obligations against the said A. J. Harrell."

Defendant executed his note for $34,000, which, with the other notes, was deposited with the savings bank. The "underwriting agreement" makes no mention of defendant's getting any stock. He was to sell certain bonds when issued, and to receive accrued interest as his compensation. His $34,000 note, like his $5,000 note, was executed in consideration of his receiving certain bonds when issued. He was not to receive any of the money derived from the sale of bonds except this accrued interest, for it was to be deposited with the savings bank in accordance with a trust to be created by the Salt Company.

Clearly, defendant was not to pay the note unless the bonds were delivered to him, and he certainly was not to pay the note and also pay over the proceeds of the bonds when sold. Had he received the bonds and sold them and deposited the proceeds as provided for, he would no longer have been liable on his note. But in no case was he liable unless the bonds were delivered to him or the Salt Company was able to deliver them.

It seems quite clear to us that this "underwriting agreement" was a contract to sell bonds rather than one to buy bonds, and the most that can be made of it is that it was what is commonly understood by the term "underwriting," namely, that in the event defendant failed to sell the bonds referred to, he, the underwriter, will take such bonds as he does not sell. But defendant's liability for nonperformance was dependent upon the Salt Company's producing and tendering the bonds. Kirkpatrick v. Eastern Milling & Export Co. (C. C.) 135 Fed. 147; s. c., 137 Fed. 387, 69 C. C. A. 579. Defendant's note served no other purpose, and was intended to serve no other purpose, than to stand as security for the bonds that were to be placed with him for sale, and quite probably as an assurance that he would faithfully pay over the money received by him for the bonds, no part of which had he a right to retain as his own. It would seem to follow that defendant never having received any bonds to sell, he is not in default, and all consideration for his note has failed.

The so-called "control agreement" imposed on Wilcox the obligation to vote for directors satisfactory to defendant, and defendant was to have control of Wilcox's stock during the period of time that the bonds of the Salt Company might be outstanding as an obligation against defendant. We have given the evidence as to the 3,400 shares of stock issued to defendant from which it appeared that it was in reality not his, but was to be given to purchasers of bonds as a bonus, and that he left this stock in the company's safe, and has not since seen it, and never made any use of it. It formed no part of the consideration of the $34,000 note. It was not until October 14, 1913, that the bond issue was authorized by the directors, which was then fixed at $100,000.

Defendant, as we have seen, signed, as secretary, a notification to stockholders of the passage of this resolution and calling for their consent. He remained at the company's office until November 5, 1913, performing his duties as secretary, and made an unsuccessful trip to Stockton to obtain subscriptions for bonds. We can discover no consideration for defendant's notes, aside from such consideration as is implied by their execution, except the promise to deliver to defendant the bonds of the Salt Company, and as no bonds were ever issued and no authority for their issue shown, there was a failure of consideration. This was the situation in November, when defendant returned to his home in Visalia, and it was the situation when the action was commenced in February, 1914, and still is so far as shown.

The question remains: Was defendant responsible for this situation, and, if not, still had he so acted towards the Salt Company as to relieve it from performance on its part?

[2] The bond issue failed because the consent of two-thirds of the shareholders of the Salt Company was not obtained thereto. Responsibility for this nonconsent of stockholders was not brought home to defendant. He had no agreement to secure this consent. It does not appear that the agreement of June 16, 1913, by which Wilcox was to give defendant his proxy for Wilcox's common stock was carried out. The so-called "control agreement" of September 19, 1913, was carried out so far as the election of directors was concerned, but the control otherwise was to be during the period that the "bonds shall be an outstanding obligation against" defendant, and that period never arrived. He did not have possession of Wilcox's stock, or such control over it as prevented Wilcox from consenting to the bond issue. There was no evidence that he did anything to prevent the shareholders from giving their consent, nor was there any evidence that he influenced, or attempted to influence, any director to refrain from attending meetings. He did not believe that he was the owner of 3,400 shares, or had any right to deal with them as owner. Appended to the transcript are the affidavits of such stockholders as gave their consent, 11,537½ shares, and among these is the unverified written statement of Wilcox, showing his consent, and that he owned 5,211½ of these shares and voted them. If he owned other shares, it was not shown (except by recital in the "control agreement"), and it thus appears, notwithstanding the "control agreement," that Harrell did not, in fact, control Wilcox's shares to the point of having a right to vote them, nor did defendant do anything to prevent Wilcox, as a stockholder, from giving his consent to the bond issue. The suggestion of appellant that defendant should have given his consent as the owner of 3,400 shares is answered by his testimony that he did not own them. It was not shown that had he sent in his consent it would have made up the required two-thirds of all the shares. Wilcox testified that the Salt Company received nothing for this stock, either in money, labor, or property, and it may be doubted whether its issue was valid (Civ. Code, § 359), inasmuch as the only consideration for which it was issued was as a bonus for bonds which were never authorized or issued.

[3] Defendant testified that he made up his mind, after returning to Visalia and consulting his attorney, to have nothing more to do with the Salt Company, and that he would not go ahead with his agreement of September 19, 1913. Just what he meant by this admission is not clear. There were several agreements of that date, the "underwriting agreement," the "control agreement," his note for $34,000. The examination of the witness did not bring out what he referred to by "the agreement of September 19, 1913." Whatever his state of mind was he did not communicate it to the Salt Company. What he did was to remain passive. He had taken part in the proceedings up to and including the authorization of the bond issue by the directors, and what remained to be done was to obtain the consent of two-thirds of the stockholders over which he had no control. The making up his mind to go no further with the Salt Company did not in any way prevent the stockholders from acting, and had two-thirds of them consented, and had the bonds been issued, at that time or later, defendant's mental attitude would not have relieved him from liability. We do not think his having resolved to have nothing more to do with the Salt Company amounted to such repudiation of his obligation as to release the company from performance on its part. When he met Mr. Wilcox at the Olympic Club and handed his resignation as director and secretary to Wilcox, the reason he gave, whether the correct one or not, was not accompanied by any statement that he repudiated his obligation to the Salt Company. He said nothing and did nothing which would relieve the Salt Company from issuing the bonds. And when Wilcox saw defendant December 2, 1913, at Visalia, Wilcox's object in going there apparently was to raise $10,000 for the purchase of land. Defendant was not asked to pay his bond subscription, and nothing was said about his carrying out his agreements, nor was defendant informed that the company was ready or able to deliver the bonds, and his note was not yet due. Before the Salt Company could avoid performance, defendant's refusal to perform should appear to have been explicit, positive, and unequivocal. The rule stated by Mr. Benjamin is as follows:

> "A mere assertion that the party will be unable, or will refuse to perform his contract is not sufficient; it must be a distinct and unequivocal, absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made." Benjamin on Sales, § 568.

In 6 Ruling Case Law, p. 1025, the rule is thus stated:

> "In order to justify the adverse party in treating the renunciation as a breach, the refusal to perform must be of the whole contract, or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute. * * * It may be observed, however, that the renunciation itself does not, ipso facto, constitute a breach. It is not a breach of the contract unless it is treated as such by the adverse party." Hanson v. Slaven, 98 Cal. 377, 382, 33 Pac. 266; Bell v. Bank of California, 153 Cal. 234, 242, 94 Pac. 889.

In Smoot's Case, 15 Wall. 36, 21 L. Ed. 107, it was held that mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient to terminate it; it must be distinct and unequivocal absolute refusal to perform, treated and acted on as such by the promisee. Approved in Dingley v. Oler, 117 U. S. 503, 6 Sup. Ct. 850, 29 L. Ed. 984.

Cases cited by appellant where the defaulting party "has made it impossible for the contract to be performed," or where the defendant "by his own act prevented the performance by the complaining party," are not in point, for the reason that we do not think the facts bring the case within the rule governing in such cases.

[4] Certain minutes of the Salt Company corporation were offered in evidence, and upon objection by defendant, refused admission. These minutes pertained to the issuance of the bonds of the corporation. Later the resolution that was adopted October 14, 1913, authorizing the bonds, was introduced, and furnished the evidence which was intended by the minutes. There was therefore no prejudice in the ruling.

[5, 6] In several pages of appellant's brief is printed the cross-examination of defendant relative to payment of the $5,000 note and the understanding of the parties as to the meaning of the contract of June 16, 1913. Some of the questions were answered, while objections to others were sustained. The agreement, aside from the addendum, seems to be clear and not open to parol explanation. As to the added paragraph, its purpose is not plain. Apparently, it was not intended that what are referred to as defendant's "standard bonds" were offered as security for defendant's note, but were to secure the payment of the company's debenture bonds contemplated. The evidence was that the savings bank would not accept them and they were taken back by defendant and did not figure in any subsequent proceedings. We cannot see that appellant was prejudiced by the rulings of the court. Some questions on cross-examination of defendant as to what he did with the 3,400 shares of the company's stock issued to him were objected to and sustained. One was whether defendant had ever offered to return the shares to the company, and the other was whether he had ever written a letter to the company, advising it that the stock was in its safe. Defendant had testified, as we have shown, what he did with the stock, and that it was intended to be used as a bonus to purchasers of bonds, and was not his stock. Full latitude should have been given to test the probability or improbability of defendant's account of this stock. Several questions were asked and answered along this line. The questions objected to should have been allowed, but we do not think the ruling was prejudicial. The court gave the following instruction:

> "You are instructed that when a corporation proceeds to issue bonds by resolution of its board of directors, the resolution authorizing the bond issue must first be adopted by a unanimous vote of the board of directors at a regular meeting, or at a special meeting called for such purpose. Any resolution so adopted for the issuance of bonds must be afterwards approved by the written assent of stockholders of the corporation holding at least two-thirds of the subscribed or issued capital stock of the corporation, and such written assent must be filed with the secretary of the corporation.
>
> "If you find from the evidence in this case that the resolution, authorizing the issuance of debenture bonds and adopted by the board of directors of Pacific Coast Salt Company on October 14, 1913, was not thereafter, and prior to the commencement of this action, approved by the written assent of stockholders of said company holding at least two-thirds of the capital stock of the corporation, and that such written assents were not filed with the secretary of the company prior to the commencement of this action, then plaintiff cannot recover in this action, and your verdict must be for defendant."

Appellant objects to the second subdivision of this instruction as being "regardless of any act by defendant, whether preventing performance or repudiating his contracts, etc., it was necessary for the Salt Company to perform on its part, even though informed by defendant that he would not perform on his part," and that the instruction "is in direct conflict with section 1440 of the Civil Code." It is urged that the vice of this instruction becomes apparent when considered in connection with certain other instructions requested by plaintiff and given by the court with a proviso. There are five of these instructions. The first instruction was addressed to a case where, there being evidence that one party to a contract has, by some act, deliberately made it impossible for the contract to be performed, such act in law amounts to a prevention of performance, and if the evidence offered showed that defendant entirely repudiated his agreements, "there has been no failure of consideration," etc. The second instruction was that, where one of the parties to a contract declares that he will not perform his part, he thereby releases the other party from the contract; if, therefore, defendant declared he would not pay the notes sued on, there has been no failure of consideration, and plaintiff should recover. The third instruction was addressed to the proposition that if defendant prevented by act or conduct or by renunciation of liability under the contracts sued upon, during the period that the company had a right to deliver or tender the bonds, it was not necessary for the company to tender or deliver the bonds. The fourth was that if a party declares himself not bound by the contract, he cannot set up failure in either demand or tender on the part of the other party as a defense to an action brought by such other party on the contract, and that offer to perform is waived or unnecessary "when it is reasonably certain that the offer will be refused, or that performance will not be accepted." The fifth instruction was that the slightest consideration is sufficient to support the most onerous obligation, and that inadequacy of consideration is for the parties to consider, and not for the court or jury when the contract is sought to be enforced; that "we are not concerned with the motive that induced Harrell to enter into the agreements introduced in this case" if supported by a sufficient consideration as heretofore defined. To each of these instructions the court added the following:

> "Unless you find from the evidence that the resolution adopted by the board of directors of said company, authorizing the issuance of said debenture bonds, was not prior to the commencement of this action approved by the written assent of the stockholders of said company holding at least two-thirds of the subscribed or issued capital stock of the said company, and that such written assents were not filed with the secretary of said company prior to the commencement of this action, in which event your verdict must be for the defendant."

After giving the foregoing instructions as modified, the court gave the following instruction:

> "You are further instructed that the want of performance of an obligation, in whole or in part, or any delay therein, is excused when the debtor is induced not to make it by any act of the creditor intended, or naturally tending to have that effect, done at or before the time at which such performance or offer may be made, and not rescinded before that time."

Appellant does not object to this last instruction, but it contends that:

> "Not only are the foregoing instructions misleading and confusing, but the proviso added by the court makes them clearly erroneous, and necessitates a reversal of the judgment."

[7-9] To determine the importance of appellant's criticism, it becomes necessary to again call attention to the situation developed by the evidence. Beyond doubt, the burden was upon plaintiff to show affirmatively that defendant by his conduct prevented the company from getting out its bond issue. And the rule of law unquestionably is as stated by Mr. Benjamin in his work upon Sales:

> "In order to justify the adverse party in treating the renunciation as a breach, the refusal to perform must be of the whole contract, or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute."

Further:

> "The renunciation itself does not ipso facto constitute a breach. It is not a breach of the contract unless it is treated as such by the adverse party." Benjamin on Sales and cases cited, supra.

There was no evidence that defendant omitted a duty resting upon him by contract or as a director in the matter of issuing these bonds. All that the directors could do had been done, and a circular letter had been sent out to stockholders, calling for their consent to the bond issue. Responses to this letter came in and were filed, but concededly not by two-thirds of the shareholders. Defendant had not agreed to obtain these consents, and there was no implied obligation upon him to do so. There was not a particle of evidence that he influenced or tried to influence any stockholder to withhold his consent, nor was there a particle of evidence that he influenced or attempted to influence any director to act in any particular way, and there was no evidence that any action or inaction of the directors had anything to do with the failure of two-thirds of the stockholders to give their consent. There is absolutely no explanation or reason shown why the requisite two-thirds did not consent. Had defendant sent in the consent of the 3,400 shares assessed to him, it would not have made up the requisite number. It is therefore immaterial whether or not we accept defendant's testimony that these shares did not belong to him.

The so-called "contract agreement" did not purport to require a transfer of Wilcox's shares to defendant, and they never were so transferred. Wilcox agreed to vote for directors satisfactory to defendant, and that was done. The further provision was that defendant should have control of Wilcox's shares during the period that the bonds might be an outstanding obligation against defendant—a period which did not arrive. As shown above, Wilcox must have retained his shares in his own control, for he sent in his assent to the bond issue as a shareholder. There was nothing in any agreement entered into by defendant requiring him to direct or authorize Wilcox, as a shareholder, to consent to the bond issue; nor was there any agreement that defendant should vote Wilcox's shares. Defendant exercised no control over the affairs of the company, and the evidence was that Wilcox was the president and general manager and conducted the business of the company.

[10] Conceding that the instruction as given did not leave the jury free to consider the effect of defendant's alleged conduct as having prevented the company from issuing the bonds, there was no substantial evidence upon which the jury could have found for appellant on this issue.

We have stated and restated what defendant's obligations were. Briefly and in substance he in June, 1913, subscribed for bonds to the amount of $5,000, and gave his note without date for that amount upon the express condition written on the back of it:

> "This note is subject to a subscription of $50-000.00 seven per cent. debenture bonds, when same [the note] will become due and payable."

No bonds had yet been authorized by the directors of the Salt Company. At this time defendant had no connection with the company, and he made no agreement to do more than to take these bonds when issued to the extent of $5,000. In the following September he became a director and secretary of the Salt Company. The agreement he then made in connection with his $34,000 note was to undertake the sale of bonds when issued of equivalent value and pay the proceeds to the savings bank for the Salt Company. By this so-called "underwriting agreement" the most defendant engaged to do was to take these bonds himself if he did not sell them. But he entered into no obligation to insure the issuance of the bonds or to pay his note whether or not bonds were issued.

Without repeating what has already been so fully stated, it may safely be said that the only outstanding and unperformed obligations of defendant are the two promissory notes in suit, the consideration for which has wholly failed, since no bonds have ever been legalized or issued. We are unable to discover any obligation resting upon defendant which he has not performed in respect of this bond issue.

We do not think the jury would have been sustained by the evidence had they found that defendant by his conduct prevented or excused the company from issuing the bonds. He made no such renunciation as the courts have held to be necessary to constitute such a breach of his contract as would release the Salt Company from performance on its part —a release which in the present case would mean that defendant should pay $39,000 to the company and receive nothing in return, a release also which would relieve the company from issuing any bonds, thus obtaining a large sum of money for nothing. The rule of law is that:

> "To justify the adverse party in treating the renunciation as a breach, the refusal to perform must be of the whole contract or of a covenant going to the whole contract, and must be distinct, unequivocal and absolute, and it must be treated as such by the adverse party."

There was no evidence from which the jury were authorized to infer that any such renunciation was declared by defendant. Part of the contract which it is now claimed defendant breached required that the consent of two-thirds of the stockholders to the bond issue should be procured, and to do this was no part of defendant's obligation. Defendant did not contract to sell or underwrite something which had no existence, and which became impossible of existence through no act of his. The obligation of the company had become impossible of performance. Under such a state of circumstances, the company had no right to enforce payment of those notes. The evidence did not warrant a finding by the jury that defendant had relieved the company from performance on its part, and therefore plaintiff was not prejudiced by the instructions.

The first instruction noticed was a correct statement of the law, and in restating its substance in the provisos to the other instructions noticed, there was no prejudice, for the reason that there was not evidence sufficient to have warranted the jury in finding that the defendant prevented the issue of bonds, or that he so far repudiated his obligations as to relieve the Salt Company from issuing any bonds or tendering or delivering any bonds to defendant. Objection is urged to the following instruction:

> "While it is true that the execution of the notes imports a consideration, the presumption that a consideration passed for the execution of the instruments is merely prima facie. It is disputable, and may be overcome by direct proof. But disputable inferences or presumptions, while evidence, are evidence the weakest and the least satisfactory. They are allowed to stand, not against the facts that they represent, but in lieu of proof of them. The facts being proven contrary to the presumption, no conflict arises; the presumption is simply overcome and dispelled; and, if you find from the evidence that no consideration was ever given for said notes, or either of them, or that the consideration for said notes, or either of them, has failed, then as to such note, or notes, for which defendant received no consideration, or for which the consideration has failed, your verdict should be in favor of defendant."

[11] This instruction, in its substance, was taken from Ruth v. Krone, 10 Cal. App. 770, 773, 103 Pac. 960. It was not there said that disputable presumptions are evidence the weakest and the least satisfactory. As a proposition of universal application this is not true. It was pointed out in Hitchcock v. Rooney, 171 Cal. 285, 289, 152 Pac. 913, that disputable presumptions "have such force as may in some cases outweigh positive evidence against them * * * and sometimes such presumptions as we are here considering require clear and convincing evidence to overcome them" (citing cases).

[12] The disputable presumption here was that arising from the promissory notes admittedly signed by defendant. Facts were submitted by defendant tending to show want of consideration and failure of consideration, and the instruction placed upon the jury the duty of determining the issue. The statement of the court which we think incorrect as a general proposition could not have been prejudicial, for the fact was admitted out of which the presumption arose, namely, that defendant did, in fact, execute the notes.

[13] We discover no prejudicial error in the instruction given as to where the burden rested of showing want of consideration for the notes. Nor do we think the court erred in instructing the jury that the fact that defendant was paid a salary of $100 for his services as secretary of the company constituted no consideration for the notes. There was no evidence, so far as we can discover, tending to show that this salary in

any way induced defendant to make these notes.

The many angles to this case must be our apology for the unusual length of the opinion. We may be mistaken in our treatment of some of the phases of the case, but as to the verdict, we are convinced that it finds support in the evidence. And as to the rulings of the court and its instructions, whatever of error there may be, we cannot say, "after an examination of the entire cause, including the evidence, * * * that the error complained of has resulted in a miscarriage of justice." Article 6, § 4½, Const.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(32 Cal. App. 91)

PEOPLE v. LUCK SING. (Cr. 660.)

(District Court of Appeal, First District, California. Nov. 16, 1916. Rehearing Denied Dec. 15, 1916; Denied by Supreme Court Jan. 15, 1917.)

CRIMINAL LAW 🔑178—FORMER JEOPARDY—AMENDMENT OF INFORMATION.

Where an information charging a misdemeanor in two counts was dismissed and an amended information containing three counts was filed under provision of Pen. Code, § 1387, it will be presumed, in the absence of contrary evidence, that the amended information was based on the same preliminary examination of accused as the first, so that the dismissal was not a bar to the new information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 326–329; Dec. Dig. 🔑178.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Luck Sing was convicted of violating the Wyllie Local Option Law, and his motion for new trial was overruled, and he appeals. Affirmed.

Geo. G. Graham, of Fresno, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. Defendant was accused by information with the violation of the Wyllie Local Option Law (St. 1911, p. 599) in the county of Fresno. The information contained three counts, charging as many violations of said law. Defendant was convicted upon all three counts, and sentenced to pay a fine of $500, or in lieu thereof to be imprisoned in the county jail of the county of Fresno at the rate of one day imprisonment for every $2 of said fine until the same shall have been satisfied. The present appeal is from said judgment and an order denying defendant's motion for a new trial.

The punishment imposed in this case made the offense a misdemeanor; and, under the provisions of section 1387 of the Penal Code a dismissal of an action in such a case is a bar to another prosecution unless the order is expressly made for the purpose of amending the complaint in the action. From the record it appears that, after one information had been filed against the defendant without the defendant having been brought to trial within 60 days, that information upon motion of the district attorney was dismissed for the purpose of filing an amended complaint in the action. Thereafter another information was filed against the defendant setting forth in three counts three distinct violations of the act, whereas the former information had set forth but two. It seems that, if the new information was not based upon the preliminary examination under which the defendant was held to answer and the first information filed, but upon a new proceeding in the justice's court, we would be required to hold, as contended by appellant, such new information would not come within the designation "amended complaint" as used in said section 1387, and that the defendant would by virtue of that section be entitled to a dismissal of the present action. The record, however, fails to show that there was a second preliminary examination, or that the information upon which the defendant was tried and convicted is not just what it purports to be, namely, an amended information. No error, therefore, is shown; and we will presume in harmony with settled law that the court proceeded regularly, and that the trial and conviction were had under an amended complaint. People v. Disperati, 11 Cal. App. 469, 474, 105 Pac. 617.

No error was committed by the trial court in its instructions to the jury, and the evidence amply sustains the judgment.

Judgment and order appealed from are affirmed.

(32 Cal. App. 37)

PEOPLE v. FAGES. (Cr. 504.)

(District Court of Appeal, Second District, California. Nov. 11, 1916. Rehearing Denied by Supreme Court Jan. 8, 1917.)

1. CRIMINAL LAW 🔑86—JURISDICTION—MISDEMEANORS—SUPERIOR COURT.

Pen. Code, § 1425, gives justice courts jurisdiction only of misdemeanors punishable by fine not exceeding $500 or by imprisonment not exceeding six months, or both fine and imprisonment. Const. art. 6, § 5, gives the superior court jurisdiction of "all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for." *Held*, all misdemeanors not falling within the class to which jurisdiction is given to justice courts are triable in the superior court, subject to the further exception that municipal courts in some instances are, by statute, vested with jurisdiction to try all misdemeanors, regardless of the extent of punishment which may be visited upon the person convicted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 125; Dec. Dig. 🔑86.]

2. INTOXICATING LIQUORS 🔑11 — COUNTY ORDINANCES — "CONFLICT WITH GENERAL LAWS."

Const. art. 11, § 11, provides that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." Pen. Code, § 19, provides that, except in cases where a different punishment is prescribed, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding $500, or by both. *Held*, these provisions do not limit the power of local authorities to make violation of a police ordinance enacted by them, such as one prohibiting the retailing of intoxicating liquors in certain places, a misdemeanor punishable by a greater punishment than stated in said section 19 for cases where no specific punishment is affixed, for the constitutional grant to local authorities of the right to make and enforce police regulations, "not in conflict with general laws," was intended to allow the making and enforcing of local regulations of every kind, except those punishing a particular act which was already included within the category of crimes covered by the general codes or statutes, or those affixing a punishment for acts of lesser degree than similar acts described by the statutes in excess or not in harmony with the punishment designated by the latter.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 13; Dec. Dig. 🔑11.

For other definitions, see Words and Phrases, First and Second Series, Conflict with General Laws.]

3. Criminal Law 🔑1208(1)—Punishment—Doing Business Without a License.

Under Pen. Code, § 435, declaring the acts of any person a misdemeanor who, without a license, carries on a business requiring a license, but expressing no specific punishment, wherever the securing of a license is made a condition by ordinance or statute to the transaction of any business, the punishment for violation thereof is that prescribed by section 19, for a misdemeanor for which no punishment is otherwise prescribed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3281, 3289, 3290, 3292, 3293; Dec. Dig. 🔑1208(1).]

4. Counties 🔑55 — Ordinances — Reasonableness of Penalty.

Under Const. art. 11, § 11, giving to counties, etc., power to make and enforce regulations not in conflict with general laws, the punishment prescribed by an ordinance must be both reasonable and in harmony with the state legislative enactments on kindred subjects.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 71, 72; Dec. Dig. 🔑55.]

5. Intoxicating Liquors 🔑19 — Ordinances—Reasonable Punishment.

An ordinance of the county of San Bernardino punishing retailing of intoxicating liquors outside of incorporated cities and towns by penalty not exceeding $600 fine or seven months' imprisonment, or both, was not invalid as prescribing an unreasonable punishment.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 25; Dec. Dig. 🔑19.]

6. Intoxicating Liquors 🔑11 — County Ordinances—Harmony with State Legislative Enactments.

An ordinance of the county of San Bernardino penalized retailing of intoxicating liquors outside of incorporated cities and towns by a penalty not exceeding a $600 fine or seven months' imprisonment, or both. St. 1911, p. 599, provided for local option and, on adoption, for punishment for violation of the prohibition provisions by a similar maximum fine and imprisonment. *Held*, the ordinance was not invalid as being inconsistent with a state legislative enactment on a kindred subject.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 13; Dec. Dig. 🔑11.]

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Jean Fages was convicted of a misdemeanor, and appeals from order denying new trial. Affirmed.

Albert D. Trujillo and Robert M. McHargue, both of San Bernardino, for appellant. U. S. Webb, Atty. Gen., Robert M. Clarke, Deputy Atty. Gen., and T. W. Duckworth, Dist. Atty., and John L. Campbell, Deputy Dist. Atty., both of San Bernardino, for the People.

JAMES, J. Defendant was convicted of a misdemeanor under an ordinance of the county of San Bernardino which made it unlawful for any person to sell, give, or furnish intoxicating liquor to another in said county outside of incorporated cities and towns. By this ordinance the retailing of intoxicating liquor, except for certain special uses, was entirely prohibited. The penalty fixed for a violation of the ordinance was that the person convicted should be punished by a fine of not exceeding $600, or by imprisonment in the county jail of San Bernardino county for not more than seven months, or by both such fine and imprisonment. Defendant presented a motion for a new trial, which was denied, and this appeal is prosecuted from the order made in that behalf.

[1] As by section 1425 of the Penal Code justice's courts are given jurisdiction only of misdemeanors punishable by fine not exceeding $500 or by an imprisonment not exceeding six months, or by both fine and imprisonment, the ordinance, by fixing a maximum term of imprisonment at seven months, described a misdemeanor of which the justice's courts would not have jurisdiction, but which would fall within the jurisdiction of the superior court, where in fact the case was tried; the district attorney having proceeded by information after the defendant had been held to answer. The main contention made by appellant is that the board of supervisors of the county of San Bernardino exceeded the legislative power vested in it when it attempted to define a crime commonly classed as "high-grade misdemeanor." There is no contention but that, if such power did reside in the board of supervisors, then the superior court was the court of original trial jurisdiction. By the state Constitution (section 5, art. 6) the superior court is given jurisdiction of "all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for. * * *" See this subject discussed in Ex parte Wallingford, 60 Cal. 103, and People v. Palermo Land & Water Co., 4 Cal. App. 717, 89 Pac. 723, 725.

The Legislature having given to justice's courts jurisdiction only in misdemeanor cases where the punishment may not exceed six months' imprisonment and $500 fine, all misdemeanors not falling within the class so limited are triable in the superior court, subject to the further exception that municipal courts in some instances are by statute vested with jurisdiction to try all misdemeanors, regardless of the extent of punishment which may be visited upon the person convicted. The question as to the extent of the legislative authority of a county to be exerted in the direction of creating crimes and fixing punishments may now be examined. While it is true that the general lawmaking power of the state is vested by the Constitution in the Legislature, it is also true that by section 11, article 11, there has been delegated to county and other inferior governmental agencies the right to exercise the police power in their respective localities; that provision reading as follows:

> "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

It has been held that the legislative authority so delegated to local and municipal bodies within the limits specified is as broad as the power possessed by the Legislature itself.

> "By virtue of this clause the constitutional grant of the police powers of the state to the city goes directly to and vests in the board, which thereby becomes possessed of the right to exercise within the city limits the entire police power of the state, subject only to the control of general laws. * * * The power conferred by the Constitution in this respect, subject to the two exceptions, that it is local to the city and that it is subject to general laws, is as broad as that of the Legislature itself." Odd Fellows' Cemetery Ass'n v. City and County of San Francisco, 140 Cal. 226, 73 Pac. 987; In re Montgomery, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130; Pacific Gas, etc., Co. v. Police Court, 28 Cal. App. 412, 152 Pac. 928.

Is the regulation consistent with the power granted, in that it treats of matters local in their nature and not in conflict with any general laws of the state? That it is a regulation local in its character is not disputed; but appellant's counsel argue that it conflicts with the general law of the state, because the Legislature has by general statute fixed the maximum punishment which may be enforced in misdemeanor cases.

[2] We are referred to section 19 of the Penal Code, which declares that:

> "Except in cases where a different punishment is prescribed by this Code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or both."

Appellant would have us read this section as the law not only applicable to the numerous instances to be found in the Penal Code where offenses are declared merely to be misdemeanors without any specific punishment being affixed, but as comprehending all such offenses, whether to be found in the general statutes of the Legislature or ordinances of a municipal body. It is not contended, and the proposition certainly could not be maintained, that the Legislature may not in any general statute not made a part of the Penal Code proper determine the punishment to be affixed to the commission of any prohibited act. However, it is insisted that the provisions of the section furnish a limitation as to the punishment which may be determined upon by a municipal body; in other words, that any punishment which may be fixed by local authorities as the penalty for the commission of forbidden acts within the police power must in no case exceed a fine of $500, or six months' imprisonment in a county jail, or both such fine and imprisonment. We are not so inclined to construe section 19 of the Penal Code. There are numerous instances to be found among the sections of the Code (and in the general statutes of the state) where offenses are described as "misdemeanors" and no other penal clause is added thereto. Necessarily there must exist some general provision to which courts must look in prosecutions for such misdemeanors. Meeting such a case, the judge has to refer to section 19 and finds that in all cases, where a different punishment is not "prescribed by this Code," misdemeanors defined therein are to be punished by a maximum of either or both a fine of $500 or imprisonment not exceeding six months. When the Constitution grants to local authorities the right to make and enforce police regulations "not in conflict with general laws," it is intended that local regulations of every kind may be made and enforced, except where the particular act described by the ordinance is the same act already included within the category of crimes as covered by the general Codes or statutes, or the punishment affixed by ordinance for acts of a lesser degree than similar acts described by the statute is in excess of or not in harmony with the punishment designated by the latter. All of the cases that we have examined go this far and no farther. Ex parte Sic, 73 Cal. 142, 14 Pac. 405; In re Desanta, 8 Cal. App. 295, 96 Pac. 1027; Ex parte Solomon, 91 Cal. 440, 27 Pac. 757; In re Ah You, 88 Cal. 99, 25 Pac. 974, 11 L. R. A. 408, 22 Am. St. Rep. 280; Ex parte Mansfield, 106 Cal. 400, 39 Pac. 775; Ex parte Bagshaw, 152 Cal. 701, 93 Pac. 864.

[3] This prosecution does not fall within what may be termed the "license" cases: Wherever the securing of a license is made a condition by ordinance or statute to the transacting of any business, then section 435 of the Penal Code directly applies, which declares the acts of any person a misdemeanor who, without a license, carries on any business or calling for the transaction of which a license is required. No specific punishment being expressed, necessarily reference must be made to section 19, hereinbefore referred

to, in order to determine the measure of punishment which may be meted out. Where municipal legislative bodies in their enactments requiring persons to procure licenses to conduct a business fix a punishment different from that which section 19 prescribes, declarations in the ordinances as to that punishment have been held to be void and of no effect. Such was the case of Arfsten v. Superior Court, 20 Cal. App. 269, 128 Pac. 949 (cited by appellant here), and the case of Ex parte Stephen, 114 Cal. 278, 46 Pac. 86. The punishment prescribed under an ordinance must be both reasonable and in harmony with the state legislative enactments on kindred subjects. This was the effect of the decisions in Ex parte Ah You and Ex parte Solomon, supra.

[4-6] It cannot be said that the possible maximum of seven months' imprisonment under the ordinance here considered is an unreasonable penalty to be affixed for the commission of the acts prohibited. The ordinance is not inconsistent with kindred enactments of the state. We find in the general statutes of the Legislature (Stats. 1911, p. 599) an act providing for local option in the matter of the selling or distributing of intoxicating liquors. That act furnishes authority for the enforcement of prohibition within territory in which the electors thereof so declare; and, when such locality shall have become "no license territory," any person who vends or distributes intoxicating liquor, except for certain limited uses, may be punished upon conviction by imprisonment in the county jail not exceeding seven months, or by fine not exceeding $600, or by both such imprisonment and fine. It will be observed that both the maximum fine and imprisonment there provided to be imposed and inflicted are precisely the same as those specified in the ordinance we are now considering.

We can find no error which entitles appellant to a new trial.

The order denying a new trial is affirmed.

We concur: CONREY, P. J.; SHAW, J.

32 Cal. App. 801

Ex parte WAITE. (Cr. 520.)

(District Court of Appeal, Second District, California. Nov. 11, 1916.)

Habeas corpus by E. R. Waite. Writ discharged, and petitioner remanded.

Allison & Dickson, of San Bernardino, for petitioner. T. W. Duckworth, Dist. Atty., and John L. Campbell, Deputy Dist. Atty., both of San Bernardino, for respondent.

JAMES, J. The ground upon which petitioner seeks to be discharged from custody is that the ordinance of the board of supervisors of the county of San Bernardino, under which he was convicted, is void because the maximum punishment therein provided is in excess of the power of the local legislative body to prescribe. The argument to that point has been given full consideration in the opinion filed this day in the case of People v. Jean Fages (Crim. No. 504), 162 Pac. 137, where the decision is advrese to the appellant's contention. In deciding this application it will be sufficient to refer to that case for the views of the court on the question presented.

The writ is discharged, and the petitioner remanded to the custody of the sheriff of San Bernardino county.

We concur: CONREY, P. J.; SHAW, J.

32 Cal. App. 802

Ex parte ISCH. (Cr. 521.)

(District Court of Appeal, Second District, California. Nov. 11, 1916.)

Department 1. Habeas corpus by Fred Isch. Writ discharged, and petitioner remanded.

Frank T. Bates, of San Bernardino, for petitioner. T. W. Duckworth, Dist. Atty., and John L. Campbell, Deputy Dist. Atty., both of San Bernardino, for respondent.

PER CURIAM. Upon the authority of the decision in People v. Jean Fages (Crim. No. 504) 162 Pac. 137, and in Re E. R. Waite (Crim. No. 520) 162 Pac. 140, this day decided, it is ordered that the writ be and it is discharged, and the petitioner remanded to the custody of the sheriff of San Bernardino county.

32 Cal. App. 101

CRAM v. McNEIL. (Civ. 1679.)

(District Court of Appeal, Second District, California. Nov. 16, 1916.)

1. BROKERS 🔑43(2)—EMPLOYMENT—NECESSITY OF WRITING—"BROKER."

A contract whereby plaintiff agreed to furnish to defendant the name and address of one who would purchase defendant's land, and defendant agreed to pay a commission on whatever sum he might be able to get for the land from that purchaser, is a contract for the employment of a "broker," which is required to be in writing by Civ. Code, § 1624, subd. 6.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. 🔑43(2).

For other definitions, see Words and Phrases, First and Second Series, Broker.]

2. BROKERS 🔑49(3) — COMPENSATION — PERFORMANCE OF SERVICE.

A broker earns his commission when he has either produced a purchaser ready and willing to buy on the terms proposed or has produced a binding contract or offer to contract which the principal accepts.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 72; Dec. Dig. 🔑49(3).]

Appeal from Superior Court, Los Angeles County; Willis I. Morrison, Judge.

Action by George H. Cram against H. H. McNeil. Judgment for defendant, and plaintiff appeals. Affirmed.

George H. Woodruff and Clyde C. Shoemaker, both of Los Angeles, for appellant. Bert Campbell and Willoughby Rodman, both of Los Angeles, for respondent.

JAMES, J. Appeal by the plaintiff from a judgment entered in favor of defendant.

As foundation for his suit plaintiff alleged the making of an oral contract under which defendant agreed to pay to plaintiff and one Norris a sum of money. The trial judge found all of the facts in favor of plaintiff, but as a conclusion of law determined that the contract was void because it was in violation of subdivision 6 of section 1624 of the Civil Code, that being one of the subdivisions of the statute of frauds. In the section referred to it is provided that certain contracts are invalid unless some note or memorandum thereof is in writing and subscribed by the party to be charged or his agent, including:

> "6. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission."

We quote from the findings of fact:

> "That on the 28th day of November, 1913, the plaintiff and one Harry C. Norris had knowledge of the fact that a certain person in Los Angeles, Cal., was desirous of buying a small improved ranch, with dwelling house thereon, and had been informed that such person was able and willing to pay cash for any property that he might determine to buy; that plaintiff and the said Norris also had information at said time that such person would not negotiate the purchase of any property through any real estate agent or agency.
>
> "That on the said 28th day of November, the defendant was the owner of a ranch located one and one-fourth miles from the Santa Ana car line and due north of Garden Grove station on the Anaheim-Long Beach oiled road in Orange county, state of California, * * * and that the plaintiff and said Norris knew at said time that the defendant was offering said ranch for sale through and by reason of a circular published by the defendant. * * *
>
> "That on the said 28th day of November, the plaintiff and said Norris told the defendant that they knew of a person desiring to purchase for cash a small improved ranch, and they also informed defendant at said time, that they believed that defendant's said ranch would suit such person, but that it would be useless for the plaintiff and said Norris, or either of them, to show or undertake to negotiate a sale of the defendant's said property to the person to whom they referred, for the reason that said person would not deal with or purchase property through any real estate agent or agency; that thereupon, and on the said 28th day of November, at the city of Los Angeles, in said Los Angeles county, the defendant orally promised and agreed to and with the plaintiff and the said Norris that, in consideration of the plaintiff and the said Norris putting the defendant in possession of information as to the identity and residence of such person, he, the defendant, would personally endeavor to sell his said 20-acre ranch to such person, and in case he should make a sale thereof to such person, then he, the defendant, would pay the plaintiff and the said Norris for such information a commission equal to 5 per cent. of any price at which he, the defendant, might sell his said ranch to such person, and the plaintiff and said Norris, in consideration of the said promise of the defendant, orally promised and agreed to put the defendant in possession of the said information; and the court finds that said agreement between the plaintiff and said Norris and the defendant was oral, and not in writing.
>
> "That thereafter, and pursuant to the said oral agreement, the plaintiff and said Norris, at the said city of Los Angeles, gave to the defendant the name and residence of one Frank Meier, being the person whom the plaintiff and said Norris knew was desirous of buying for cash a small improved ranch, as hereinbefore set forth, and that thereafter the defendant dealt and negotiated with the said Frank Meier, and thereafter, and before the commencement of this action, the defendant sold his said ranch to the said Meier, at the price of $16,000."

The findings further recite that no writing had been made evidencing the contract, and that payment of the amount of plaintiff's claim had been demanded and refused. A further finding appeared as to the assignment of the interest of Norris to this plaintiff.

[1] It is the contention of the appellant that the contract as made was not a contract employing an agent or broker to purchase or sell real estate; that the contract as made involved no services to be rendered by any such agent or broker, and provided merely for the sale of certain information to the defendant by which a buyer for the defendant's property was secured through the efforts of the defendant. The case of Kincart v. Shambrook, 64 Or. 27, 128 Pac. 1003, is cited in support of the contention made by appellant. In the case cited it appeared that plaintiffs there, owning certain property and desiring to sell it and having then under way, with the prospect of successful conclusion, negotiations with a prospective customer, were induced by the offer of that defendant, who proposed to pay them $850, to relinquish their efforts and the attempt to make a deal with their customer in order that the defendant might have an opportunity to sell his land to the proposed customer. It will appear from this statement that that case on its facts is quite readily distinguished from this one. There the plaintiffs gave up a valuable prospect, that of disposing of their own property, in order that the defendant might profit thereby. In no particular did the plaintiffs there find a purchaser for the defendant. The contract as proposed to them by the defendant was not that they should furnish him with the name of the person with whom they were dealing (for the defendant knew that already), but that they should relinquish their efforts in the direction of attempting to dispose of their own property. The facts in this case, as they appear from the findings of the court, are that the plaintiff and his assignor sought the defendant and agreed to furnish him with the name of a person who would likely purchase his property, in consideration that he would pay them a commission. We are unable to distinguish these facts from a case where the defendant sought the plaintiffs in the first instance and requested them to find a purchaser for his property, and they had made efforts so to do and had finally furnished defendant with the name of a person whom they considered a likely customer.

[2] An agent or broker earns his right to a commission when he has either produced to his principal a person ready and willing to

enter into a contract upon the terms proposed by the principal, or has produced to his principal a binding contract or offer to contract which the principal accepts. To be sure, it is the duty of an agent to exert himself to bring the parties together, but if the client is satisfied, as was the case here, to have the means furnished him by which he may himself make his deal with the opposite party, then the person acting as the intermediary is as fully an agent or broker, within the meaning of subdivision 6 of section 1624, Civil Code, as though he had actually produced the proposed purchaser before his principal. The services as found by the court to have been performed by the plaintiff were services naturally and necessarily incident to the performance of a contract of an agent or broker employed to sell real estate. We think that the determination of the case as made by the trial court was in accordance with the requirement of the statute.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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32 Cal. App. 115

SILVA v. SILVA. (Civ. 2015.)

(District Court of Appeal, Second District, California. Nov. 17, 1916.)

1. DIVORCE 🔑37(7) — DESERTION — WANT OF CONSENT—CONTINUANCE.

Under Civ. Code, § 99, providing that separation by consent is not sufficient to constitute desertion, and Civ. Code, § 107, making desertion without just cause and against the consent of the other party for one whole year a ground for divorce, the want of consent, as well as the separation, must continue during one whole year previous to the commencement of the action.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 113; Dec. Dig. 🔑37(7).]

2. DIVORCE 🔑133(3)—DESERTION—CONSENT—AGREEMENT FOR SEPARATION.

A written agreement between a husband and wife after the desertion by the wife, whereby the parties mutually agree to live separate from each other, shows a consent to the desertion during the time the agreement remained in force.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 448; Dec. Dig. 🔑133(3).]

3. DIVORCE 🔑37(5)—DESERTION—INTERRUPTION.

Under Civ. Code, § 101, making an agreement to live separately revocable, a written agreement was revoked where on the day of its execution the husband in good faith sought a reconciliation with his wife, and asked her to go home with him, but such revocation did not prevent the execution of the agreement from interrupting the period of desertion without consent necessary to entitle the husband to a divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 111; Dec. Dig. 🔑37(5).]

4. CONTRACTS 🔑93(2)—WRITTEN AGREEMENT —EFFECT.

Parties to a formal written agreement are bound by its terms where no claim is made of fraud, duress, or undue influence, or for reformation thereof for mutual mistake, notwithstanding a claim that they did not understand its purport.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 416; Dec. Dig. 🔑93(2).]

Appeal from Superior Court, Ventura County; Robert M. Clarke, Judge.

Action for divorce by Joseph Rose Silva, Jr., against Amelia Rose Silva. Interlocutory decree for the plaintiff, and defendant's motion for new trial overruled, and defendant appeals. Order overruling motion for new trial reversed.

D. H. Laubersheimer, of Los Angeles, for appellant. Chas. F. Blackstock, of Oxnard, for respondent.

SHAW, J. Plaintiff brought this action to obtain a decree of divorce upon the ground of desertion. Defendant answered, denying the alleged desertion, and as a further defense and by way of recrimination set forth a cause of action against plaintiff based upon his alleged willful neglect and extreme cruelty.

Upon trial of the action the court found the allegations of the complaint true, and that the matters affirmatively pleaded in defendant's answer as a bar to plaintiff's cause of action were untrue. An interlocutory decree for plaintiff followed. The appeal is prosecuted by defendant from an order of court denying her motion for a new trial.

Among other grounds upon which appellant asks for a reversal is the contention that the evidence is insufficient to support the finding to the effect that on October 15, 1911, defendant willfully and without cause deserted and abandoned plaintiff against his will and without his consent, and ever since said date has lived and still continues to live separate and apart from plaintiff, against his will and without his consent.

[1-3] It may be conceded that the separation of defendant from plaintiff on October 15, 1911, was with the intent to desert him without just cause and against his consent. Such fact, however, does not entitle plaintiff to a decree of divorce, since as provided in section 107, Civil Code, the status existing at the time of the desertion must continue for a period of one whole year. Separation by consent is not sufficient to constitute desertion. Section 99, Civ. Code. During the entire period the status must be without the consent of the deserted spouse. "It continues only so long as there is a want of consent to the separation on the part of the deserted party." McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808. The complaint herein was filed on October 18, 1912, more than one year after the date of the desertion, during the while of which period defendant had separated herself from plaintiff. It appears, however, that on October 23, 1911, eight days after defendant's act of desertion, she and the plaintiff executed a written instrument in due form,

whereby they mutually agreed to live separate and apart from each other. It thus appears that during a part of the time, dating from October 15, 1911, and ending October 18, 1912, at which time the complaint was filed, the separation was by mutual consent, as evidenced by this instrument in writing so executed by the parties. Such consent, however, as provided in section 101, Civil Code, is a revocable act, and if one of the parties afterwards in good faith seeks a reconciliation and restoration which the other refuses, such refusal is desertion. There was evidence offered on the part of plaintiff which it is claimed tended to prove that on the date of the execution of the agreement to live separate and apart, plaintiff, in good faith, sought a reconciliation with defendant and asked her to go home with him. Upon this testimony, while conceding the execution of the agreement, respondent insists it was revoked on the same day it was executed. Assuming this to be true, nevertheless, there was a period of time between October 15, 1911, and October 18, 1912, when the separation was by virtue of said agreement and by and with the consent of plaintiff. According to our view, the execution of the instrument was in the nature of a condonation, and the effect of it was precisely the same as though defendant had returned to her home and after a restoration of the marital relation for a time had again left with intent to desert plaintiff. The time of the desertion would date from the last departure, and not from the time when she first left. So in this case, the one year during which the desertion must continue must be deemed to have commenced at the time the plaintiff revoked the agreement under and by virtue of which the parties lived separate and apart, and not from October 15th, when defendant left him. In our opinion the action was prematurely brought, inasmuch as the desertion by defendant had not continued one year prior to the time when the complaint was filed on October 18, 1912.

[4] Respondent insists that the formal written agreement, duly executed by the parties, should be deemed invalid as an agreement of separation, for the reason that defendant did not intend to sign a contract of separation and did not understand its terms when she executed the same; and likewise insists that plaintiff did not understand its purport when he executed it, and therefore since the minds of the parties never met, the document constituted no valid contract between them. No claim is made that the signature of either party to the instrument was obtained by fraud, duress, or undue influence; nor is reformation thereof sought for mutual mistake. So far as appears from the record, they signed it freely and voluntarily, and it is unnecessary to cite authorities in support of the doctrine that under such circumstances the parties to an instrument must be deemed bound by the plain import of the language used.

For the reasons given, the order denying defendant's motion for a new trial is reversed.

We concur: CONREY, P. J.; JAMES, J.

173 Cal. 802

WESTERN ASS'N OF SHORT LINE RAILROADS v. RAILROAD COMMISSION OF STATE OF CALIFORNIA.

UNITED RAILROADS OF SAN FRANCISCO v. SAME.

(S. F. 7614, 7641.)

(Supreme Court of California. Dec. 14, 1916. Modification of Opinion Jan. 11, 1917.)

CARRIERS ⇨10—MOTOR TRUCK OR BUS LINES—JURISDICTION OF RAILROAD COMMISSION—"OTHER TRANSPORTATION COMPANIES."

Const. art. 12, § 22, as amended in 1911, giving the Railroad Commission power to establish rates for the transportation of passengers and freight by railroads "and other transportation companies," and providing that no railroad "or other transportation company" shall charge a greater or less compensation than specified by the tariff established by the commission, vested the Railroad Commission with regulatory powers over common carriers transporting freight by motor trucks or passengers by busses on the public highways of the state between cities and other places.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 12, 14–20; Dec. Dig. ⇨10.

For other definitions, see Words and Phrases, First and Second Series, Transportation Company.]

In Bank. Application for writ of mandate by the Western Association of Short Line Railroads and another against the Railroad Commission of the State of California. Writ issued.

William M. Abbott, William M. Cannon, and Clarence M. Oddie, all of San Francisco (Morrison, Dunne & Brobeck, of San Francisco, of counsel), for petitioners. Douglas Brookman, of San Francisco (Max Thelen, of San Francisco, of counsel), for respondent.

HENSHAW, J. Petitioner, Western Association of Short Line Railroads, is a corporation, organized to promote the best interests of the short, independent railroads, steam and electric, operating in the state of California and in other states. Fifteen of such California railroads are members of this corporation. It made application to the respondent commission to regulate, within the law, the transportation business of the so-called Wichita Transportation Company, which company admitted that it was engaged as a common carrier in the business of transporting freight in motor trucks on the public highways of the state of California between the city of San Diego, in San Diego county, and the city of El Centro, in Imperial county, as well as to intermediate and other points in this state. The United Railroads of San Francisco, petitioner, made like request of respondent commission for regulatory orders governing the conduct of the Peninsula Company, and showed that petitioner was operating an interurban electric car line, extending from Fifth and Mission streets, in San Francisco, to the city of San Mateo; it was so operating under franchises obtained from the proper authorities; that the Peninsula Company was regularly operating and maintaining a system of automobile busses, carrying from 16 to 20 passengers each, running upon regular schedule from the point of departure of petitioner's cars in San Francisco to their terminus in San Mateo, and making return trips from San Mateo to San Francisco in like manner, and upon a route paralleling as closely as possible the line of the petitioner's electric railway; that in so operating they charged for the service the identical through fare charged by the petitioner, and similar lesser fares for intermediate points; that the Peninsula Company was a common carrier, a public utility, and a transportation company within the meaning of the law, power to regulate which and the duty to regulate which were conferred by law upon the Railroad Commission.

The Railroad Commission declined to entertain jurisdiction of these petitions, upon the ground that the law had not vested in it jurisdiction so to do. Mandate was then sought from this court, and the single question thus presented is that indicated: Does the Constitution, or do the legislative enactments of the state, vest the power of regulation over such transportation companies in the Railroad Commission?

In denying these applications the Railroad Commission filed an elaborate opinion, in which the question of power was discussed under two heads: First, the question of the constitutional grant of power; second, the question of the legislative grant of power. Application for mandate before this court was in the first instance denied, it appearing to the court that the commission had reached and expressed a satisfactory conclusion upon both propositions. Subsequently this alternative writ of mandate was issued for further consideration of the first proposition, namely, whether or not the Constitution has conferred upon the commission regulatory powers over transportation companies such as have herein been described.

It is not and will not be questioned but that, if the Constitution has vested such power, it is not within the legislative power, either by its silence or by direct enactment, to modify, curtail, or abridge this constitutional grant. The language of the Constitution in dealing with these very powers places this beyond peradventure when it declares (section 22, art. 12) that:

> "No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the railroad commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the railroad commission in this Constitution."

See Telephone Co. v. Eshleman, 166 Cal. 640, 653, 137 Pac. 1119.

We agree with the construction placed by the commission upon the legislative enactments and with its conclusion that the Legislature inadvertently failed or deliberately declined to make a specific grant of power to the railroad commission to regulate the affairs of these classes of transportation companies. We need not here repeat the convincing reasoning of the commission in this behalf, since doubtless its views will find expression in its own official reports, and it is sufficient for the purposes of this determination to express our concurrence in and with them.

We take up, then, the single consideration of the constitutional grant of power. It is found in section 22, art. 12, of the Constitution as it was amended in 1911. The section creates the railroad commission and defines its powers. In so doing it declares:

> "Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission, than the rates, fares and charges which are specified in such tariff."

It is not questioned but that the Peninsula Company and the Wichita Transportation Company are public transportation companies, are common carriers, and are public utilities within the definition of section 23, art. 12, of the Constitution. As little will it be questioned but that, if the quoted language of section 22 stood alone as a subject of construction, it would be unhesitatingly held, in the present day, as it is held in construing similar language in other states, that it conferred upon the Railroad Commission regulatory powers over all transportation companies, therein including transportation companies of the classes under consideration. Exempli gratia, in Georgia Railway & Power Co. v. Jitney Bus Co., the Georgia statute conferred jurisdiction upon the Railroad Commission over "all common carriers—railroads and express corporations or companies within this state," and its Railroad Commission held this to be a grant of power to regulate automobile busses and trucks carrying passengers and property for hire. Public Utilities Rep. Ann. 1915C, see page 928. Again, the Illinois Public Utilities Commission had, under section 8 of that state's act (Laws 1913, p. 464) been given "general jurisdiction over all public utilities," and a "public utility" was defined to be "every corporation that now or hereafter may own, etc., for public use any plant, equipment or property to be used for or in connection with the transportation of persons." Here, again, the Illinois Public Utilities Commission held this grant to confer upon it jurisdiction over such automobile passenger and freight carriers. Jacksonville Ry. Co. v. O'Donnell, Utilities Rep. Ann. 1915C, p. 853. Therefore we repeat that one would have no hesitancy in declaring that the language of the Constitution in conferring upon the Railroad Commission power of regulatory control over "railroads and other transportation companies" embraced within its grant companies of the nature we are considering. And we interrupt our argument here to say that, while the problem is to be resolved solely under the determination of the existence or nonexistence of the power in the Railroad Commission, no reason appears why such power should not have been conferred upon it, and multitudinous reasons exist why it should have been conferred. These automobile stage companies carry passengers to great distances, over many and devious roads. It is a part of common knowledge that one may travel by this method at least from San Diego to Sacramento, and doubtless further—a distance of over 600 miles. Thousands of passengers are thus carried over mountains and plains. Aside from the mere matter of the regulation of fares, every consideration suggests the desirability, if not the need, of safety regulations touching the care and upkeep of the machines, the skill and prudence of the chauffeurs, etc. And touching the movement of freight, while in many instances these truck companies parallel railroads, in others they enter, unrestricted and uncontrolled, into new territory. Modern transportation has unquestionably reached the point where it is no more an answer to the farmer who thinks that the rates of the auto truck which passes his farm are extortionate, to say that he may haul his own product, than it would be to make him the same answer if he were complaining of a railroad extortion. And, moreover, it is not only a matter of common knowledge, but is presented in these cases, that in many instances these unregulated companies interfere seriously with the revenues of controlled public utilities, a percentage of which revenues goes by way of taxes to the support of the state.

But returning to the fundamental questions: The nonexistence of the power in the Railroad Commission to supervise these corporations is found and declared by the Railroad Commission to rest upon the construction of the phrase "other transportation companies" given to it by this court in Board of Railroad Com'rs v. Market St. Ry. Co., 132 Cal. 677, 64 Pac. 1065. It is said, and truly, that section 22, art. 12, of the Constitution, amended as it was in October, 1911, and embodying as it does the precise language contained in the section before amendment, will be held to have been amended and re-enacted in the light of the construction which this court had put upon that language. In 1901, section 22, so far as concerns the quoted language, stood identically as it does to-day. In that year the Railroad

Commission made demand upon the Market Street Railway Company of San Francisco to produce its books, records, and papers and submit itself to the regulatory powers of that commission as defined by the act of 1880 (Stats. 1880, p. 45). The Market Street Railway Company resisted this demand. The Railroad Commission brought action in the superior court to enforce it. The railway company prevailed and the commission appealed, contending that it was given authority by virtue of section 22, art. 12, of the Constitution. Before this court the question for determination was stated to be:

> "Do the words 'railroad and other transportation companies' include a street railway company in a municipality engaged in the business of carrying passengers on street railroad cars?"

This was the sole proposition presented to this court for determination. Mr. Justice Temple, in dissenting, held that from the context the meaning of "other transportation companies" was so plain as to deprive a court of the power to construe it. But the view of the majority of this court was that the words called for construction. So construing them this court held, for reasons not calling for repetition, as they are fully set forth in the opinion, that "other transportation companies" did not embrace within its meaning "street railway companies carrying passengers for hire within the municipal limits." But the decision, upon fundamental and familiar principles, decided nothing more than that this particular character of transportation company was not embraced within the purview of the language of the Constitution. Thus it is said that the language of the Constitution "is inconsistent with the idea that the entire people of the state (through the State Railroad Commission) were interested in the rates for carrying passengers within the corporate limits of a town or municipality"; and it is further declared, arguendo:

> "Companies engaged in draying, running freight wagons, delivery wagons, delivering parcels, teaming, or running elevators, are engaged in the business of 'transportation'; but it surely could not be contended that they are subject to the jurisdiction of the 'Railroad Commission.' The people of the state would not have agreed to pay the salaries and expenses of the railroad commissioners, selected from different geographical sections of the state, for the purpose of regulating the charges of the 'United Carriage Company' of San Francisco. Yet it is a transportation company."

This language is convincing in establishing the unquestioned fact that this court had in contemplation and was discussing transportation companies of whatsoever kind, operating exclusively within a municipality; and good reason appears for this, because all such transportation companies were subject to license fees and police regulations imposable upon them by the municipal authorities.

All, therefore that was actually decided in the Market street case was that the Market Street Railway and other street railways of its character were not embraced within the meaning of the phrase "other transportation companies" as employed in the Constitution. The most that was inferentially declared in the obiter above quoted was that other transportation companies operating wholly within the limits of a municipality were not within the contemplation of the Constitution. Further than this the decision did not go, and further than this it should not be carried. It results, therefore, that the adjudication relied on by the Railroad Commission in no wise determines the question presented. That question is at large. It may be thus put: Did the Constitution in the language quoted exclude by necessary or even by fair construction control over transportation companies of the character here presented? Assuredly nothing in the language of the grant excludes them, and no legitimate construction upon the phrase so oft quoted demands their exclusion. It must be, and therefore is held, that the Constitution has granted regulatory powers over such corporations to the Railroad Commission by virtue of section 22, art. 12, of the Constitution, and it follows herefrom that mandate should issue to the Railroad Commission in accordance with the prayers of the petitioners.

It is adjudged accordingly.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.; LAWLOR, J.

Modification of Opinion.

PER CURIAM. We think that the opinion already filed in these cases sufficiently and clearly enough indicates the view of this court as to the extent of the jurisdiction of the Railroad Commission as to such transportation companies as those involved in these proceedings. In view of what is said in the opinion, it is manifest that the writ of mandate ordered issued by the judgment is too broad in its terms and requires the exercise of jurisdiction not conferred by section 22 of article 12 of the Constitution. It was not intended to require the assumption by the railroad commission of jurisdiction of any matter not fairly covered by the provisions of that section.

The proceedings before the Railroad Commission involve substantially only matters relating to the rates to be charged by the transportation companies that were defendants therein, and for all practical purposes it is necessary only to grant relief in that particular respect.

It is ordered that the opinion heretofore filed be modified by striking out the words "in accordance with the prayers of the petitioners" at the end of said opinion and inserting in lieu thereof the words "to exercise such powers."

It is ordered that the judgment heretofore given be modified to read as follows:

> "It is ordered that a peremptory writ of mandate issue to the Railroad Commission requiring the commission to make its order that the defendants in the proceedings referred to pending before said commission, viz. the 'Wichita Transportation Company,' and the 'Peninsula Rapid Transit Company,' forthwith file with the commission their schedules of rates, fares, charges, and classifications, and further that the commission assume the jurisdiction over these companies which is conferred by section 22, art. 12, of the Constitution."

(174 Cal. 168)

FRANCIS v. WEST VIRGINIA OIL CO.

(L. A. 3828.)

(Supreme Court of California. Jan. 3, 1917.)

1. LANDLORD AND TENANT 🔑290(1)—FORCIBLE DETAINER—CONTRACT TO PURCHASE.

The summary action for unlawful detainer against a tenant given by Code Civ. Proc. § 1161, subd. 1, cannot be maintained unless the conventional relation of landlord and tenant exists between the parties so that the latter is estopped to deny the former's title, and one in possession under a contract to purchase does not after default in the payments become a tenant at will subject to removal by unlawful detainer.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1208; Dec. Dig. 🔑290(1).]

2. LANDLORD AND TENANT 🔑291(12)—FORCIBLE DETAINER—EVIDENCE—CONTRACT TO PURCHASE.

In an action for unlawful detainer, defendant can introduce the contract to purchase under which he claims possession to show that he is not a tenant, though the validity of titles cannot be tried in such proceedings.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1247; Dec. Dig. 🔑291(12).]

3. MINES AND MINERALS 🔑54(2)—OIL LANDS—CONSTRUCTION OF SALE CONTRACT—RIGHT TO POSSESSION.

A contract to sell oil lands, which provided that the purchaser should not remove any pipe or casing in any well drilled on the property, and that, in event of a forfeiture of the right to purchase, the casings and derricks should revert to the vendor, that it should not annul a previous contract between the vendor and the purchaser's assignor, but that the purchaser should hold and acquire the lands under that contract, by implication gives the purchaser the right to possession under the contract, though there is no express provision therefor.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 150; Dec. Dig. 🔑54(2).]

Department 2. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action in forcible entry and detainer by Mary F. Francis against the West Virginia Oil Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Matthew S. Platz and C. E. Arnold, both of Bakersfield, for appellant. Geo. E. Whitaker, of Bakersfield, for respondent.

MELVIN, J. Plaintiff appeals from an adverse judgment. By her pleading Mary F. Francis alleged that in the month of September, 1911, defendant had gone into possession of certain land in Kern county with her knowledge and acquiescence as her tenant at will; that on May 2, 1912, she had served notice requiring the West Virginia Oil Company to vacate the premises; but that said corporation had refused to accede to her demand. She alleged her right to the possession of the land and prayed for its restitution. Defendant admitted possession and refusal to surrender the land to plaintiff, but denied the alleged tenancy at will.

[1] At the trial it clearly appeared that the defendant had gone into possession after the execution of certain contracts of sale. The first of these contracts was made by Mrs. Francis and Mr. E. S. Good. The latter assigned all of his rights under this agreement to the West Virginia Oil Company, and in January, 1912, a new writing was executed by plaintiff and that corporation ratifying the assignment and substituting the West Virginia Oil Company as vendee in Mr. Good's place. This agreement called for the payment of stipulated sums at given times, and the plaintiff in her testimony stated that she had received $15,000 on the purchase price and $600 by way of interest. It was also in evidence that the defendant had expended something more than $85,000 in developing oil on the property.

It seems to be the theory of the plaintiff that, when the defendant corporation defaulted in one of the payments on the purchase price, it at once became a tenant at will subject to removal from the land by the summary method of a suit in unlawful detainer. In this she is in error. The true rule with reference to the existence of the relation of landlord and tenant necessary to support an action in unlawful detainer is thus expressed in Jones on Landlord and Tenant, § 563:

> "The action of unlawful detainer can be maintained only where the relation of landlord and tenant subsists between the parties to the action, and hence it becomes material to determine whether parties stand in that relation to each other. While it is not necessary to show an express demise or letting of lands to sustain the action, the facts must show impliedly at least that the defendant occupies as tenant of the plaintiff and this must be something more than a mere quasi tenancy. It is some times said that one who is in possession of lands under a contract for a sale is a tenant at will to the owner. This is true in a restricted sense only. He is a tenant at will just as a mortgagor after condition broken is a tenant at will of the mortgagee. He may be deprived of the possession if it can be done peaceably or may be evicted in an action of ejectment. The mortgagor is not a tenant within the meaning of the unlawful detainer act, however. The conventional relation of landlord and tenant means the relation created by convention or agreement between the parties. The cases are numerous in which a summary remedy has been refused because the contract or circumstances under which the owner of premises permitted another to take possession of them contemplated some condition or consideration apart from rent or a tenancy at the mere sufferance or will of the owner."

This is the rule in California. Wheelock v. Warschauer, 21 Cal. 309–316; Steinback v. Krone, 36 Cal. 303–309; Johnson v. Chely, 43 Cal. 299–305; Walls v. Preston, 28 Cal. 225; and Henderson v. Allen, 23 Cal. 519. In order that such an action may be maintained, the conventional relation of landlord and tenant must be shown to exist. In other words, the action is limited to those cases in which the tenant is estopped to deny the landlord's title; and when a defendant in an action which under our Code is the equivalent of one in unlawful detainer proves the nonexistence of such relation, the plaintiff must fail. Richmond v. Superior Court, 9 Cal. App. 63, 64, 98 Pac. 57.

[2] It follows that the superior court did not err in permitting defendant to prove the execution of the contracts of purchase. While the validity of titles may not be tried in proceedings of this character, evidences of title are admissible to show the character or extent of the possession claimed. 19 Cyc. 1165; Hoag v. Pierce, 28 Cal. 188; Shelby v. Houston, 38 Cal. 411; Dennis v. Wood, 48 Cal. 361.

[3] Appellant contends that, since the contract did not in set terms give the defendant the right of possession of the property, its entry upon the premises was merely permissive, and therefore that of a tenant at will. There is no merit in this argument, because the agreement between Mrs. Francis and the oil company clearly contemplated possession and occupancy of the land by the vendee. It was therein provided that the purchaser should not remove or cause to be removed any of the pipe or casing in any well drilled on the property, and that, in the event of a forfeiture by the corporation of the right to purchase the land under the contract, the casings and derricks should revert to the vendor. By the terms of the writing it was understood that it should not set aside or annul the contract between Mrs. Francis and Mr. Good except as specifically provided, but that the oil company should "hold and acquire said lands under said contract." In view of this language and of the subsequent conduct of the parties to the contract, there can be no doubt that the immediate entry by the West Virginia Oil Company upon the land and the development of oil thereon were within the contemplation of the plaintiff and defendant. Courts have frequently held that by implication contracts have given the right to immediate possession by the vendees even where no express provisions to that effect were contained in the writings. In Olson v. Minnesota & North Wisconsin R. Co., 89 Minn. 280, 94 N. W. 871, the vendee was obligated to pay all taxes and assessments, and in case of default buildings and improvements on the land were to revert to the vendor. It was held that the right to possession by the vendee was implied. A similar decision was made in Welch v. Hover & Co., 75 Wash. 130, 134 Pac. 526.

A vendee in possession is not a tenant in any sense of the word, and only a tenant may be sued under the first subdivision of section 1161. The proceeding is purely statutory and is restricted in its operation to those persons specified in the statute. Martel v. Meehan, 63 Cal. 47–50; Ben Lomond Wine Co. v. Sladky, 141 Cal. 619–623, 75 Pac. 332. Failure of performance of his part of the contract of sale by the vendee in possession does not make him a tenant. Brown v. Beatty, 76 Ala. 250; Mason v. Delancy, 44 Ark. 444; Brown v. Persons, 48 Ga. 61; Griffith v. Collins, 116 Ga. 420, 42 S. E. 743; Goldsberry v. Bishop, 63 Ky. (2 Duv.) 143; Young v. Ingle, 14 Mo. 426; Hauser v. Morrison, 146 N. C. 248, 59 S. E. 693. The rule established by these and many other authorities is in accordance with justice. Even a vendee who has defaulted in his promised payments is entitled to an opportunity of showing his equities and presenting his defenses.

It is not necessary to comment upon any other contentions made by appellant, as they are substantially disposed of, we believe, in the foregoing discussion.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(174 Cal. 172)

PEOPLE v. ABRAMS. (Cr. 2033.)

(Supreme Court of California. Jan. 3, 1917.)

1. ARSON 🔑12 — ELEMENTS — PRESENCE OF HUMAN BEING IN BUILDING.

Under Pen. Code, § 454, defining first degree arson as the malicious burning in the nighttime of an inhabited building in which there is at the time some human being, the presence of a human being other than the person or persons doing the forbidden act is essential to the offense.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 26, 27; Dec. Dig. 🔑12.

For other definitions, see Words and Phrases, First and Second Series, Arson.]

2. ARSON 🔑37(1)—EVIDENCE—SUFFICIENCY.

In trial for arson, where it appeared that defendant and his wife were lessees occupying the building as their dwelling at the time of the fire, evidence, being entirely circumstantial, pointing no more strongly to him than to the wife as committing the crime, *held* insufficient to show the presence of a nonparticipating person in the building at the time as required by Pen. Code, § 454, defining first degree arson, since the presumption of innocence, available to the wife in a proceeding against her could not be entertained, under the circumstances, against the husband.

[Ed. Note.—For other cases, see Arson, Cent. Dig. § 71; Dec. Dig. 🔑37(1).]

3. CRIMINAL LAW 🔑1167(2) — HARMLESS ERROR.

The contention of an accused that two different counts in the information charging different crimes had the effect of improperly charging in the information two different offenses was of no practical importance after he had been acquitted as to the matters embraced in the second count, since that subject-matter was no longer in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3101; Dec. Dig. 🔑1167(2).]

4. Arson 🔑9—Ownership of Building.

One may be guilty of arson as to a building owned by another and occupied solely by himself in view of Pen. Code, § 452, providing that to constitute arson it is not necessary that a person other than accused should own the building, since this section clearly implies that ownership by a person other than defendant is sufficient.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 19–22; Dec. Dig. 🔑9.]

In Bank. Appeal from Superior Court, Los Angeles County; Fred W. Houser, Judge.

Max Abrams was convicted of arson, and from the judgment and order denying new trial, he appeals. Reversed.

Constantine M. Mooslin and Ford & Hammon, all of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

ANGELLOTTI, C. J. This defendant and his wife were jointly charged by information with the crime of arson, in the willful, malicious, and felonious setting fire to and burning with intent to destroy a certain building, the property of another, occupied by them as tenants as a dwelling house. In a second count of the same information they were charged with burning and destroying the same property with intent to defraud an insurer thereof. Separate trials were demanded, and the trial of this defendant was had before his codefendant was put on trial. It does not appear that she has ever been tried. A verdict of not guilty was rendered as to the matters charged in the second count. As to the charge of arson the jury found the defendant guilty of arson in the first degree. Judgment of imprisonment in the state prison was thereupon pronounced. We have here an appeal from this judgment and from an order denying a motion for a new trial.

The appeal in this case was taken, as the Constitution requires, to the District Court of Appeal of the Second Appellate District, and that court affirmed the judgment and order appealed from. A hearing in this court was ordered principally because we were not satisfied as to the correctness of the disposition by the learned District Court of Appeal of the claim that the evidence was insufficient to support the verdict finding this defendant guilty of arson in the first degree. Further consideration of that question has satisfied us that the evidence furnishes no support for any such verdict.

[1, 2] By our statute arson, which is the willful and malicious burning of a building, with intent to destroy it (section 447, Pen. Code), is divided into two degrees. Arson of the first degree, the more heinous offense, is defined as being the malicious burning "in the nighttime an inhabited building in which there is at the time some human being." Section 454, Pen. Code. The presence of "some human being" in the building at the time of the burning is therefore obviously essential to this particular offense. And it is just as clear that it must be some human being other than the person or persons doing the forbidden act. It was so held in People v. Principe et al., 23 Cal. App. 729, 139 Pac. 658. In the case at bar the evidence clearly shows that no human being was in the building other than the defendants jointly charged, the appellant here and his wife. They were tenants occupying the building as their dwelling; the building itself, as we have seen, belonging to another person. There is not a shred of evidence pointing to this defendant as being the person committing the alleged offense rather than his wife. In fact, the only conceivable theory, apart from mere conjecture or surmise, upon which it can be held that the evidence sufficiently supports a conclusion that he was a participant in the burning, is, in view of the evidence, that both he and his wife were joint participants. The evidence, which is entirely circumstantial, points no more strongly to him than it does to the wife. In fact, if there be any difference, it points more strongly toward the wife, for she was the sole owner of and carried insurance on the personal property contained in the building, and the evidence points pretty clearly to the conclusion that, if the fire was incendiary, the primary object was the destruction of this personal property with a view to obtaining the insurance money, and that, if there was any destruction of the building intended (which appears not to have been accomplished to any substantial extent), it was entirely incidental to the accomplishment of this main object. Certain it is that, if the evidence sufficiently supports a conclusion of this defendant's guilt, it shows to the same extent the guilt of the codefendant wife, and there is nothing therein to support a conclusion that, the defendant being guilty, the wife nevertheless was a nonparticipant, and therefore one whose presence in the building would satisfy the requirements of section 454, Penal Code. The presumption of innocence available to her in any proceeding against her may not be successfully invoked, under the circumstances, against the husband. A verdict finding this defendant guilty of arson in the first degree involves, in view of the definition of that offense, a finding by the jury of the guilt of the husband and the innocence of the wife of all participation in the crime, a result absolutely unwarranted by the evidence. It follows from what we have said that upon the record before us the presence of the wife in the building cannot be held to satisfy the requirements

of section 454, Penal Code, and that the evidence utterly fails to show that there was any human being, within the meaning of that section, in the building at the time the fire was applied by this defendant, if it ever was applied by him. The verdict given against him is therefore contrary to the evidence. He was thereby found guilty of an offense as to which there was no evidence furnishing legal support for a conclusion of his guilt, and the conviction cannot be allowed to stand.

For the purposes of further proceedings in the event that they are concluded to be advisable, we deem it proper to notice one or two other matters.

[3] The contention as to two different offenses, being improperly charged in the information, is no longer of any practical importance, in view of the fact that defendant has been acquitted as to the matters embraced in the second count, and that subject-matter is no longer in the case.

[4] We find no substantial merit in the other objections raised by motion to set aside the information and by the demurrer to the information. As to the particular objection founded on a claim that a tenant cannot be guilty of arson, under our statutes, as to a building owned by another, and occupied solely by himself, we concur in the views expressed by the learned District Court of Appeal, and adopt the same as a part of this opinion. They are as follows:

> "Although the information stated that the defendants occupied the building and were tenants therein, the further fact was alleged that the building was the property of Smith. 'To constitute arson it is not necessary that a person other than the accused should have had ownership in the building set on fire. It is sufficient that at the time of the burning another person was rightfully in possession of, or was actually occupying such building, or any part thereof.' Pen. Code. § 452. The foregoing section clearly implies that ownership of the building by a person other than the defendant is sufficient, although it is declared to be not necessary. In People v. Handley, 100 Cal. 370, 34 Pac. 853, it was held that the defendant was properly convicted of arson in burning a house occupied by him as tenant of another who was the owner thereof. People v. Myers, 20 Cal. 76, and People v. De Winton, 113 Cal. 403, 45 Pac. 708, 33 L. R. A. 374, 54 Am. St. Rep. 357, are decisions which do not, in our opinion, support the proposition of appellant that under the allegations of ownership and tenancy, as stated, there is no sufficient charge that the defendants were guilty of the crime of arson."

Certain questions raised as to instructions to the jury are of such a nature that they will probably not arise on another trial, and need not here be discussed.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

(174 Cal. 176)

GRAZIANI v. DENNY, Superior Court Judge.
(S. F. 7817.)

(Supreme Court of California. Jan. 4, 1917.)

1. JUDGES ⚷25(1)—JUDGE PRO TEMPORE—JURISDICTION.

Although by stipulation in a divorce action a judge pro tempore was selected under Const. art. 6, § 8, with power to act in such capacity "in all further proceedings" in the suit, another judge of the same court was not without jurisdiction to pass upon a motion to set aside the interlocutory decree of divorce made by the judge pro tempore on the ground that such judge had no jurisdiction and that the judgment had been obtained through collusion; the constitutional provision not declaring that the power of a judge pro tempore shall be exclusive, and the jurisdiction of the court being a single entity, irrespective of its exercise by one judge or another.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 99, 105–106; Dec. Dig. ⚷25(1).]

2. PROHIBITION ⚷11—GROUNDS—IRREGULAR EXERCISE OF JURISDICTION.

Where a judge of a superior court exercises authority in a matter properly to be heard by another judge of the court, it is an irregularity only, and not a matter of jurisdiction to be controlled by prohibition.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 36; Dec. Dig. ⚷11.]

In Bank. Application for writ of prohibition by Celia Graziani against Thos. C. Denny, as Judge of the Superior Court in and for Sonoma County. Alternative writ discharged, and proceeding dismissed.

W. F. Cowan, of Santa Rosa, for petitioner. L. E. Johnston, of Napa, and Geary & Geary, of Santa Rosa, for respondent.

SLOSS, J. This is an application for a writ of prohibition against Hon. Thomas C. Denny, one of the judges of the superior court of Sonoma county.

On September 28, 1915, the petitioner, Celia Graziani, commenced a divorce action in said superior court against her husband, Emil Graziani. The defendant filed his answer, and there was also filed a stipulation, signed by said Celia and Emil Graziani, plaintiff and defendant in the action, that L. E. Fulwider, a member of the bar, duly admitted to practice in all the courts of the state, might act and proceed in said cause as judge pro tempore.

Mr. Fulwider duly qualified as such judge pro tempore, and proceeded to hear and try said action of divorce. Having heard evidence, he signed, made, and entered, as such judge pro tempore, an interlocutory judgment or decree determining that the plaintiff, Celia Graziani, was entitled to a divorce from said Emil Graziani, and awarding the custody of the minor children of the marriage to the said plaintiff. All of these proceedings, from the filing of the complaint to the decree, were had within the space of a single day.

On the 15th day of March, 1916, within six months after the entry of the interlocutory decree, Emil Graziani filed in said superior court a notice directed to Celia Graziani and her attorney, notifying them that he would, at a given time, move said superior court for an order setting aside, vacating, and annulling the interlocutory decree of divorce, upon the grounds that the court, acting or presuming to act, through said L. E. Fulwider as judge pro tempore, had no jurisdiction, and that the judgment had been obtained through collusion and fraud. At the time specified in the notice said Emil Graziani, by his attorneys, appeared in said superior court, and requested the respondent, a duly elected, qualified, and acting judge of said court, to hear said motion. The plaintiff, Celia Graziani, objected to any hearing in said action by Judge Denny on the ground that L. E. Fulwider, as judge pro tempore, was present and willing and able to proceed, and that he alone had jurisdiction to act in the case. The respondent overruled these objections, and announced his intention of proceeding with the hearing of the motion. The purpose of the present proceeding (in which an alternative writ of prohibition has been issued) is to restrain Judge Denny from proceeding with the hearing of the motion.

The authority for the selection of Mr. Fulwider as judge pro tempore is found in section 8 of article 6 of the Constitution. That section, in its first form, read in part as follows:

> "But a cause in the superior court may be tried by a judge pro tempore, who must be a member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the cause."

In 1910 the section was amended by the elimination of the words "approved by the court" and the addition of the following clause:

> "And the person so selected shall be empowered to act in such capacity in all further proceedings in any suit or proceedings tried before him until the final determination thereof."

The original provision was carried into the statutes by the adoption of section 72 of the Code of Civil Procedure, which includes, in addition to the above-quoted language of the Constitution, a provision for the oath to be taken by the judge pro tempore, and a declaration that his action shall have the same effect as if he were a judge of the court. We think it clear, however, that the constitutional provision, both before and after the amendment of 1910, was self-executing and that it required no act of the Legislature to make it effective.

The most notable feature of the amendment of 1910 is the elimination of the requirement that the selection of a judge pro tempore by the parties must be approved by the court. Section 8 of article 6, as it now reads, commits the choice entirely to the will of the parties. In the ordinary adversary proceeding, this mode of conferring judicial power seems unobjectionable enough. The trial of a cause before a person selected by the parties to act as judge may be likened to an arbitration, in which issues of law and fact are determined by "one or more persons" designated by the parties in interest. Code Civ. Proc. § 1281 et seq. It is manifest, however, that the appointment, under the unrestricted will of the parties, of any member of the bar as judge of a cause, may lead to very questionable, not to say scandalous, practices, when applied to litigation in which the public has an interest, separate and distinct from, and perhaps antagonistic to, that of the formal parties. The best illustration of such litigation is the very kind of case here involved, namely, an action for divorce. While the husband and wife are the only necessary parties to an action for divorce, the maintenance and protection of the marriage relation are matters of such concern to the state that divorce litigation has under our law, and that of other jurisdictions, been hedged about with a variety of restrictions unknown to other judicial proceedings. The danger of collusion in divorce proceedings is so great that special precautions are thought to be required to guard against it. For example, it is provided that divorces cannot be granted upon default or upon the uncorroborated statement, admission or testimony of the parties. Civ. Code, § 130. For these reasons, it is insisted by the respondent that the provisions of section 8, art. 6, of the Constitution have no application to divorce proceedings. It is claimed that in such cases there are, in effect, three parties, the plaintiff, the defendant, and the state, and that the agreement of the plaintiff and defendant alone will not suffice to empower a person selected by them to act as judge.

[1] While we fully recognize the dangers inherent in the trial and determination of divorce cases by persons selected by the parties themselves, we do not find it necessary here to determine whether section 8 of article 6 permits this procedure. Assuming that it does, we see no ground for holding that Judge Denny, a duly elected and qualified judge of the superior court of Sonoma county, is without jurisdiction to act in a case regularly pending in that court. The constitutional provision authorizes a judge pro tempore to try a cause, and empowers him to act "in such capacity in all further proceedings" in the cause tried before him until the final determination thereof. For the purposes of the particular case, he is given by the Constitution the same power that is vested in the regularly elected and qualified judge of the court. But there is nothing in the constitutional provision which declares that his power shall be exclusive, or that it shall be in any way greater than that of elected judges.

> "The jurisdiction of causes is vested by the Constitution in the court, not in any particular judge or department thereof. The Constitution, in fact, says nothing about departments. It provides that there may be as many sessions

of the court at the same time as there are judges (Const. art. 6, § 6); but, whether sitting separately or together, the judges hold but one and the same court, and the jurisdiction they exercise in any cause is that of the court, and not the individual. The division into departments is purely imaginary, and for the conveniences of business and of designation. Transferring a cause for trial or disposition from one of those departments to another does not effect a change or transfer of the jurisdiction of that cause; that remains at all times in the court as a single entity." White v. Superior Court, 110 Cal. 60, 67, 42 Pac. 480.

See, also, Carter v. Lothian, 133 Cal. 451, 454, 65 Pac. 962.

[2] The superior court of Sonoma county has two judges. For the purpose of this divorce proceeding, it may be said that the court has three judges. Any judge of the court has authority to act in a cause pending in the court. If one of them exercises authority in a matter which should more properly be heard by another, his action would constitute, at most, an irregularity. But the objection would not in any event be one going to the jurisdiction, which alone is involved in prohibition. The motion to vacate the judgment was presented, not to any individual judge, but to the superior court of Sonoma county, and there is no ground for holding that any judge of that court is without jurisdiction to entertain such motion.

The alternative writ is discharged, and the proceeding dismissed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.; LAWLOR, J.

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32 Cal. App. 105

PEOPLE v. HORGAN. (Cr. 505.)

(District Court of Appeal, Second District, California. Nov. 16, 1916.)

1. Criminal Law ⟹1170½(5)—Harmless Error—Cross-Examination.

In a prosecution for robbery committed in the course of a game of draw poker, where the person robbed and others participating in the game appeared as witnesses for the prosecution, cross-examination of them, to show circumstances from which the jury might deduce a direct promise of immunity pursuant to which charges of gambling made against them had been dismissed, was not prejudicial, in view of the fact that it fully appeared that the cases against them were dismissed without their knowledge of that fact, or of the reason therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3133; Dec. Dig. ⟹1170½ (5).]

2. Robbery ⟹23(1) — Evidence — Fraudulent Gaming.

In a prosecution for robbery committed in the course of a poker game in which defendant had claimed that his money had been obtained by trick or fraud, evidence as to whether certain witnesses were regular patrons of the gambling place, offered to show that the proprietor conducted a "crooked game," was inadmissible, as the fact that some of the witnesses frequented the place did not tend to show that defendant's money had been obtained at play by fraudulent means within Pen. Code, § 332.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 29; Dec. Dig. ⟹23(1).]

3. Criminal Law ⟹1170(1)—Harmless Error—Exclusion of Evidence.

In such prosecution, the exclusion of certain evidence was not erroneous, where defendant's substantial rights could not have been prejudiced thereby, as where upon his own evidence the jury could not properly have reached a different verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3129; Dec. Dig. ⟹1170(1).]

4. Criminal Law ⟹829(3)—Requested Instruction—Given Instruction.

In such prosecution, defendant's requested instruction that, if he did not take the money from the person alleged to have been robbed, but took it from the proprietor of the gaming place whom he claimed to have obtained it by trick or fraud, he should be acquitted, was properly refused where other instructions did not permit a verdict of guilty unless the jury was satisfied beyond a reasonable doubt that defendant, or persons acting under his orders, by means of force and fear resulting from the use of a gun, unlawfully took the money from the person alleged to have been robbed, who himself had not obtained defendant's money by winning at play through fraudulent means, as defined by Pen. Code, § 332.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⟹829(3).]

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Arthur Horgan was convicted of robbery, his motion for a new trial was denied, and he appeals. Judgment and order affirmed.

Frank T. Bates, Walter J. Hartzell, and Charles L. Allison, all of San Bernardino, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

SHAW, J. The defendant, with James Allen and Dan Boyd, were by information jointly charged with the crime of robbery, in that by means of force and fear they took from the possession and person of Jacob Widener, the prosecuting witness, the sum of $40, lawful money of the United States. Upon a separate trial from his codefendants, Horgan was convicted of the crime as charged. His appeal is from the judgment pronounced and from an order of court denying his motion for a new trial.

The alleged offense occurred in the city of Needles, Cal., at which place Boyd, Allen, and defendant arrived at about 10:30 p. m. on January 15, 1916, coming from Oatman, Ariz., where they had been employed as laborers in the mines. Upon arriving at Needles, Boyd and Allen obtained a room at a lodging house at which they registered, and then, with defendant, visited saloons and restaurants around the town until about 1 o'clock the next morning, when they went to a gambling house conducted by one Faust in the basement of a building, where a game of draw poker was in progress. Defendant and Allen each bought some $20 worth of chips from

Faust and entered the game, in which Faust, Widener, and some three or four others were engaged. After playing for some time and losing the $20 which he had invested in chips bought from Faust, Horgan left the table and stood watching the game near Allen, who continued playing. In the deal immediately preceding the "hold up," Allen drew an ace-king flush, upon which, before other cards were drawn by the players, he raised the ante or bet. All but one of the other players laid down their hands. This player drew three cards, which, with the two cards retained, gave him three queens and a pair of jacks, upon which he won the stakes. Thereupon Allen, turning to defendant, said: "That is an awful way they have of getting our money." At this Horgan drew his gun and, pointing it at the crowd, ordered them to hold up their hands, saying: "All you ——— of ——— hold up your hands. I have got the best hand now." Thereupon Allen proceeded to take from Widener some $35 or $40, and from others, including Faust, who was conducting the game, he took various sums. Then, compelling Faust to open the door, they left by the stairway leading from the basement, immediately following which there was an exchange of shots between Faust on the one side and defendant on the other. They took a train about to leave Needles, getting off at Yucca, from which place they came to Los Angeles, thence to San Diego, where they were arrested.

It appears that Faust, Widener, and others engaged in playing were arrested for gambling and, after testifying at the preliminary hearing of the charge against Allen, Boyd, and defendant, the cases against them were dismissed.

At the trial of defendant two defenses were interposed: (1) That while admitting his part as stated in the hold-up, and admitting that they did, in the manner stated, take money from the table and from the person and possession of Faust, they assert they took none whatsoever from Jacob Widener, named in the information as the victim of the robbery. (2) That in taking money from Faust they were retaking their own money which had been obtained from them by means of trick and fraud. As to both of these questions it is conceded there was a direct conflict of evidence. There is ample evidence to show the taking of money from the possession of Widener, and the statement of defendant and those jointly charged with him, which is little more than a surmise of fact based upon what they conceived to be the probability thereof, that in the last hand played by Allen his opponent was dealt three cards off the bottom of the pack, which statement is directly contradicted by another witness. However, even were it true that Allen lost the money bet on this last hand by reason of the fraud claimed, it by no means follows, nor is there any evidence, that defendant lost his money or any of it by reason of like acts of Widener whom he robbed; nor is there any evidence showing that Faust was a party to such alleged fraud and trickery.

[1] As stated, Faust, Widener, and others of those engaged in playing, were arrested and charged with gambling. After they had testified at the preliminary hearing of defendant, the cases against them were dismissed. On cross-examination, questions were asked of Widener and others appearing as witnesses in behalf of the prosecution, the purpose of which it is claimed was, not to show directly a promise of immunity pursuant to which the dismissals were had, but to show circumstances from which the jury might make such deduction. Conceding the court might properly have granted defendant greater latitude on cross-examiantion, nevertheless, in view of the fact that it fully appears the cases were all dismissed without the knowledge of the witnesses and that they did not know why such action was taken, no prejudice could result from the rulings. This is particularly true, since it was conclusively shown by the testimony of the district attorney, called by defendant as a witness, that the dismissals were not had upon any suggestion or agreement made with defendants, but that such action was taken by the justice before whom the actions were pending, by reason of a statement made to him by the district attorney, as shown in answer to the question:

> "Mr. Hert, I will ask you whether or not it is a fact that the dismissal of these cases in Needles was obtained because of the fact that the witnesses had informed you, or you had been informed from some source which you understand came from the witnesses, that they would not be here for this case unless those cases were dismissed?"

An objection to this question being overruled, the district attorney replied:

> "No. At the time the preliminary examination was held, these men came in and testified; these witnesses that have testified here came up and testified, and after they had testified Judge Covage asked me what I thought about it, and I said: 'They have got it on you now, as section 1324 has not been read to them. Even if it was read to them, they are exempt from prosecution in this case, and I don't see where you will get anywhere with your prosecution against those fellows for gambling.'"

The court further stated to defendant's attorney:

> "If you desire to ask him if there was a promise of immunity by the district attorney's office or any reward, you may ask that."

[2] Other rulings in excluding evidence as to whether or not the witnesses were regular patrons of Faust's place, the purpose of which it is claimed was to show that he conducted a "crooked game," were proper. The question involved was whether defendant's money was obtained by trick or fraud, and the fact that some of the witnesses frequented the place did not tend to prove that defendant's money had been obtained by larceny, as defined in section 332 of the Penal Code.

[3] Other rulings in excluding evidence are

likewise without merit. In no event could defendant's substantial rights have been prejudiced thereby, since upon the evidence adduced by him in his own behalf the jury could not properly have reached a different verdict from that rendered.

[4] Defendant requested the court to give two instructions, one of which was given as modified and the request as to the other was denied. These instructions were in effect the purpose for which evidence of the taking of money from others than Widener was introduced, namely, to show intent of the defendant with respect to the offense charged, and that if he did not take any money from Widener, but took it from Faust who had obtained it by trick and device, defendant should be acquitted. The subject of these instructions seems to have been fully covered by instructions given elsewhere, that in order to justify a verdict of guilty the jury must be satisfied beyond a reasonable doubt that the money alleged to have been taken by defendant was in fact taken from the possession of the complainant Jacob Widener. The jury was also instructed as to what constituted larceny by trick and device, and told that property obtained in such manner was not the subject of larceny by the rightful owner thereof from which the property was so taken; and likewise instructed as to the purpose of admitting evidence showing the taking of money from others than Widener who were present, and expressly told that defendant was being tried solely and alone for the robbery of Jacob Widener. It is apparent, under the instructions given, that the jury could not have reached a verdict of guilty unless they were satisfied beyond a reasonable doubt that defendant, or persons acting under his instructions and orders, by means of force accomplished by the use of a gun and the fear resulting from the use thereof, unlawfully took the money from the person and possession of Jacob Widener, as to whom there is not the slightest evidence that he had obtained defendant's money in the manner pointed out in section 332, Penal Code.

The record discloses no error whereby defendant's substantial rights could have been prejudiced, and the judgment and order are therefore affirmed.

We concur: CONREY, P. J.; JAMES, J.

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32 Cal. App. 110

PEOPLE v. ALLEN. (Cr. 515.)

(District Court of Appeal, Second District, California. Nov. 16, 1916.)

1. Criminal Law 🔑1169(1)—Harmless Error—Examination of Witnesses.

In a prosecution for robbery during a poker game, questions to a witness for the defense, on direct, tending to show that witness had been promised that if he would change his testimony to convict defendant the same charge against him would be dismissed, was not prejudicial, where it was not claimed that witness' testimony was influenced or that he testified untruthfully.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3137; Dec. Dig. 🔑1169(1).]

2. Criminal Law 🔑1153(3)—Discretion of Trial Court—Order of Testimony.

The trial court's action, in permitting the prosecution on rebuttal to offer testimony that might have been introduced in chief, would not be disturbed, where defendant was accorded every opportunity to meet such alleged new evidence; since the order in which the testimony may be introduced is largely in the discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3063; Dec. Dig. 🔑1153(3).]

3. Witnesses 🔑305(2)—Immunity — Nonincriminating Testimony—Statute.

Pen. Code, § 1324, providing that an offender may be compelled to testify against another like offender, provided that if he demands to be excused from testifying on the ground that his testimony might incriminate him, which he should be deemed to do unless the section is read to him, shall not be liable to prosecution for the offense where he testifies voluntarily, was designed to enable prosecuting officers, by granting the immunity therein provided, to obtain testimony against one charged with an offense in cases where a witness was previously protected by Const. art. 1, § 13, providing that no person shall be compelled in a criminal case to be a witness against himself; and hence a witness who was not called to testify "against" defendant, but, without objection, testified for him, tending to incriminate defendant and also himself, was not entitled to a dismissal of the case against him on the ground that the statute had not been read to him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1054, 1055; Dec. Dig. 🔑305(2).]

4. Indictment and Information 🔑189(11)—Offenses—Verdict—Statute.

In a prosecution for robbery of a named person by unlawfully and feloniously and by means of force and fear taking and carrying away property from such person against his will and consent, defendant could be convicted of assault with intent to rob, where there was no proof that he obtained money from such person, in view of Pen. Code, § 1159, providing that the jury may find defendant guilty of any offense the commission of which is necessarily included in that with which he is charged or an attempt to commit the offense, and section 211, defining robbery as the felonious taking of personal property in the possession of another from his person or immediate presence, and against his will, accomplished by means of force or fear.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 595; Dec. Dig. 🔑189(11).]

5. Robbery 🔑24(6) — Sufficiency of Evidence—Assault with Intent to Rob.

In a prosecution for robbery, evidence *held* to sustain a conviction of an assault with intent to rob.

[Ed. Note.—For other cases, see Robbery, Dec. Dig. 🔑24(6).]

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

James Allen was convicted of assault with intent to rob, his motion for a new trial was denied, and he appeals. Judgment and order affirmed.

Frank T. Bates, Walter J. Hartzell, Raymond E. Hodge, and Charles L. Allison, all of San Bernardino, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

SHAW, J. This case is a companion to that of People v. Horgan (Crim. No. 505), 162 Pac. 399, an opinion in which, affirming the judgment therein, was this day filed. The defendant here was jointly charged with Horgan and one Dan Boyd with robbing Jacob Widener. Upon trial he was convicted of assault with intent to rob one Jacob Widener. He appeals from the judgment and an order of court denying his motion for a new trial.

The facts as to commission of the offense are identical with those presented in the Horgan Case, and, as in that, the defendant here complains of a number of rulings by the court in admitting and excluding evidence, some of which were discussed in the Horgan Case. As to these it is unnecessary to repeat what was there said.

[1] Dan Boyd, a witness for the defense, was on direct examination interrogated as follows:

> "Q. Have you been approached by anybody, either the sheriff or district attorney of this county, to change your testimony as given at the two former trials of this case? Q. Is it not a fact that an officer from the district attorney's office came to you while you were in the county jail, and endeavored to get you to change your testimony? Q. And didn't he tell you at that time that if you would change your testimony that would convict Allen that the case against you would be dismissed?" to all of which objections were sustained.

In the absence of any enlightenment upon the subject, we are unable to perceive what purpose defendant had in asking the questions, or how they could possibly be material and pertinent to the issues being tried. It is not claimed that Boyd's testimony was influenced in any way, or that he testified other than truthfully; and even if it were conceded that the county officers did try to corrupt and induce him to commit perjury, since they failed to succeed, defendant could not be prejudiced by such efforts.

A number of questions were asked by the district attorney on cross-examination, to which objections were sustained and the jury told to disregard the questions; nevertheless defendant assigns the asking thereof as misconduct of the district attorney and well calculated to prejudice defendant in his substantial rights. We do not think so. There is nothing in the circumstances presented by the record from which a presumption of prejudice could be drawn, based upon the action of the district attorney in asking the questions, answers to some of which the court might properly have permitted as cross-examination. The record presents nothing upon which prejudicial misconduct of the district attorney can be predicated.

[2] Since the order in which testimony may be introduced is a matter largely in the discretion of the court (People v. Jones, 123 Cal. 65, 55 Pac. 698), its action, in the absence of anything showing an abuse of discretion, in permitting the prosecution on rebuttal to offer testimony that it might have introduced in chief, will not be disturbed. Defendant was accorded every opportunity to which he was entitled in meeting such alleged new evidence.

[3] As stated, defendant was jointly charged with the commission of the crime with James Horgan, who it appears was tried and convicted. At the trial, Allen was called as a witness on behalf of defendant and gave testimony which clearly tended, not only to incriminate the defendant Horgan, but also to incriminate himself. When the trial of this defendant was called, his attorney made a motion to dismiss the case against him upon the ground that section 1324 of the Penal Code had not been read to him when called as a witness for the defendant Horgan. The purpose of this provision is to enable prosecuting officers, by granting the immunity therein provided, to obtain testimony against one charged with an offense in cases where, prior to the enactment, a witness was protected by section 13, art. 1, of the Constitution. The language is that such person "is a competent witness against any other person so offering."

In the case of People v. Richman, 28 Cal. App. 761, 155 Pac. 142, this court, in discussing the interpretation to be given the statute, said:

> "The whole purpose of this enactment seems to have been to enable prosecuting officers to obtain the testimony of persons implicated in a criminal transaction. Under the provisions of section 13, art. 1, of the Constitution, no person may be compelled to give testimony against himself. The protective force of the constitutional provision applied to cases where the testimony sought from a party involved in a criminal transaction might tend in some way to fasten the crime upon him. In order to furnish a means by which testimony of an interested party, even though it might tend to incriminate him, might be obtained in aid of the prosecution of other persons, the Legislature has provided that such testimony may be compelled, but that when it is extracted in this mandatory way the person giving the self-incriminating testimony may not be subjected to prosecution for the offense concerning which he has furnished evidence against himself."

Defendant was not called as a witness against Horgan, but, without objection, testified for him. Availing himself of his constitutional right when so called, he, under section 13 of article 1 of the Constitution, might have refused to testify on the ground that his testimony would tend to connect him with the commission of the crime for which Horgan was being prosecuted. In our opinion, the provision was not intended to apply to codefendants called as witnesses for the defense, but to enable the prosecuting officer to obtain the testimony of those particeps criminis to a crime for the commission of which another is being prosecuted. To hold otherwise would mean that, in the trial of one of a dozen persons jointly charged with the commission of a crime pursuant to a conspiracy, he, since the district attorney would have no voice in the matter, might by calling his codefendants as witnesses secure their discharge from prosecution, however well equipped with conclusive evidence of their guilt the district attorney might be, thus depriving him of the control of the prosecution of those accused of committing crimes.

[4, 5] Another point made by appellant as ground for reversal arises out of that part of the charge of the court to the jury which deals with the form of their verdict and the offenses of which he might be convicted under the information. The court instructed the jury that their verdict might be either one of "not guilty," or one of "guilty of robbery as charged in the information," or "guilty of grand larceny," or "guilty of assault with intent to rob one Jacob Widener." The verdict of the jury was, as hereinbefore stated, "guilty of assault with intent to rob one Jacob Widener." Appellant insists that, inasmuch as the information charged defendant with the commission of robbery, committed as follows: "The said * * * James Allen * * * on the 16th day of January, 1916, at the said county of San Bernardino, state of California, did willfully, unlawfully and feloniously, and by means of force and fear, rob, take, steal and carry away from the person, possession and immediate presence of Jacob Widener, and against the will and without the consent of the said Jacob Widener, * * * then and there the property of the said Jacob Widener"—he could not be convicted of assault with intent to rob, since the information contained no appropriate allegations charging him with such offense. In our opinion, the contention is without merit. Section 1159 of the Penal Code provides:

> "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."

"Robbery" is defined by section 211 of the Penal Code as the "felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." In People v. Chavez, 103 Cal. 407, 37 Pac. 389, the court says:

> "It may be conceded that an assault with intent to commit rape, as well as a simple assault, are included in the offense here charged" —which was that of rape.

There is evidence which clearly tends to prove that defendant was guilty as charged in the information, namely, that while Horgan, at the point of a loaded pistol, commanded those in the gambling room to hold up their hands, and, by means of such force and the fear resulting therefrom, he (the defendant) proceeded, against the will of Widener, to take money from his pockets. That it was done with a guilty intent admits of no doubt. In order, however, to constitute robbery, the defendant must have obtained money from Widener. Upon this point the evidence is in conflict, and apparently the jury were not convinced beyond a reasonable doubt that he obtained any money in the search of Widener's pockets. Such act, assuming no property was obtained from him, while incomplete as a robbery, possessed all the elements of robbery other than the taking of money. The assault was made and made with the intent to rob. That it was not accomplished may be due to the fact that Widener possessed no money, or to other causes. While an assault with intent to commit a crime may constitute an attempt, the converse of the proposition is not true, since there may be an attempt to commit a crime, such as larceny, for instance, unaccompanied by an assault. In robbery, however, there must be an assault, accompanied by an intent to rob, and the actual taking of the property by force and against the will of the one robbed; and since this is true, the lesser crime, namely, an assault with intent to commit robbery, lacking in the one element of the crime charged, is included in the offense for which defendant was prosecuted. Upon the record, which we have examined with some care, the jury might very well have acquitted the defendant; but since, on the other hand, there is evidence upon which they might have properly convicted him of the offense charged, this court cannot disturb the verdict rendered to the effect that he was guilty of an assault with intent to commit robbery.

The judgment and order are therefore affirmed.

We concur: CONREY, P. J.; JAMES, J.

32 Cal. App. 154

BLACK v. WAREHOUSE INV. CO.

(Civ. 1930.)

(District Court of Appeal, First District, California. Nov. 21, 1916. Rehearing Denied by Supreme Court Jan. 19, 1917.)

1. MASTER AND SERVANT ⟹332(1)—INJURIES TO THIRD PERSONS—QUESTION FOR JURY.

In an action for personal injuries in falling into an elevator shaft, whether the party who directed plaintiff to use the telephone, plaintiff having been injured while attempting to fulfill such mission, was the representative of the defendant in general charge of the work of construction being done upon defendant's warehouse, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1274; Dec. Dig. ⟹332(1).]

2. MASTER AND SERVANT ⟹330(2)—INJURIES TO THIRD PERSONS—EVIDENCE.

In an action for injuries received in falling into an elevator shaft, evidence that the principal contract for the brick and steel work for defendant's warehouse was entered into by the contractors with a party as the representative of defendant at the warehouse in respect to that portion of the work of construction at and after the time of plaintiff's injury was admissible, such party having directed plaintiff to use the telephone, a mission which he was attempting to fulfill when injured; as the evidence tended to show the general authority of the party as defendant's agent and representative at the time and place of plaintiff's injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1270; Dec. Dig. ⟹ 330(2).]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by George J. Black against the Warehouse Investment Company, a corporation. From a judgment for defendant following an order granting its motion for nonsuit, plaintiff appeals. Judgment reversed.

Grant & Zimdars and William H. Bryan, all of San Francisco, for appellant. L. A. Redman, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in defendant's favor following an order granting defendant's motion for a nonsuit.

The action was one for damages for personal injuries sustained by the plaintiff by falling into an unguarded elevator shaft in a building owned by the defendant. The facts upon which the plaintiff relied for his recovery, and upon which he predicates his claim for a reversal of said judgment, are substantially these: The defendant, Warehouse Investment Company, was at and for some time prior to the injury complained of the owner of a warehouse in San Francisco fronting on Townsend street on the north, and extending to King street, designated in the record herein as the "old" building. The said defendant was also at the time of the accident engaged in the erection of another warehouse building designated as the "new" building, adjacent to the former building, but fronting on King street and extending back to a private alley, also owned by the defendant, and which ran through, and under the second floor of, the old warehouse building. The general brick and steel work of the new building was being done under a contract with Anderson & Rainey, but from the operation of this contract had been specially excepted the erection of two large steel beams or girders for a railroad track entering the building in the outside wall on King street. On the morning of June 14, 1913, the work of construction in that part of the building had so far progressed that it was ready for the placing of these beams, which were at the time in the possession of the Overland Freight Transfer Company, whose duty it was to transport them to the place of their erection when notified so to do. On the evening of June 13, 1913, a Mr. Qualters, an employé of the Overland Freight Transfer Company, met a Mr. Johnson, representing the California Erecting Company, and arranged with him to put the beams in place on the following morning. The plaintiff herein was an employé of Johnson or of his company, and was with him at the time of this interview with Qualters, who then gave Johnson a card bearing the telephone number of a stable to which the latter was to telephone when all was in readiness for the hauling of the beams to their place of erection. Qualters at the time stated that he would have to take up the matter of the agreement with Johnson for the erection of the beams with a Mr. Tilden, who, he said, was the boss at the building, for the latter's approval. On the following morning Johnson, Qualters, and Tilden met at the building, and the agreement being approved by the latter, Johnson, the plaintiff, and others went ahead with the work of preparation for putting the beams in position, and while such work was in progress Tilden informed Johnson that "We got a telephone in there, and you can go and use that phone, and phone to the barn when you are ready for the beams," at the same time pointing out to him where the office in the old building in which such telephone was situated was to be found. When all was ready Johnson told the plaintiff, Black, to go to the indicated telephone and send the message to the barn for the delivery of the beams. It was while Black was undertaking to fulfill this mission that he fell into the unguarded elevator shaft in the old building and sustained the injuries which form the basis of this action. This elevator shaft lay in the line of a driveway on the ground floor of the old building which could be entered by way of the alleyway which ran along the north end of the new building and intersected said driveway. It was along the most direct way to the office of the old building in which was the telephone to which the plaintiff had been directed to go, and it was while going along this route that the plaintiff fell into the unguarded shaft of said elevator.

At the trial and upon the conclusion of the plaintiff's case the defendant, Warehouse Investment Company, moved for a nonsuit upon the ground chiefly that no evidence had been presented connecting the said defendant with the accident or with the plaintiff's injuries, or showing or tending to show that the plaintiff was other than a mere trespasser, or, at most, none other than a licensee in entering the building in which the accident occurred, and that there was no evidence that said defendant was in possession of the old building at the time of the accident. The court granted the motion for nonsuit, and gave judgment for the defendant thereon.

[1, 2] In so doing we are of the opinion that the court was in error. We are satisfied from a careful reading of the record that there was some substantial evidence before the court tending to show that Mr. Tilden was the representative of the Warehouse Investment Company in general charge of the work of construction being done upon said warehouse. Mr. Qualters referred to him as

the "boss," and required and received his approval of the agreement with Johnson. It was he who told Johnson where the telephone was located to which the plaintiff was presently directed to go. During the progress of the main work upon the building Mr. Tilden was shown to have been present directing the work. In addition to this, the plaintiff offered proof that the principal contract for the brick and steel work was entered into by the contractors with Mr. Tilden as the representative of the defendant at the warehouse in respect to that portion of the work of construction both at and after the time of the plaintiff's injuries. The court sustained the defendant's objection to this offer, and this, we think, was also error. Such offered proof, taken in connection with the facts that said Tilden was to approve and did approve the particular agreement with the plaintiff's employer, and did direct him to the place where the telephone was located to which the plaintiff was going at the time he received his injuries, would, in our opinion, have furnished both competent and substantial evidence tending sufficiently to show the general authority of Tilden as the defendant's agent and representative at the place and time of plaintiff's injuries to entitle the latter to have the case go to the jury.

For both reasons, we think the judgment must be reversed; and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

32 Cal. App. 165

ALAMEDA COUNTY v. COOK et al.

(Civ. 1931, 1932.)

(District Court of Appeal, First District, California. Nov. 22, 1916. Rehearing Denied by Supreme Court Jan. 19, 1917.)

1. Clerks of Courts 🔑35—Fees—Right to Retain—Statutes—Construction.

Under Pol. Code, § 4152, making the county clerk ex officio clerk of the superior court, and section 4232, fixing his salary at $4,000 per annum, and section 4290, providing that such salary should be in full for all services, and section 4292, requiring him to pay into the county treasury all fees allowed by law except where such fees or percentage thereof were allowed to him, where Act June 29, 1906, c. 3592, § 13, 34 Stat. 600 (U. S. Comp. St. Supp. 1911, p. 535) provided that the clerk collecting naturalization and immigration fees could retain one half thereof and account for the other half to the federal bureau, the clerk was not authorized to retain such fees personally, but the county could recover them.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 62; Dec. Dig. 🔑35.]

2. Clerks of Courts 🔑35—Fees—Right to Retain—Statutes—Construction.

The circumstance that Pol. Code, § 4233, fixing compensation of officers in Santa Clara county, at one time declared that the county clerk must pay into the treasury all fees received by him from whatever source derived, and that such section was amended by St. 1911, p. 1282, to read "including fees allowed by the government of the United States of America in all matters pertaining to the naturalization of aliens," was not an expression that every other county clerk could retain the naturalization fees for his own personal use.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 62; Dec. Dig. 🔑35.]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Alameda County against John P. Cook and the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Reed, Black, Nusbaumer & Bingaman, of Oakland, for appellants. W. H. L. Hynes, Dist. Atty., Walter J. Burpee, Chief Deputy Dist. Atty., and T. P. Wittschen, Deputy Dist. Atty., all of Oakland, for respondent. Leon Moss and F. A. Stephenson, both of Los Angeles, as amicus curiæ.

LENNON, P. J. These are appeals from judgments rendered in favor of the plaintiff upon the defendants' default in answering after their demurrers to the plaintiff's complaints had been disallowed, in two actions wherein the plaintiff prayed for judgment against the defendant Cook for the recovery of certain sums of money aggregating $5,854.50, collected by him as fees during his incumbency of the office of county clerk of the county of Alameda, and against the corporation defendant, as surety upon his official bond. One action was for the recovery of that part of the aggregate amount collected by said Cook during the years 1907 to 1911, and the other action was for the recovery of the balance of said aggregate sum collected by him during his term of office commencing in the year 1911. Both cases being between the same parties and involving identical questions of law and fact, the appeals were presented and argued together, and will therefore be discussed and decided as one.

The sums of money in suit were alleged to have been collected by the defendant Cook as county clerk of Alameda county, under an act of Congress which provided that the clerk of any court collecting such fees was authorized to retain one-half thereof, and that the remaining one-half should be accounted for quarterly to the federal bureau of immigration and naturalization. 34 Stat. 596, c. 3592; U. S. Comp. St. Supp. 1911, p. 535, § 13. It is conceded that the corporation defendant is liable upon its bond if it be held that the complaint states a cause of action against the defendant Cook; but it is the latter's contention that he was entitled as a matter of law to retain for his own use and benefit one-half of the fees provided for by the federal statute in question and which he collected under and by virtue of that statute in his official capacity as county clerk.

[1] We are satisfied that this contention cannot be sustained. A similar contention was made in the case of City and County,

etc., v. Mulcrevy, 15 Cal. App. 11, 113 Pac. 339; and in that case this court held that although the federal naturalization act authorized Mulcrevy as county clerk to retain, as against the government of the United States, one-half of the fees which he had received for services rendered in naturalization proceedings, the disposition of such fees did not concern the federal government, and that inasmuch as they were paid to and collected by Mulcrevy in his official capacity he was compelled to account for and pay the same into the treasury of the city and county of San Francisco pursuant to certain charter provisions under which he held and conducted his office, which provided that the salary allowed and paid to him should be in full compensation for all services rendered, and that he should pay into the city and county treasury all moneys coming into his hands as county clerk no matter from what source derived or received.

The Supreme Court of the United States, where the Mulcrevy Case ultimately went upon a writ of error, after a denial of a rehearing by the state Supreme Court, not only affirmed the judgment of this court, but incidentally answered the question now raised here adversely to the contention of the defendants, viz. that any construction of the federal statute denying to the county clerk the right to retain to his own use one-half of the fees collected by him, had no tendency to create antagonism between the state and its officers, and would not result in a conflict of law and authority between the state and the federal governments. In the course of its opinion the court in effect said that the federal statute did not purport to deal or interfere with the relation of the state and its officers, and that the disposition of fees collected under a federal statute by a state officer, after an accounting to the federal government for its proportion thereof, might very properly be covered and controlled by the law of the state without necessarily creating any antagonism between the state and its officers, nor any conflict between the federal and state statutes.

We are unable to perceive, as counsel for the defendants would have us do, any material distinction between the scope and effect of the charter provisions of San Francisco upon a construction of which rested the decision originally and finally rendered in the Mulcrevy Case, and the provisions of the statute law of the state which the plaintiff claims, and the court below held, compelled the defendant here to account for and pay into the county treasury of Alameda county the fees collected for services rendered by him, in his official capacity as county clerk, to the federal government in naturalization proceedings. While it is true that the decision in the Mulcrevy Case both by the Supreme Court of the United States and this court rested largely, and probably entirely, upon a consideration and construction of the particular provisions of the San Francisco charter, which prescribed that Mulcrevy's salary should be in full for all services rendered by him, and required him as county clerk to pay into the county treasury all moneys coming into his hands, as such officer, "no matter from what source derived or received," nevertheless the phrasing and purpose of those charter provisions were not in our judgment in effect peculiar to the municipal government of San Francisco, for analogous provisions are to be found in the statute law of the state prescribing the duties of county clerks throughout the state, providing for their compensation, and directing the disposition of fees collected by them in their official capacity. Those statutory provisions, it is conceded, were in operation either as a part of the former county government act, or as sections of the Political Code, at the time the defendant Cook received and retained the fees in suit. Thus the statute provided that the defendant as county clerk of Alameda county was ex officio clerk of the superior court of that county, and was required to perform the duties imposed upon him by law (Pol. Code, § 4152), and his salary as such county clerk and ex officio clerk of the superior court was fixed at $4,000 per annum (Pol. Code, § 4232), which was to be "in full compensation for all services of every kind and description" rendered by him either as county clerk or ex officio clerk of the superior court (Pol. Code, § 4290); and as such clerk he was required to charge and collect for the use of his county, and "pay into the county treasury on the first Monday in each month the fees now or hereafter allowed by law in all cases except where such fees or a percentage thereof" were allowed to him or were made a charge against the county (Pol. Code, § 4292). While these statutory provisions do not in so many words, as did the charter provisions involved in the Mulcrevy Case, direct that all fees, "no matter from what source derived or received," should be paid into the county treasury, nevertheless they did direct the defendant to collect and pay into the county treasury all fees "allowed by law," and this direction, we take it, is broad enough in its scope and effect to cover and control the disposition of all fees received by the defendant Cook in his official capacity regardless of the source from which they were derived.

That the fees received by county clerks under the federal statute in naturalization proceedings come within the category of fees "allowed by law" was definitely declared in the case of Freeholders, etc., v. Slater, 87 N. J. Law, 621, 90 Atl. 377, decided subsequent to the decision of the Supreme Court of the United States in the Mulcrevy Case, where it was held that inasmuch as the county clerk received such fees for services rendered in his official capacity as clerk of the court in which naturalization proceedings were had, he was required to pay them into the county treasury under a statute which provided that costs, allowances, percentages, and other perquisites of whatsoever kind which by law the county clerk may receive for any official acts or services rendered by him or his assistants, shall be for the sole use of the county. 4 Comp. St. N. J. 1910, p. 4643, § 38.

We are not unmindful of the several cases from other jurisdictions holding in effect that when rendering services in naturalization proceedings the county clerk is acting as the agent of the United States separate and apart from and without regard to his official relations to the state, and that therefore the disposition of the fees charged and collected under the federal statute in naturalization proceedings was no concern of the state. These cases, however, were all decided previous to the rendition of the opinion of the Supreme Court of the United States in the Mulcrevy Case, and therefore their effect as authorities upon the question presented here has been seriously impaired if not destroyed.

[2] The circumstance that section 4233 of the Political Code, which fixes the compensation of county officers of counties of the fourth class (Santa Clara), at one time declared that the county clerk of counties of that class must pay into the county treasury all fees received by him in his official capacity from whatever source derived, and that such section was amended in 1911 (Stats. 1911, p. 1282) to read "including fees allowed by the government of the United States of America in all matters pertaining to the naturalization of aliens," was not an expression of the legislative will that the county clerk of every other county in the state might retain fees collected in naturalization proceedings for his own personal use and benefit. The amendment to the section in question, although more precisely expressing the legislative will and intent as to the disposition of fees received in naturalization proceedings, did not as a matter of law add anything to the meaning of the section as originally enacted, nor consequently by inference restrict the scope of the statutory provisions relating to county clerks throughout the state couched in the same general language as that relating to the county clerk of Santa Clara before its amendment.

The two cases of Alameda County v. Dalton, 148 Cal. 246, 82 Pac. 1050, and Sacramento County v. Pfund, 165 Cal. 84, 130 Pac. 1041, have no application to the facts of the present case. In the former it was the claim of Dalton that he, as the county assessor, was entitled to retain to his own use a certain percentage of the amount of poll taxes collected yearly by him under the terms of a statute which plainly provided that he was "to retain for his own use" the percentage in controversy, but which was in irreconcilable conflict with an earlier statute which expressly provided that he should not receive any compensation for his services in collecting poll taxes. The Supreme Court decided that the latter statute prevailed, and that it expressly justified the retention by Dalton for his own personal use of 15 per cent. of the poll taxes collected by him for the state.

The case of Sacramento County v. Pfund, supra, involved the right of the county clerk of that county to retain to his own use a certain percentage of hunting licenses sold by him under the hunting license act, which provided that "for each license sold, registered and accounted for by any person except a fish and game commissioner, he shall be allowed as compensation out of the fish and game preservation fund 10 per cent. of the amount accounted for. Stats. 1909, p. 663. Construing this act the Supreme Court held that the phrase "any person" was designedly employed therein to differentiate the service of selling licenses from the duties ordinarily required of the county clerk in his official capacity, that is to say, that the selling of licenses was purely a personal service rendered by the clerk as an individual; and that such differentiation indicated with sufficient certainty the legislative intent to confer upon the county clerk the right to retain for his own use the percentage provided for by the statute.

Clearly the cases immediately under discussion are not in conflict with the Mulcrevy Case, and do not tend in any degree to support the claim of the defendant that he was entitled to retain the fees in controversy here for his personal use, if we are correct in our previously expressed interpretation of the intent and purpose of the provisions of section 216 of the county government act which were in force during the first term of the defendant Cook as county clerk, and continued in force during his second term in the form of section 4292 of the Political Code, and which required county officers to account for "the fees now or hereafter allowed by law except where such fees or a percentage thereof is allowed such officers. * * *"

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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32 Cal. App. 158

PEOPLE v. KNOX. (Cr. 354.)

(District Court of Appeal, Third District, California. Nov. 21, 1916.)

1. EMBEZZLEMENT ⚿10—GIST OF OFFENSE.

The essential gist of the crime of embezzlement is in the breach of trust reposed in the agent, employé, or bailee by his principal, employer, or bailor, so that the charge of embezzlement always presupposes the lawful acquisition, by the agent, employé, or bailee, of the possession of the property which has been misappropriated or wrongfully converted.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 8; Dec. Dig. ⚿10.]

2. LARCENY 🔑15(1)—DISTINCTION FROM EMBEZZLEMENT.

The essential distinction between the crime of embezzlement and that of grand larceny is that, in embezzlement, the original taking of the property is lawful, while in grand larceny the original taking involves a trespass, or is accompanied by a felonious intent to deprive the owner of the property taken.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 39, 40; Dec. Dig. 🔑15(1).]

3. LARCENY 🔑15(1) — ELEMENTS — LAWFUL POSSESSION BY DEFENDANT.

Defendant, in the automobile business, who borrowed money of the prosecuting witness, giving a bill of sale covering two automobiles as security, was not guilty of larceny in removing and selling one of the cars, where they were first kept in his garage for the prosecuting witness free of charge, but later an arrangement was made whereby the prosecuting witness hired a corner of the garage for a stipulated monthly rental, and moved his machines to that corner, whereby he became a bailee for hire.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 39, 40; Dec. Dig. 🔑15(1).]

Appeal from Superior Court, Napa County; R. H. Latimer, Judge.

E. J. Knox was convicted of grand larceny, and he appeals from the judgment and an order denying his motion for new trial. Judgment and order appealed from reversed.

E. S. Bell, of Napa, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant, having been convicted of the crime of grand larceny, appeals from the judgment and the order denying his motion for a new trial.

The information filed against the accused is in two counts; the first charging the crime of embezzlement in that he fraudulently converted to his own use an automobile, known as a "Krit roadster," the alleged property of one H. J. Beal, and in the second that he committed the crime of grand larceny in that he feloniously stole and carried away said automobile.

The point first called to our attention is that both counts of the information charge identically the same offense, viz. embezzlement, and that there is therefore no groundwork for the support of the verdict. This point, however, does not require consideration here, inasmuch as we have arrived at the conclusion that the evidence, as it is presented before us, shows that, if the defendant is guilty of any crime at all growing out of the transaction upon which this action against him is founded, it is that of embezzlement and not grand larceny.

Stating them as they were given at the trial by the prosecuting witness himself (H. J. Beal), the facts are substantially as follows: The transaction from which this prosecution arose was had between said H. J. Beal and the defendant on the 29th day of April, 1914. For a period of some four or five months prior to that time the parties named had been intimate acquaintances, both being members of the Methodist Church in the city of Napa. Beal was then engaged in the business of buying and selling real estate, and Knox was a dealer in automobiles, maintaining, in an alley or a small street in the rear of the Napa Hotel, a garage of rather limited capacity and used mainly for the storing of automobiles.

On the morning of the 29th day of April, 1914, the defendant called at the residence of Beal. The latter had just finished his morning meal when his doorbell rang. Upon opening the door, Beal saw the defendant, who stated that he had called for the purpose of securing from Beal, if he could, a loan of the sum of $475. Knox stated to Beal that he was about to obtain the agency in Napa of the Maxwell automobile, and that the company required, before vesting him with the powers of such agency, that he should deposit with it a sum of money as evidence "of good faith"; that the amount he needed for that purpose would be the sum of $475; that he would be able to return the money within a few days. Beal replied that, while he had no money to let out, nevertheless he was in a position and inclined to accommodate the defendant, and asked the latter what security he could give for the loan. Knox said that he could and would execute and deliver to Beal his promissory note for the amount, and as security therefor would execute and deliver to Beal a bill of sale of two automobiles owned by him—one a Maxwell and the other a "Krit" roadster. This proposition was satisfactory to Beal, who thereupon drew his check on the Bank of Napa for the sum of $475 in favor of Knox and delivered the same to the latter. Knox then delivered to Beal his promissory note for the sum mentioned, and at the same time delivered to him the bill of sale of the two cars above described. Beal did not take possession of the machines so pledged to him, but left them in the garage of the defendant, where they were at the time of the transaction mentioned. But it appears that either later on the same day upon which the loan in question was made, or the day following, Beal had heard that the defendant had not used the money borrowed by the accused for the specific purpose for which he represented to Beal that he wanted it, and thereupon and immediately called at the home of the defendant, and there, in the presence of the wife of the accused, told the latter what he had heard concerning the disposition that he (the defendant) had made of the money. Knox admitted to Beal that, in the place of putting the money up as deposit to secure the agency of the Maxwell Company, he had used it in paying off a balance or an amount due on the Maxwell car which, with the Krit roadster, he had pledged to Beal. The latter then declared that he did not approve of the conduct of the accused in so misrepresenting to him the use to which he intended to apply the money, and that he (Beal) desired therefore to take possession of the pledged property. Knox assented to this proposition, and thereupon the two men immediately proceeded to the garage or storeroom in which the two cars were kept, and on reaching the garage Beal said that he would, if agreeable to Knox, rent one corner of said storeroom in which he would store the machines, and asked Knox what rental he desired or would charge. The latter replied that, inasmuch as they were still personal friends, he would charge Beal nothing for the room occupied by the cars. Beal, however, said that he desired to pay for the use of the room, and thereupon it was agreed that he should and would pay therefor the sum of $2.50 per month. The two men then moved the cars to a particular corner in the garage. There they remained undisturbed for some three or four weeks, when Beal, after several other previous visits to the garage and finding the cars in the corner in which he and Knox had placed them, called at the garage and observed that the Maxwell car had been removed to a shed near and on the outside of the garage. Knox was at the garage at this time, and Beal asked him "what the Maxwell was doing under the shed," to which the defendant replied that he had sold it. "I asked him by what authority he removed it out of the barn," Beal continued to testify, "and he laughed and said: 'Beal, you don't care anything for either of these automobiles, for that matter; you have a good machine, and it is your money you want.' And he further told me that he had sold it to some party formerly—oh, I don't know—but that he had taken a mortgage on a house and lot in Vallejo as security for the Maxwell; he had sold it for $400." Beal further testified that nothing more was said or occurred by or between them on that occasion.

A few days after the conversation above recited—Beal fixed it at approximately a week from said time—the latter again visited the garage, and there met Knox and the party to whom the defendant had sold the Maxwell car. Beal testified that he passed "the time of day" with the party to whom Knox had sold the Maxwell, and that further than that nothing was at that time done or said. Beal further testified that, within about 30 days from the time that the defendant told him of selling the Maxwell, the accused paid him (Beal) the sum of $100 on the note referred to above.

In the month of October, 1914, the defendant (so it appears from Beal's testimony) moved his garage from the "barn" (Beal sometimes referred to it as a "barn") in the rear of the Napa Hotel to a small storeroom or building on Main street, between Pearl and First streets, in said city of Napa, where it remained for several months. Early in February, 1915, Beal missed the Krit roadster from the garage or storeroom of Knox. Shortly thereafter, Beal and Knox met at an automobile house in San Francisco. Beal on that occasion asked Knox what he had done with the Krit roadster, and in reply Knox stated that he had stored the machine in San Francisco, and that his purpose in taking it there was to sell it. Considerable talk went on between them about the Krit, Beal saying that Knox had no right to move the machine from Napa and no right or authority to sell it. Knox said that "I cared nothing at all for the machine, but it was the money I was after, that I wanted, and I told him that that worked one time, but it would not work twice."

It was shown by the witness Covington that he sold the Krit roadster to a party in San Francisco.

The above constitutes an accurate synoptical statement of the facts as testified to by Beal, the prosecuting witness, and it was undoubtedly upon his testimony that the jury founded their verdict, inasmuch as the record discloses no other testimony addressed to the question as to the possession of the pledged property or to the several transactions occurring between Beal and Knox relative to the said property.

Although brought out by the defense, there is another circumstance, the verity of which was in a measure admitted by the district attorney who prosecuted this case, and to which therefore we may properly advert, and it is: That during a portion of the year 1914, and after it had been pledged to Beal, the Krit machine was in the possession of Messrs. Bush & Haus, the owners of another garage in the city of Napa. Bush testified that Knox brought the Krit to his garage to have some repair work done on it, and that he said to Bush that, if he would make the repairs, he could, himself, use the machine whenever he desired to do so. On one occasion, Bush & Haus let it out to the district attorney, who was then making his canvass over Napa county for election to the office of district attorney. That official admitted at the trial that he hired the Krit from Bush & Haus at the time and for the purpose mentioned.

It is to our minds an unquestionable proposition that the facts as proved and above stated clearly disclose that, if the defendant is guilty of any crime growing out of the transaction between him and Beal, it is that of embezzlement.

[1, 2] The essential gist of the crime of embezzlement is in the breach of trust reposed in the agent, employé, or bailee, by his principal, employer, or bailor, and therefore the charge of embezzlement always presupposes the lawful acquisition by the agent, employé, or bailee of the possession of the property which has been misappropriated or wrongfully converted to the use of such agent, employé, or bailee. The essential distinction, then, between the crime of embezzlement and that of grand larceny, is that, in embezzle-

ment, the original taking of the property is lawful, while in grand larceny the original taking involves a trespass or is accompanied by a felonious intent to deprive the owner of the property so taken. In other words, "in the case of grand larceny, the taking must be with a felonious intent; * * * but in embezzlement the original taking is lawful, and the crime consists in the fraudulent appropriation of property by a person to whom it has been intrusted." People v. Dye, 29 Cal. App. 169, 179, 154 Pac. 875, 879; People v. Howard, 160 Pac. 697; People v. Tomlinson, 102 Cal. 19, 36 Pac. 506. Of course, when a person obtains property from the owner thereof with the latter's apparent consent, but so obtains it with the intention of stealing it, and carries out that intent, he is guilty of larceny; but this record affords absolutely no ground for the inference that the defendant obtained possession of the machines with the intent to steal them.

[3] The facts of this case, however, as we have detailed them herein, plainly speak for themselves, and therefore require no analytical examination to demonstrate that the one essential element of larceny, namely, the asportation or felonious taking of the property, in the first instance is clearly wanting. It is, however, vigorously argued that, while originally the pledged property was permitted by Beal to remain in the possession of the defendant, the property was subsequently taken from his possession by the act of Beal in "renting" for a stipulated monthly rental a small portion or corner of the garage in which they had always been kept and removing the machines to the corner so rented for storage. We are unable to view the situation as the record here presents it in that light. We cannot see how it can truly be said that Knox was any the less intrusted with the machines after they were removed to a particular corner of the garage of which he had exclusive control than he was before they were so removed. He had used and was using the building or garage at the time of his transaction with Beal as a room in which to store automobiles. That he had the possession of the building at all times is not questioned. Necessarily, therefore, he had possession of its contents, whatever they were or by whomsoever they were owned, and was responsible for the safe-keeping of all property deposited or left therein for that purpose. The fact that in the first instance he was a mere gratuitous or voluntary bailee, and subsequently became a bailee for hire, cannot, of course, change the situation. He still held the property in trust for Beal. Let it be supposed, as a matter of illustration, that Beal, after receiving the bill of sale from Knox, had taken actual possession of the machines, and had removed and placed them for safe-keeping or storage in the garage of Bush & Haus, agreeing to pay the latter for the service so rendered a certain monthly rental, and that Bush & Haus had, without authority, sold the machines and pocketed the proceeds of the sale. In such case, would it be doubted for a moment that Bush & Haus had thus obtained lawful possession of the machines, and so would be guilty of embezzlement and not of grand larceny? The case presented against the defendant here is no different in any particular from the supposititious case above stated.

That the defendant not only openly exercised possessory dominion over the pledged property, but even exercised acts of unqualified ownership of a part thereof, and this with the knowledge and tacit consent of Beal, is indisputably shown by the proofs. He removed the Maxwell machine from the garage to a shed situated near the garage, where it was seen by Beal, who was told by the defendant that he (the defendant) had sold it. Beal made no serious protest against this act of the defendant; he merely asked the accused by what authority he had removed the Maxwell to the shed and sold it. Beal subsequently saw the purchaser of the machine at the defendant's garage. He merely "passed the time of day with him," but said nothing about his interest in the Maxwell, nor did he then question the defendant's right to sell it. However, the decision of the case must, obviously, rest entirely upon the solution of the question whether the defendant, at the time he disposed of the pledged property, did or did not have lawful possession of the said property. We repeat that, to our minds, there is no escape from the conclusion that the evidence unquestionably shows that he did have such possession, and that, consequently, the verdict adjudging him guilty of grand larceny is wholly without support.

The judgment and the order appealed from are, accordingly, reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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32 Cal. App. 171

EDWARD BARRON ESTATE CO. v. WATERMAN et al. (Civ. 1807.)

(District Court of Appeal, First District, California. Nov. 23, 1916. Rehearing Denied Dec. 23, 1916. Denied by Supreme Court Jan. 22, 1917.)

1. LANDLORD AND TENANT ⚷37—CONSTRUCTION OF LEASE—STATUTES.

Under Civ. Code, §§ 1641, 1643, 1644, 1649, and Code Civ. Proc. § 1864, prescribing rules of construction of contracts, the scope, purpose, and effect of a lease must be determined from a consideration of it as a whole, rather than by resort to any individual clause; it must be given such an interpretation as will make it effective in conformity with the intention of the parties. If its terms are in any way ambiguous or uncertain, it must be interpreted in the sense in which the lessee believed, at the time of making it, that the lessor understood it. If different constructions of its clauses may be otherwise equally proper, that construction must be given which will be most favorable to the party in whose favor the clauses in controversy were made; and the words used must be taken and applied in their usual and ordinary sense.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 98; Dec. Dig. ⚷37.]

2. LANDLORD AND TENANT ⚷71—TERM OF LEASE—OPTION OF LESSEES—"REBATED"—"ENTITLED."

A lease granted premises to defendants for five years, commencing the 15th day of January, 1909, and ending on the 14th day of January, 1914, but provided that in case the premises should not be ready for occupancy by January 15, 1909, the rent reserved should abate and not be payable until the premises were ready for occupancy, that the failure to have the premises ready should not be a cause for vacating the lease, nor should the lessees be entitled to any damage, rebate, or recoupment, except the rent expressly agreed upon, but that the term of the lease should be extended so that the lessee should be entitled to occupancy for the full term of five years from the date when the premises should be ready for occupancy. *Held*, that the extension provision of the lease was intended for the benefit of the lessees rather than the lessor, so that, although the premises were not ready for occupancy until April 1, 1909, when the lessees entered, they were not required to hold possession, or liable for rent, after January 14, 1914, "rebated" having been used in its ordinary meaning of to deduct from and "entitled" having been employed to mean to give the right to demand or receive, being diametrically opposed to the idea of imposition of an obligation.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 217; Dec. Dig. ⚷71.

For other definitions, see Words and Phrases, First and Second Series, Entitle; Rebate.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Edward Barron Estate Company, a corporation, against W. M. Waterman and Marcus Levy, copartners doing business under the firm name of Waterman & Levy. From a judgment for defendants, plaintiff appeals. Judgment affirmed.

Rehearing denied by Supreme Court; Shaw, Sloss, and Lawlor, JJ., dissenting.

Lilienthal, McKinstry & Raymond, of San Francisco, for appellant. Theodore L. Breslauer, of San Francisco, for respondents.

LENNON, P. J. This is an action for rent; and the only point presented in support of the plaintiff's appeal from the judgment entered in favor of the defendants involves the construction of certain clauses of a lease executed by the M. Fisher Company to the defendants on December 12, 1908, of certain premises in a building which was then in course of construction. Although the lease at the outset granted the demised premises to the defendants "for the period of five years commencing on the 15th day of January, 1909, and ending on the 14th day of January, 1914, at the monthly rental of $250," nevertheless a subsequent clause of the lease provided that:

"In case the demised premises shall not be finished and ready for occupancy by the 15th day of January, 1909, the rent hereinbefore reserved shall abate and shall not be payable until said demised premises are ready for occupancy; but it is expressly understood that the failure to have said demised premises ready for occupancy by the 15th day of January, 1909, shall not be a cause for vacating, annulling or rescinding this lease, nor shall the lessees by reason thereof be entitled to any damage, rebate or recoupment except the rent hereinbefore expressly provided and agreed upon; but in that event the term of this lease shall be extended so that the lessee shall be entitled hereunder to the occupancy of the leased premises for the full term and period of five years from and after the date when said premises shall be ready for occupancy."

The demised premises were not made ready for occupancy until April 1, 1909, at which time the defendants entered into possession of the premises and remained therein under the terms of the lease until January 14, 1914. In the month of May, 1911, the lessor, M. Fisher Company, conveyed its interest in the lot of ground upon which was situate the building in which the demised premises were located, together with its interest in the lease, to the plaintiff. The defendants paid the stipulated rent for the full time that they actually occupied the premises, but after they had vacated the same the plaintiff made demand upon them for the payment of rent from January 15 to April 1, 1914. This demand, which was refused, was predicated upon the theory that the lease obligated the defendants to occupy or pay rent for the demised premises for a full term of five years from April 1, 1909, the date of the actual occupancy of the premises.

[1] The scope, purpose, and effect of the lease, of course, must be determined from a consideration of it as a whole rather than by a resort to any individual clause thereof. Civ. Code, § 1641. So construed, the lease must be given such an interpretation as will make it effective in conformity with the intention of the parties (Civ. Code, § 1643); and if its terms are in any way ambiguous or uncertain, it must be interpreted in the sense in which the lessee believed at the time of making it that the lessor understood it (Civ. Code, § 1649); and if different constructions of its clauses may be otherwise equally proper, that construction must be given which will be most favorable to the party in whose favor the clauses in controversy were made (Code Civ. Proc. § 1864). Furthermore, the words of a contract, save in certain excepted cases not involved here, must be taken and applied in their usual and ordinary sense. Civ. Code, § 1644. The word "rebated" was doubtless used in the ordinary sense. Ordinarily, says Webster, "to rebate" means "to deduct from." The word "entitled" evidently was likewise employed in the lease, and is generally and ordinarily understood to mean to give "the right to demand or receive, * * * to furnish with good grounds of

seeking," and, as thus defined, has been judicially declared to be opposed diametrically to the idea of the imposition of an obligation. 15 Cyc. 1085; 11 Am. & Eng. Ency. of Law, 50; People's Trust Co. v. Smith (Sup.) 30 N. Y. Supp. 342.

[2] Tested by the foregoing statutory rules for the ascertainment of the intent of the parties to a contract (Civ. Code, § 1637), we have no doubt but that the trial court correctly concluded that the lease in controversy was sufficiently certain in its designation of the commencement and termination of the leasehold term, and also in its expression of the intent of the parties not to extend such term beyond January 14, 1914, save at the option of the lessees. In other words, the lease, in our opinion, was fairly construed by the trial court to mean that, although the leasehold interest was to take effect on January 15, 1909, nevertheless if the lessor's delay in completing the demised premises operated to deprive the lessees of the use and occupation thereof on and after the date designated for the commencement of the term, then and in that event the rent was to be rebated, that is to say, proportionately deducted for the time that the occupancy by the lessees was delayed through the noncompletion of the building; and the term of the lease, if the lessees so desired, extended for the full period of five years from the date when said premises were ready for occupancy. We think it plain that the extension provision of the lease was intended for the benefit of the lessees rather than the lessor, and, if so, must be construed as giving them the privilege of remaining in possession of the premises for the full term of five years from the date of their entry, while not imposing upon them the obligation to remain longer than the term designated in the leases by dates. The defendants, not having exercised the option granted to them for an extension of the leasehold term, were under no obligation to retain the demised premises beyond the date definitely designated in the lease for the termination of the occupancy, and consequently were not obligated to the plaintiffs for the rent claimed to have accrued subsequent to that time.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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32 Cal. App. 139

SILVA v. NORTHERN CALIFORNIA POWER CO. (Civ. 1562.)

(District Court of Appeal, Third District, California. Nov. 17, 1916. Rehearing Denied by Supreme Court, Jan. 15, 1917.)

1. ELECTRICITY 🔑19(3) — ACTION FOR LOSS BY FIRE—BURDEN OF PROOF.

Where plaintiff suffered loss by fire which evidence shows started at a point on electric wires owned by defendant which in the ordinary course of events would not have happened if defendant had used proper care, under the doctrine of res ipsa loquitur, a prima facie case of negligence by defendant was shown, and the burden of excusing such negligence was upon defendant.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. 🔑19(3).]

2. EVIDENCE 🔑219(1)—ADMISSIBILITY—FABRICATING EVIDENCE.

Evidence, showing that electric wires produced in court by defendant were not the ones in use at time of plaintiff's loss by fire, claimed to have been caused from defendant's wires, was admissible not as res gestæ, but in the nature of an admission that defendant had no defense except by fabricating evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 762, 765, 766, 770; Dec. Dig. 🔑219(1).]

3. TRIAL 🔑252(7)—ACTION FOR LOSS BY FIRE—INSTRUCTIONS — CONFORMITY TO EVIDENCE.

Defendant's requested instruction that "defendant cannot be held liable for any defective wiring in the tankhouse" was properly refused, where there was no evidence to show that such wiring was defective; the claim being that plaintiff's loss by fire was caused from defects outside the house.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 602; Dec. Dig. 🔑252(7).]

4. ELECTRICITY 🔑19(13) — ACTION FOR LOSS BY FIRE—INSTRUCTIONS.

In an action for loss by fire caused from defendant's electric wires, instructions *held* sufficient.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. 🔑19(13).]

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by M. G. Silva against the Northern California Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Freeman, of Willow, for appellant.
J. R. Robinson, for respondent.

CHIPMAN, P. J. The action is for damages occasioned by the alleged negligence of defendant in delivering electricity to plaintiff's tankhouse, resulting in the destruction of the latter by fire. The cause was tried by a jury, and plaintiff had the verdict for $500. Judgment was accordingly entered, from which defendant appeals on bill of exceptions.

The negligence complained of consisted in want of proper care in the delivery of electricity to plaintiff's motor placed in said tankhouse. Paragraphs 3 and 4 of the amended complaint set forth the following facts:

"That at a time prior to the destruction of said tankhouse by fire as hereinafter stated, and at the request of plaintiff, and for the purpose of supplying and selling to plaintiff electricity to propel said motor, defendant erected, placed, and installed the necessary wiring, appliances, and apparatus for the purpose of conveying an electric current from its said power line to said motor in said tankhouse. That said wiring, appliances, and apparatus as so installed extended from one of the poles of said power line on said land near said tankhouse to the said motor in said tankhouse, and included a transformer placed by defendant on said pole and connected with said wires for the purpose of reducing the current of electricity that should be conveyed to said tankhouse, and that from said transformer, the said wires as so installed extended to said tankhouse, where they entered the same through holes in the wall thereof made by defendant for said purpose and at an elevation of about 18 feet from the ground, and that they ran thence along and down the inner wall of said tankhouse to an electric meter, which was at all times herein mentioned owned by, and under the supervision and control of, defendant, and used by it to measure the electricity used by plaintiff for his said purposes, and which meter was situated on the inner wall of said tankhouse near said motor. That from said meter said wires ran to a switchboard on said inner wall near said motor, and were thence connected with said motor. That all said appliances, wires, and apparatus were installed by defendant as above stated. That thereafter, and until the fire hereinafter referred to, plaintiff purchased of defendant, and defendant sold to plaintiff, electricity for his said purposes, and which was delivered and conducted over and through said wiring and appliances as so installed.

"And plaintiff alleges that the wires, appliances, and apparatus herein referred to connected with and extending from said power line to the place where said wires entered said tankhouse as above stated, and used by defendant to supply plaintiff with electricity as above stated, were at all times herein mentioned owned by, and under the supervision and control of, defendant, and that prior to and at the time of the fire hereinafter referred to, defendant negligently and carelessly allowed the same to be and remain, and by reason of said negligence they became, and were, in such condition as to admit a dangerous amount or voltage of electricity to said wires in said tankhouse, and thereby to render them dangerous and unsafe with respect to causing fire to said tankhouse.

"And plaintiff alleges that by reason of said negligence and carelessness, and on or about the 15th day of January, 1915, the electric current conveyed by said wires at said tankhouse caused the said structure to ignite and take fire at or about the place where said wires entered said structure, and that the said tankhouse, together with its contents, including said pump and motor, were burned and entirely destroyed by said fire."

A general and special demurrer was overruled, and defendant answered: Admitted wiring plaintiff's tankhouse as alleged, but denied that defendant had any control over the same; alleged that it did have control over the wires leading from the transformer to a point within a few inches of the tankhouse, but denied that it had any control or was under any duty to keep in repair any wires beyond said point or in said tankhouse; admitted ownership of the meters in the tankhouse, but alleged that these were properly installed and were safe; denied that the wires which defendant did control were dangerous or unsafe in any respect, and denied any responsibility for the fire.

At the close of plaintiff's evidence a motion for nonsuit was made and denied. The correctness of the ruling is not made the subject of discussion, for the reason that evidence on the part of both plaintiff and defendant was admitted after the motion was denied. The rule is that if all the evidence given by both parties supports the verdict, the order denying the motion for nonsuit will not be disturbed. Van Horn v. Pacific Refining, etc., Co., 27 Cal. App. 105, 111, 148 Pac. 951.

Plaintiff lived upon a farm a short distance from the city of Chico, Butte county. His residence was about 45 feet from the tankhouse. Defendant, about 2½ years before the fire, had built a power line over plaintiff's land, carrying 6,600 volts of electricity. One of the poles of this line was 169 feet from the tankhouse, and on this pole was installed a transformer designed to reduce the current passing into the tankhouse to 220 volts, admittedly the proper quantity for the purpose of operating plaintiff's motor. The wires from the transformer to the tankhouse entered the latter through the shingled wall at a height of 22 feet from the ground, and just below the floor on which the tank rested; these wires crossed the tankhouse under this floor to the opposite wall and ran down that wall to meters and thence to the motor. Between the meters and motor was a switch for controlling the current passing into the motor, and there was also a switch above the meter. All the wires and appliances for operating the motor were installed by defendant. The meters were owned by defendant, and were used to measure the electricity sold by defendant to plaintiff. The wires from the transformer to the house were owned by defendant, but the wires inside the house were paid for by plaintiff. He testified that he did not know they belonged to him until he heard it so stated after the fire occurred. Whether his or defendant's is perhaps not important, for they were used by defendant to supply the current, and there was no evidence that there was anything wrong with the inside wires. About a year before the fire the transformer burned out, and the fire consumed the pole. The pole and transformer and the wires to the tankhouse were replaced at that time. The day before the fire something went wrong with the motor, and plaintiff telephoned to defendant. An electrician was sent out by defendant on the day of the fire. Plaintiff testified:

> "He came out and tested the fuse, put on some more fuses, throwed the switch, the fuse blowed right out, and he put on some more fuses, and then he said the motor was burned out; he told me I would have to bring it in, and he left for town. * * * When he went away he left the fuses he had put back. He put in the first fuses, and they blowed out; then he put in some more fuses and he left."

It appeared that no other change took place inside the tankhouse that day and at 9:30 that night the tankhouse fire occurred.

Referring to the wires in the building, plaintiff testified:

> "Those wires were in the same condition they were at the time they were put in—at the time they were put in by the defendant. They have

never been changed nor moved. The building has never been repaired, nor has any part of it."

Of the wires going from the transformer to the building, he testified:

> "As those wires come from the pole to the building, they go right straight from the pole to the building. They are fastened on the outside of the building, right there on the side. I think they are fastened above the holes that they go through. They are fastened to some hooks. The wires that come from the pole go directly to those hooks, and are fastened to the hooks. Then the wires that go through the building are connected onto those wires, and they sag down a little and go into the building. It is a different wire that goes into the building from the wire that extends from the pole to the tankhouse. The wire that goes through the hole in the building is fastened to those wires that extend from the pole."

The witnesses to the fire all agree that it started outside of the building and at the point on the outside and next to the building where the defendant's wires were connected with the wires running into the building. Plaintiff testified that his attention and that of his wife was called to the fire by his daughter when the fire started, and the blaze was right at the junction of these wires next to the tankhouse; that he ran to the tankhouse and went in and took out one or two articles; that while in the building he looked up to where the wires entered, and there was no fire inside.

Mrs. Silva's testimony, as well as that of neighbors attracted to the fire, was corroborative of plaintiff's testimony. It appeared that in the installation of the plant by defendant the wires running from the transformer to the building were hung on a hook screwed into the building and connected with the inside wires two or three inches from the building. At this point insulators and what were called circuit breakers were on defendant's wires. Witness Wright arrived at the tankhouse shortly after the fire started. He testified:

> "The fire was burning around the wires at the place where the wires went into the tankhouse. * * * Q. Could you state whether or not all of the insulation was burned off at the end of those wires for 2 or 3 feet back from the end of the wires? A. I think it was all burned off before they fell."

The office intended to be performed by these circuit breakers and insulaters on defendant's wires at the point of connection with the wires going inside was to control the current or prevent its doing damage in passing into the building.

It further appeared that after the wires fell to the ground, the ends were brought together and caused a spark, showing that the current was then passing from the transformer over these wires. It appeared that the wires were insulated where they passed through the walls of the building and were at the time in place and, so far as known, in good condition. And the evidence was that the fire did not start elsewhere than on the outside and at the point of connection as already explained. The evidence was that the fire could not have been caused by any agency other than the electricity passing from the transformer.

[1] And as the fire started at a point on the wires admittedly owned by and in the control of defendant, we think sufficient was shown to make a prima facie case of negligence on the part of defendant and to cast upon defendant the burden of excusing its negligence.

We had occasion to examine somewhat fully into the doctrine of res ipsa loquitur in the case of Hill v. Pacific Gas & Electric Co., 22 Cal. App. 788, 136 Pac. 492, and we there held the rule inapplicable to the electric company for the reason that as to that company the evidence did not measure up to the requirements of the rule which is as stated in Judson v. Giant Powder Co., 107 Cal. 549, 556, 40 Pac. 1020, 1021 (29 L. R. A. 718, 48 Am. St. Rep. 146):

> "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care."

Defendant's position is a denial that the rule res ipsa loquitur has any application to the case, and that it was "essential for plaintiff to show from the record by his complaint and sustaining evidence that defendant was under an obligation with plaintiff to maintain the wires and apparatus under its contract in such condition as not to deliver to plaintiff a dangerous amount or voltage of electricity, and that it did deliver such dangerous amount or voltage to plaintiff's intended and known purposes, and that the damage complained of resulted from such delivery." We cannot accede to this view of plaintiff's duty. Having shown that the fire occurred under the circumstances and from causes hereinabove pointed out, a prima facie case of negligence was made out, and shifted the burden upon defendant of showing that defendant was not negligent. Defendant in fact undertook to show that it was not negligent. It introduced two witnesses, defendant's linemen, who testified that they were at the tankhouse the morning after the fire, and tested the transformers and found them in good condition; that they took the three service wires from the pole lying upon the ground and carried them to defendant's office and locked them up, where they remained in their then condition until produced at the trial and were introduced as exhibits; that "each of the three wires put in evidence as defendant's exhibits has on the end, alleged by defendant's witnesses to have been attached to the tankhouse, a loop, which is claimed by defendant to have been attached to an iron screw hook five inches long, and screwed into the wall of the tankhouse. On each wire from this loop * * * is a porcelain knob or ball called a 'circuit breaker' or 'insulator,'" the purpose of which was to keep the voltage away from the building; that these knobs were still on the end of the wires; and that no insulators had burned off except on that part of the wires that entered the building carrying the current. This evidence was put forward to establish the theory that the fire started in the wall of the building from the wires over which defendant had no control. The presence of the unburned knobs at the end of the wires leading from the transformers showed, it is urged, that the fire was not caused by defective appliances belonging to defendant. These same witnesses also testified to testing the transformers and finding them in safe condition. Witnesses for plaintiff who were at the fire were very positive in their testimony that the appliances used to safeguard the electricity passing into the building at the point of junction of the wires were all burned off the wires coming from the transformers, and that when the wires fell, there were no knobs or anything else on them, but that the wires back for some distance and the insulators on them were burnt off before the wires fell. These witnesses were shown the exhibited wires, and testified that they were not the wires that fell from the building, one witness testifying that if they were they had been repaired. Plaintiff testified:

> "When the wires fell, there was simply a straight wire; there was no knob on the end of the wire. They burned through and broke beyond the circuit breaker, in the part where the current was passing through to the building. I am sure that when those wires fell at my place, and when Osborne picked them up there was no circuit breaker attached to the ends of the wires. The fire was burning fully 20 minutes around these wires before they came down, that was the center of the blaze when it started. The end of these wires—the end of that circuit breaker was right in the fire."

[2] There was testimony which, if believed by the jury, justified them in finding that the fire occurred as claimed by plaintiff, and it also had a tendency to discredit the testimony of defendant's witnesses upon a very important fact advanced by defendant in explanation of the accident, and would also justify the jury in looking with disfavor upon other testimony of these witnesses.

> "It is laid down as a well-settled rule that all efforts by either party to a suit, directly or indirectly, to destroy, fabricate, or suppress evidence may be shown, not as a part of the res gestæ, but in the nature of an admission that the party has no sufficient case unless aided by suppressing evidence, or by the fabrication of more evidence." Jones on Evidence, vol. 1, § 22a.

The fabrication of evidence is calculated to raise a presumption against the party who has recourse to such practice, not less than when evidence has been suppressed or withheld. It was for the jury to determine in what light defendant's testimony was to be considered.

There was testimony submitted by defendant tending to show that the burned-out condition of the motor might have caused a short circuit, the effect of which would be the blowing out of the fuse in the tankhouse. It is suggested as defendant's theory that "the fire may have started because the insulators were affected by the burned-out motor and the resultant short circuit." This is mere conjecture. There was no evidence that such effect would follow. In reply it may be said that the appliances used by defendant to control the current are intended to withstand the burning out of a motor, which latter is not an uncommon occurrence, as the evidence showed. There was testimony submitted by plaintiff that failure to keep the necessary quantity of oil in the transformer would sometimes cause it to burn out, or cause a short circuit, which for the time would increase the voltage on the wires running from the transformer.

Defendant failed to acquit itself of negligence by evidence overcoming the prima facie case made by plaintiff. The defense seems to rest primarily upon plaintiff's failure to show facts sufficient to call for any explanation by defendant. This, we think, is based upon a misconception of the rule applicable to the case as developed by the evidence.

[3] The court gave a number of instructions at the request of the defendant and on its own motion. At the close of defendant's instructions the court refused the following:

> "You are instructed that under the issues presented in this case the defendant cannot be held liable in any way for any defective wiring in said tankhouse, if any existed."

There was no evidence tending to show that the wiring within the tankhouse was defective. The evidence was that this wiring was done by defendant; that it served its purpose perfectly and was in as good condition when the fire occurred as when put in place. The burning out of the motor was from some inherent defect, and in no wise related to the wiring, and it was not claimed that defective wiring within the building caused the fire. The evidence as to the cause of the fire centered around the insulators or circuit breakers in defendant's control where the fire first occurred. We cannot see that the instruction, given in its concrete form would have been of any service to defendant. Besides, instruction 9, given at defendant's request, seems to have been sufficient upon the point, for in all probability it was an excessive voltage passing from the transformer, for the moment, and not defective wiring that caused the accident. Instruction 9 was as follows:

> "I instruct you that while the law required of the defendant that it should use ordinary care to see that an unnecessarily dangerous amount of electricity, with respect to causing fires, was not permitted to enter upon the wires in said building of plaintiff, yet this does not make of the defendant an insurer. It only required of the defendant that it should exercise ordinary

> care; that is, such a degree of care as an ordinarily prudent man under like circumstances would exercise, and if you find from the evidence that the defendant did exercise such ordinary and reasonable care to see that a dangerous and unnecessary amount of electricity, with respect to causing fires, did not enter upon the said wires in the said tankhouse, then, notwithstanding the fact that a fire did result from such electricity, if you should so find, then it will be your duty to find a verdict for defendant."

Defendant was further safeguarded by instruction 7, given at its request, as follows:

> "If you find that the said fire that destroyed said tankhouse was actually caused by reason of the wires, appliances, and apparatus of defendant being in such condition as to allow a dangerous and unsafe amount or voltage of electricity into the wires in said tankhouse, still the defendant is not liable in damages to plaintiff, and you cannot find a verdict against defendant, unless you also find that the defendant failed to use due and ordinary care to prevent such condition."

It is claimed that:

> Instruction No. 21 "is confusing, inaccurate, and prejudicial, because it makes no distinction at all between the defendant's service wires and the plaintiff's wires, and predicates defendant's liability upon both wires, whereas the complaint predicates defendant's liability upon only its negligence and carelessness in allowing 'the wires, appliances, and apparatus herein referred to connected with and extending from said power line to the place where said wires entered said tankhouse, as above stated, and used by defendant to supply plaintiff with electricity as above stated' (quoted from the complaint), to be and remain in such condition as to admit a dangerous amount of voltage to said wires in said tankhouse, and to thereby render them (the wires in the tankhouse) unsafe with respect to causing fire to said tankhouse."

The point of the objection arises out of a reference in the instruction to the wires within the building, whereas it is claimed that the complaint is founded, and other instructions also, on the theory that the alleged negligence consisted in defendant's failure to exercise care to keep the wires and apparatus which were under its control in a safe condition. Instruction No. 20 was as follows:

> "If the jury believe from the evidence that at the time and place claimed by plaintiff and mentioned in the proof, the wires, appliances, and apparatus referred to in this action extended from defendant's power line to the place where said wires entered the tankhouse of plaintiff, and that said wires were used by defendant to supply plaintiff with electricity, and that at said time and place mentioned in the proof were under the supervision and control of defendant, then it was the duty of the defendant, through and by its employés in charge of and in control of said wires, appliances, and apparatus, to use and exercise ordinary care to operate and control same, and to reasonably control and regulate a reasonably safe amount of electricity to pass through said wires, apparatus, and appliances, and to do so in a reasonably safe manner for the reasonable protection of plaintiff's building and property from fire."

In instruction No. 21 the jury were told that if they find that plaintiff exercised reasonable care in operating his motor and pump, and if they find that at said time—

> "the wires, appliances, and apparatus mentioned in the proof extended from said power line and entered the said tankhouse, and were at said time and place under the supervision and control of defendant, and that defendant failed to exercise ordinary care to keep said wires, appliances, and apparatus in reasonably safe condition, and failed to reasonably regulate the amount of electricity passing through said wires into plaintiff's said pumphouse," etc.

Defendant could not have been prejudiced by this instruction for the reason that there was no evidence that the wires within the building were defective, or that the fire was caused by any condition existing in the building through defendant's or plaintiff's negligence.

[4] The instructions given by the court very clearly left with the jury the question whether or not the fire occurred at a point where defendant had control of the wires and appliances, and whether or not defendant was guilty of negligence in conveying the electricity by means of these wires and appliances to the tankhouse. Instruction 7, above quoted, and instruction 11, given at defendant's request, show that this was the dominant question submitted to the jury, and properly so. Instruction 11 was as follows:

> "If defendant used ordinary care and was not guilty of carelessness or negligence, and did not carelessly or negligently allow the wires, appliances, or apparatus, as the same are described in the amended complaint, to become in such condition as to admit a dangerous amount or voltage of electricity to said wires in said tankhouse and thereby to render them unsafe or dangerous with respect to causing fire to said tankhouse, you cannot find for plaintiff and against defendant."

We do not think the instructions were either confusing or prejudicial, but that the issues arising out of the evidence, as well as the pleadings, were submitted upon instructions which fairly gave the law to the jury.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

32 Cal. App. 189

CLAY et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 2164.)

(District Court of Appeal, Second District, California. Nov. 25, 1916.)

1. Justices of the Peace 🔑159(9)—Appeal Bond—Recitals—Date of Judgment.

The erroneous recital of the date of the judgment, in an undertaking on appeal from a justice of the peace, is immaterial, where the notice of appeal was correct, and the undertaking was given in aid of that appeal.

[Ed. Note.—For other cases, see Justices of the Peace, **Cent. Dig.** §§ 565–569; **Dec. Dig.** 🔑159(9).]

2. Justices of the Peace 🔑159(10) — Appeal Bond—Time for Filing—Justification of New Sureties.

Under Code Civ. Proc. § 978a, requiring the undertaking on appeal to be filed within five days after notice, and providing that if the adverse party excepts to the sufficiency of the sureties, and unless five days thereafter, on notice to the adverse party, they or other sureties justify, the appeal must be regarded as if no undertaking had been given, an undertaking is in time if filed within five days after the exceptions to the sureties with new sureties who justified, though it is filed more than five days after the notice of appeal, and though an entirely new undertaking on which the sureties had not justified, filed without notice of justification given to the appellee would be insufficient.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 557–561, 570–572; Dec. Dig. 🔑159(10).]

3. **Justices of the Peace 🔑159(10) — Appeal Bond — Time for Filing — New Undertaking.**

The fact that the undertaking on appeal from a justice of the peace was rewritten, and signed again by one of the former sureties and a new surety, does not make it a new undertaking within Code Civ. Proc. § 978a, fixing the time for filing undertakings on appeals.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 557–561, 570–572; Dec. Dig. 🔑159(10).]

4. **Justices of the Peace 🔑159(9)—Appeal Bond—Stay of Execution.**

An undertaking for a stay of execution of a justice's judgment, though written in the same document as the undertaking for appeal, is a separate undertaking, and the inclusion thereof in the second undertaking filed with justification of new sureties does not make the undertaking on appeal a new undertaking nor does its insufficiency to stay execution because of erroneous recitals affect the validity of the undertaking on appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 565–569; Dec. Dig. 🔑159(9).]

5. **Justices of the Peace 🔑163 — Undertaking to Stay Execution—Recitals as to Judgment — Recovery of Personal Property.**

An undertaking to stay execution of a justice's judgment for the recovery of possession of personal property with an alternative recovery of money, which refers to the judgment as an ordinary money judgment, is insufficient to stay the execution unde Code Civ. Proc. § 978.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 606; Dec. Dig. 🔑163.]

6. **Justices of the Peace 🔑159(9)—Appeal Bond—Sureties—Variance in Name.**

The fact that, in the second undertaking on appeal from a justice's judgment with justification of sureties, one surety was referred to in the body and on the justice's docket by his initials, though he signed and justified by his full name, does not invalidate the undertaking since the record sufficiently establishes the fact that the justification shown by the docket, was by the same sureties who signed the undertaking.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 565–569; Dec. Dig. 🔑159(9).]

7. **Justices of the Peace 🔑159(6)—Appeal Bond — Justification of Sureties — Absence of Appellee.**

Where the adverse party was notified of the justification of sureties on an undertaking on appeal from a justice of the peace, his failure to be present did not affect the justification, but merely waived his right to require further justification by the sureties.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 555; Dec. Dig. 🔑159(6).]

Application for mandamus by C. H. Clay and others, copartners, doing business under the name of Sterling Laundry, against the Superior Court of Los Angeles County and J. W. Curtis, Judge. Peremptory writ issued.

W. J. Hittson and John S. Cooper, both of Los Angeles, for petitioners. Albert G. Payne, for respondents.

CONREY, P. J. On prayer of the petitioners an alternative writ of mandamus was issued requiring the superior court to make an order vacating an order dismissing an appeal from a justice's court, in an action to recover possession of certain personal property, and to proceed with the trial of that case, or to show cause why the same has not been done. Return having been duly made by the respondent, we are now required to determine whether the superior court was authorized to dismiss said appeal.

The petitioners were defendants in an action in the justice's court of Los Angeles township, in the county of Los Angeles, wherein Anna Lange was plaintiff. On June 23, 1916, the case came on for trial in that court, resulting in a judgment rendered on June 26, 1916, in favor of the plaintiff for possession of the described personal property, or $199.15, the value thereof, and $8.90 costs. On July 3, 1916, the defendants filed a notice of appeal and an undertaking, the sureties whereon were John J. Hutchinson and Wm. E. Shaw. On July 6th, the plaintiff duly served and filed an exception to the sufficiency of the sureties, and thereafter the defendants filed and served notice of justification of sureties to be had on July 10th. The docket of the justice shows, under date July 10th: "Sureties sworn, J. J. Hutchinson, W. G. McGehee; submitted." Also, that on July 25th the sureties were approved and the papers in the case transmitted to the clerk of the superior court. The transmitted papers include the undertaking which was filed in the justice's court on July 3d, and also an undertaking filed in the justice's court on July 10th; the sureties on this undertaking being John J. Hutchinson and W. B. McGehee.

[1] The recitals of the new undertaking refer to the judgment as having been given and entered on the 28th day of June, 1916, instead of June 26th; but this is an immaterial variance. The notice of appeal was correct, and the undertaking was given in aid of that appeal. Judd v. Superior Court, 29 Cal. App. 671, 157 Pac. 566.

On August 7, 1916, in response to a motion made by the plaintiff therein, the superior court dismissed the appeal. The grounds of the motion were that John J. Hutchinson and Wm. E. Shaw, the sureties named in the undertaking filed July 3d, "failed and neglected to qualify thereon"; also, "that afterwards, to wit, on the 10th day of July, 1916, the defendants filed their bond and undertaking on appeal in said action with the justice's court, but failed to serve or file any notice upon plaintiff, or appealing from said judgment rendered in the justice's court on the 26th day of June, 1916, other than the notice filed and served June 28, 1916"; that by reason of said facts the superior court acquired no jurisdiction of said cause.

Respondent contends that the superior court did not acquire jurisdiction of the case on appeal for the following reasons: (1) That the undertaking was not filed until seven days had elapsed after the filing of the notice of appeal, and that the document filed on July 10th was a new and different undertaking from the undertaking to which exceptions were filed. (2) That the second undertaking in the body thereof purports to be made by J. J. Hutchinson and W. B. McGehee, but is signed by John J. Hutchinson and W. B. McGehee, and that on account of such variance John J. Hutchinson was not in any manner obligated thereon; that the record does not show justification by John J. Hutchinson. (3) That neither the record nor papers on file show that the plaintiff or her attorney were present and participated in the attempted qualification of sureties on the undertaking filed July 10th.

[2] It is our opinion that all of these contentions of the respondent are without merit. Section 978a, Code of Civil Procedure, refers to undertakings on appeals from justices' courts and is as follows:

> "The undertaking on appeal must be filed within five days after the filing of the notice of appeal and notice of the filing of the undertaking must be given to the respondent. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no * * * undertaking had been given."

It is entirely clear that where other sureties justify in place of the original sureties, and such justification takes place within five days after the filing of exceptions to the sufficiency of the sureties named in the undertaking, the substitution of new sureties and their justification is within due time, even though it be more than five days after filing the notice of appeal. The time limited is exactly the same as if the justification were by the sureties originally named. Budd v. Superior Court, 14 Cal. App. 256, 111 Pac. 628. The decisions cited by respondent's counsel do not support his contention. Bennett v. Superior Court, 113 Cal. 440, 45 Pac. 808; Wood v. Superior Court, 67 Cal. 115, 7 Pac. 200; Martha Washington Council No. 2 v. Superior Court, 29 Cal. App. 45, 154 Pac. 298; Keefe v. Superior Court, 23 Cal. App. 750, 139 Pac. 899. So far as these cases bear upon the question at all, they are merely to the effect that where exceptions have been taken to the sufficiency of the sureties, and where, instead of causing the sureties or others in their places to justify after notice, appellant merely files a second undertaking without giving notice of justification of sureties, and the time limited has elapsed without justification of sureties, no jurisdiction is acquired of such appeal. But, on the other hand, if the sureties do justify, even though they may be new sureties substituted in place of those first named, it is sufficient. Judd v. Superior Court, 29 Cal. App. 671, 157 Pac. 566.

[3-5] The fact that the undertaking was rewritten and signed a second time by John J. Hutchinson, together with the new surety, does not make the document a new and different undertaking within the meaning of the terms of section 978a, Code of Civil Procedure, or deprive the appeal of its intended effect, which was to preserve the jurisdiction of the superior court to entertain such appeal. As a bond for costs on appeal, the two papers are identical; there is merely a substituted surety, who duly justified. It is true that each of the two documents contains an additional agreement intended to serve as an undertaking to stay execution on the judgment pending the appeal, and that they differ from each other both in the recited statement of amount of the judgment and in the penal sum wherein the sureties were to be bound. We think, however, that, although contained in the same document, an undertaking to stay execution is a separate and different agreement from the undertaking for costs, which is the undertaking necessary to support the appellate jurisdiction. Where the undertaking is sufficient to constitute a bond on appeal, jurisdiction of the appeal is sustained thereby, even though the undertaking be not sufficient for the purposes of a stay of execution. Judd v. Superior Court, 29 Cal. App. 671, 157 Pac. 566; Edwards v. Superior Court, 159 Cal. 710, 714, 115 Pac. 649. Moreover, both of said documents are so written that in any event they would fail to have any effect as undertakings to stay execution. They refer to the judgment as an ordinary money judgment, instead of describing it as a judgment for the recovery of possession of personal property, with an alternative recovery of money if the property cannot be delivered to plaintiff; and neither of them purports to make the sureties responsible under the conditions prescribed for an undertaking to stay execution upon a judgment for the recovery of specific personal property. Code Civ. Proc. § 978.

[6] The fact that in the second undertaking, in the body thereof, the surety Hutchinson is named only as J. J. Hutchinson, whereas his signature and affidavit are in the name of John J. Hutchinson, does not, in our opinion, constitute a defect impairing the sufficiency of the undertaking. The same is true of the fact that the justice's docket shows justification by J. J. Hutchinson instead of stating that it was by John J. Hutchinson. The affidavit to the undertaking

was made by John J. Hutchinson and in the first instance constitutes the surety's justification upon the undertaking, subject only to the right of the plaintiff's attorney to further examine him at the time set for justification of sureties. We consider the record to be sufficient to establish the fact that the justification shown by the justice's docket under date of July 10th was by the same sureties who signed the undertaking as settled and determined on that day.

[7] Since the appellant's sureties were present to justify on July 10th and the plaintiff's attorney had been duly notified of the time and place for such justification, it is of no consequence that the plaintiff's attorney was not then and there present, if in fact he was not present. The only effect of his absence under such circumstances would be that he thereby waived further justification of the sureties and would no longer be entitled to object to their sufficiency. Fletcher Collection Agency v. Superior Court, 159 Pac. 1049, decided August 1, 1916; W. P. Jeffries Co. v. Superior Court, 13 Cal. App. 193, 109 Pac. 147.

It is ordered that a peremptory writ issue, commanding that the court below vacate its order dismissing the appeal and restore the case to its calendar.

We concur: JAMES, J.; SHAW, J.

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32 Cal. App. 227

BROWNELL v. SUPERIOR COURT IN AND FOR SAN BERNARDINO COUNTY et al. (Civ. 2192.)

(District Court of Appeal, Second District, California. Nov. 28, 1916.)

APPEAL AND ERROR ⚷390—UNDERTAKING—AMENDMENT — "INSUFFICIENCY OF UNDERTAKING."

Although the amendment of an undertaking on appeal may be allowed by the superior court on account of the insufficiency thereof, as "insufficiency of the undertaking" indicates a distinction between an undertaking which does not comply with the statute and the entire absence of an undertaking, where an undertaking was so defective that it did not identify the appeal which it was intended to support, it constituted no undertaking, and the superior court could not authorize its amendment and is wholly without jurisdiction in the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2077–2088; Dec. Dig. ⚷390.

For other definitions, see Words and Phrases, First and Second Series, Insufficiency of Undertaking.]

Certiorari by Charles H. Brownell, as administrator of the estate of Hanson A. R. Brownell, deceased, against the Superior Court of the State of California in and for the County of San Bernardino, and H. T. Dewhirst, Judge. Orders of the Superior Court granting leave to amend an undertaking denying petitioner's motion for dismissal of the appeal annulled.

William Guthrie, of San Bernardino, for petitioner. T. A. Williams, of Los Angeles, for respondents.

CONREY, P. J. Certiorari. The petitioner was plaintiff in an action against Bendigo Mines Company, a corporation, in the justice's court of San Bernardino township, county of San Bernardino. After judgment in that court in favor of the plaintiff, the defendant gave notice of appeal to the superior court of that county. On the same day that defendant filed in the said justice's court an undertaking entitled the same as the title of the action from which the appeal was taken, but which did not describe any judgment of that justice's court or refer to any appeal to the superior court of San Bernardino county. The references to a judgment were as follows:

> "Whereas, in an action in the justice's court of Los Angeles township, county of Los Angeles, and state of California, judgment was, on the 27th day of June, 1916, given and entered in said justice court, in favor of Charles H. Brownell, administrator of Hanson A. R. Brownell, deceased, and against Bendigo Mines Company; * * * and, whereas the said Bendigo Mines Company is dissatisfied with said judgment and desirous of appealing therefrom to the superior court of the county of Los Angeles: Now, therefore," etc.

All further references are to the "said appeal" and to the "said judgment" and to the "said superior court."

After the papers filed in the justice's court had been transmitted to the superior court of San Bernardino county, the plaintiff moved for a dismissal of the appeal upon the ground that no undertaking had been filed, or money deposited in lieu thereof at any time after the filing of the notice of appeal from the judgment, and that the superior court was without jurisdiction over the action. When said motion was presented, the superior court permitted the defendant to withdraw said undertaking from the files and have it amended by substituting, for the words "Los Angeles township," the words "San Bernardino township"; and for "county of Los Angeles," the words "county of San Bernardino"; and for the words "superior court of the county of Los Angeles," the words "superior court of the county of San Bernardino"—all of which was done upon the original document, with memoranda placed in the margin signifying consent to such amendments by the surety company through its authorized officers. This having been done, the motion to dismiss the appeal was denied, and the respondent superior court intends to proceed to trial and judgment in the action. Section 954 of the Code of Civil Procedure provides for the substitution of a new undertaking on appeal where the undertaking first filed was insufficient. That section apparently refers only to appeals to the Supreme Court or District Courts of Appeal, and our attention has not been directed to any provision which would make it applicable to appeals from justices' courts. But it has been held that in such cases it is an authorized practice for the superior court to allow the amendment of an undertaking on appeal on account of the insufficiency thereof in like instances where such relief would be granted on an appeal to the supreme court. Cohen v. Connick, 26 Cal. App. 491, 147 Pac. 479.

The case now before us, however, is not one wherein such relief may be granted. The use of the phrase "insufficiency of the undertaking" indicates a distinction between an undertaking which does not fully comply with the requirements of the statute and the entire absence of an undertaking. Where the undertaking is so defective as not to constitute any obligation upon the sureties therein, it is in reality no undertaking at all. Several times it has been decided by the Supreme Court that the recitals in an undertaking on appeal must identify the appeal which it is intended to support and that, if they fail to do so, the error is incurable. Little v. Thatcher, 151 Cal. 558, 91 Pac. 321, and cases there mentioned. Such is the case at bar. The undertaking wholly fails to identify the appeal which it may have been intended to support. Therefore the superior court could not authorize the amendment and is wholly without jurisdiction in the case.

The orders of the superior court granting leave to amend said undertaking and denying petitioner's motion for dismissal of the appeal are annulled.

We concur: JAMES, J.; SHAW, J.

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32 Cal. App. 206

BRIANS v. SUPERIOR COURT OF SONOMA COUNTY et al. (Civ. 1606.)

(District Court of Appeal, Third District, California. Nov. 25, 1916.)

1. PLEADING 🔑426(3)—LOST COMPLAINT—WAIVER OF OBJECTION.

Where written complaint filed in justice court as required by Code Civ. Proc. §§ 839, 851, was lost and motion to file copy was granted under section 1045, defendant, resisting motion, but afterwards defending upon the merits without objecting to jurisdiction, cannot afterwards question such judgment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1426; Dec. Dig. 🔑426(3).]

2. JUSTICES OF THE PEACE 🔑54(1)—LOST COMPLAINT—JURISDICTION.

Where complaint was filed commencing suit in justice court, as required by Code Civ. Proc. §§ 839, 851, but became lost, the court did not thereby lose jurisdiction even though no copy was filed.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 190, 198; Dec. Dig. 🔑54(1).]

Petition for writ of review by D. B. Brians against the Superior Court of County of Sonoma and Thomas C. Denny, Judge. Writ denied.

L. E. Fulwider, of Santa Rosa, for petitioner. A. M. Johnson, of San Francisco, for respondents.

CHIPMAN, P. J. A writ is sought by plaintiff to review the action of the defendant in a certain action wherein C. D. Johnson is plaintiff and D. B. Brians is defendant.

It appears from the petition that on April 1, 1914, said C. D. Johnson commenced an action against said D. B. Brians in the justice's court of Redwood township, Sonoma county, by filing a complaint therein; that defendant, Brians, entered his appearance in said action in said court, and an issue of fact was thereby presented; that on May 5, 1916, said action was called for trial in said justice's court, the plaintiff, Johnson, and the defendant, Brians, each being represented by attorney; that the original complaint in said cause was not then on file in said court, but was lost, which fact was then, and had been prior thereto, known to said Johnson's attorney; that on said day, May 5th, the said action was called for trial, no complaint being then on file in said court; that defendant, Brians, objected to the introduction of any evidence on the ground that there was no complaint on file, and over defendant's (Brians') objection, the cause was tried, and thereafter, to wit, on June 3, 1916, the said justice's court gave judgment for Brians, the defendant therein; that thereafter the said Johnson "took an appeal from said justice's court judgment to the superior court of Sonoma county, the defendants herein"; that on October 6, 1916, the said Johnson moved the superior court "for an order authorizing a copy of the original complaint in said action to be filed and used and served as the complaint in said action on the ground that the original complaint in said action had been and is lost"; that Brians, defendant in said action, objected to and resisted said motion, and on the 6th day of October, 1916, said court made an order granting said motion of said Johnson; that in making said order the court exceeded its jurisdiction; that there is no appeal from said order, and petitioner has no plain, speedy, or adequate remedy at law. Petitioner prays that said order be decreed to be in excess of the jurisdiction of the defendant court.

It appears from the return to the alternative writ that the cause of Johnson v. Brians came on regularly for trial on October 6, 1916, both parties represented by attorney; that plaintiff's attorney made a motion for an order permitting plaintiff "to file a copy of the original complaint to take the place of said original complaint, the same having been lost, whereupon comes now the court and orders that said motion be submitted." It further appears from what we take to be a copy of the clerk's minutes in the action as follows:

> "On said motion L. E. Fulwider [attorney for Brians] was sworn and testified on behalf of defendant, and opposed the said motion. C. D. Johnson was sworn, and testified on behalf of plaintiff, and a note and notice of sale were offered, received in evidence, and marked Plaintiff's Exhibits A and B. William F. Carr and W. F. Olney were sworn, and testified on behalf of plaintiff, whereupon plaintiff rests. Defendant not offering any evidence herein, comes now the court and orders that this cause be, and the same is hereby, submitted."

Then follows a copy of what is entitled "Findings and Judgment" in the case, signed by the judge of date October 6, 1916. It is recited therein:

> "This cause came on regularly for trial on October 6, 1916, on appeal from the justice's court of Redwood township, Sonoma county, on questions of both law and fact, both parties being present and represented by counsel, A. M. Johnson, Esq., appearing for plaintiff and L. E Fulwider, Esq., appearing for defendant."

The execution and delivery of the promissory note, the subject of the action, its assignment to plaintiff, partial payments, and the amount due are found and judgment entered for $30.65, the balance due.

The point relied upon by petitioner is that, the complaint having been lost before the trial in the justice's court, and no copy having been submitted in that court, the superior court was without jurisdiction to proceed after objection made by defendant.

[1] The argument is thus presented: An action is commenced in a justice's court by filing a complaint (Code of Civil Procedure, § 839); and such complaint must be in writing (Id. § 851); that a complaint or substituted copy must always be on file unless its absence is waived; and, that there can be no judgment without pleadings, original or substituted "and the allegations thereof must be sufficient to sustain the proof" (citing Wilson v. White, 84 Cal. 241, 24 Pac. 114). The rule stated in the case cited is that a defense which is not pleaded cannot be considered, although shown by the evidence; for the rule as to curing defects by litigating a matter without objection applies only where the pleading is defective, and not where there is a total absence of averment. Hence it is claimed that the justice's court could not enter judgment in the absence of a complaint, original or substituted, and over defendant's objection.

The petition fails to show the ground on which petitioner "objected to and resisted said motion" made in the superior court to substitute a copy for the original complaint. All that appears in the minutes of the trial in the superior court is that "on said motion L. E. Fulwider was sworn and testified on behalf of defendant, and opposed said motion." The testimony of defendant's attorney is in the return, and relates only to what occurred in the justice's court. It appears from the return that, after the motion was granted and the substituted complaint presented and filed, the cause was tried upon its merits, the "findings and judgment" reciting that plaintiff was represented by attorney and defendant also represented by attorney. The only objection made by defendant's attorney was to the motion, and after the court ruled thereon defendant's attorney continued to appear for defendant at the trial on the merits, making no objection to the jurisdiction of the court.

Where the appeal from a justice's court is upon questions of law and fact, and the defendant seasonably challenges the jurisdiction of the court to try the action upon its merits, by reason of the want of jurisdiction of the justice's court over the subject-matter of the action appearing upon the face of the record, such defendant is entitled to an order dismissing the action for want of jurisdiction to try it upon its merits. Bates v. Ferrier, 19 Cal. App. 79, 124 Pac. 889; Bartnett v. Hull, 19 Cal. App. 91, 124 Pac. 885, and cases cited.

If the appeal is taken "on questions of both law and fact," the "action must be tried anew in the superior court" (Code Civ. Proc. § 976); and the justice is required to transfer to the superior court certified copies of his docket and all the pleadings and papers, etc., filed in the cause (Code Civ. Proc. § 977).

> "On such appeal," said the Supreme Court in Maxson & Harris v. Superior Court of Madera County, 124 Cal. 468, 57 Pac. 379, "therefore, the entire cause is transferred to the superior court, and thereafter the latter court has exclusive jurisdiction and its judgment is final."

It was said in Bullard v. McArdle, 98 Cal. 355, 359, 33 Pac. 193, 194 (35 Am. St. Rep. 176):

> "When the effect of an appeal is to transfer the entire record to the appellate court, and to cause the action to be retried in that court as if originally brought therein, as is the case when appeals are taken from a justice's court upon questions of law and fact, the judgment appealed from is completely annulled, and is not thereafter available for any purpose."

Had petitioner seasonably challenged the jurisdiction of the superior court to try the action on its merits by reason of the want of jurisdiction of the justice's court over the subject-matter of the action appearing upon the face of the record, he might have brought the matter within the rule in Bartnett v. Hull and Bates v. Ferrier, supra. His objection went only to the motion to substitute a copy for the original lost complaint. He made no objection to the trial of the case on its merits, and, as the superior court had undoubted jurisdiction over the subject-matter of the action, and also had jurisdiction to order the lost complaint to be supplied (Code Civ. Proc. § 1045), the alleged illegal proceedings in the justice's court complained of were not available to petitioner.

In De Jarnett v. Marquez, 132 Cal. 700, 64 Pac. 1090, the appeal was from a judgment in a justice's court taken on questions of both law and fact. It was claimed that the superior court was without jurisdiction to try the case for the reason that the justice's court had no jurisdiction of the subject-matter of the action, and hence the superior court had no jurisdiction. At the trial of the case in the superior court on its merits defendant made no complaint of lack of jurisdiction in the superior court. It was held that, the court having jurisdiction of the subject-matter of the action and of the person, and the parties having gone to trial upon the merits without objection to the jurisdiction of the court, the judgment was not void. In Nolan v. Hentig, 138 Cal. 281, 71 Pac. 440, it was urged that the justice's court had no jurisdiction. The court said:

> "The cause was appealed to and heard de novo in the superior court, without objection to the jurisdiction. The judgment cannot now be questioned"—citing De Jarnatt v. Marquez, supra.

[2] The writ must be denied on a further ground. It is admitted that a complaint was filed in the justice's court, and that court therefore had jurisdiction. This jurisdiction was not lost by the disappearance of the original complaint. A copy should have been substituted in the justice's court, but the trial had without it was an irregularity, and cannot be said to have been without jurisdiction. The missing paper, as we have seen, was authoritatively supplied in the superior court, and the cause was there tried on its merits without objection by defendant. The judgment cannot now be questioned.

The writ is denied.

We concur: HART, J.; BURNETT, J.

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32 Cal. App. 211

PEOPLE v. MURNAHAN. (Cr. 348.)

(District Court of Appeal, Third District, California. Nov. 25, 1916.)

1. Infants 🔑20 — Sufficiency of Evidence.

In a prosecution for lewd and lascivious conduct with a child of ten years, evidence *held* sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 20; Dec. Dig. 🔑20.]

2. Indictment and Information 🔑132(4)—Separate Counts—Election.

Under Pen. Code, § 954, providing that an information may charge two or more different offenses connected together in their commission or two or more different offenses of the same class under separate counts, and that the prosecution need not elect between different offenses or counts, the prosecution, under an information on three separate counts charging lewd and lascivious conduct with a child of the age of ten years, was not required to elect.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. 🔑132(4).]

3. Infants 🔑20—Evidence.

There was no error in refusing to strike the child's testimony, "I can't remember whether he gave me candy or gum," given while attempting to relate all that had occurred in the commission of the offense.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 20; Dec. Dig. 🔑20.]

4. Criminal Law 🔑829(17)—Requested Instruction—Given Instruction.

The modification of defendant's request by striking out language to the effect that defendant had offered himself as a witness, and that he was competent, and that the jury in considering his testimony, should be governed by the rules controlling in the weighing of testimony of other witnesses, was not error, as it was covered by an instruction that defendant's interest in the result did not deprive him of the benefit of his own testimony, which was entitled to full consideration the same as that of any other witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. 🔑829(17).]

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Jack Murnahan was convicted of lewd and lascivious conduct with a child of the age of ten years, and he appeals. Affirmed.

Grover C. Julian, of Susanville, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The appeal is from the judgment of conviction on three separate counts for lewd and lascivious conduct with a child of the age of ten years.

[1] We find no merit whatever in the appeal. The evidence is ample to support the verdict. It is true it consists largely of the testimony of the girl herself, but we discover therein nothing incredible or improbable. We do not know of any legal objection to the action of the jury in accepting and basing their verdict upon the child's recital of the despicable treatment of her by appellant. We forbear to quote her statements as their publication would serve no useful purpose.

[2] The people were not required to make an election. In fact, the information charged that three different offenses were committed at different times on the same day and the evidence supported the averments. The course pursued was justified by section 954 of the Penal Code as amended in 1915, providing that:

> "The indictment or information may charge two or more different offenses connected together in their commission * * * or two or more different offenses of the same class of crimes or offenses, under separate counts. * * * The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict."

The election of which appellant speaks is required when one act is charged and evidence is admitted of two or more similar offenses. There was no occasion here for the invocation of such principle.

[3] There was no error in the refusal of the court to strike out the testimony of the

girl that "I can't remember whether he gave me candy or gum." She was attempting to relate all that occurred between her and appellant at the time of the commission of one of the offenses. Any donation by him would certainly be a significant circumstance tending to indicate appellant's ulterior purpose. The case of People v. Mathews, 139 Cal. 527, 73 Pac. 416, is entirely different. Therein the defendant was not permitted to show that he made gifts to his victim. The decision was really based upon the ground that it was not proper cross-examination. It was also undoubtedly open to the objection of self-serving acts and declarations.

[4] The only other point made by appellant not suggested by the foregoing consideration is that the court erred in modifying an instruction proposed by defendant. The modification consisted in striking out the following:

> "The defendant has offered himself as a witness and has given testimony in this case, and the jury are instructed that he is competent to testify as a witness, and in considering his testimony you should be governed by the same rules that control you in weighing the testimony of other witnesses who have given testimony before you in this trial."

But it is entirely manifest that this was covered by the following instruction given by the court:

> "The interest of a defendant in the result of an action does not deprive him of the benefit of his own testimony. The law makes him a competent witness in his own behalf, and his testimony is entitled to full and fair consideration by you the same as that of any other witness. He is considered innocent until the prosecution establishes the contrary by convincing proof and beyond a reasonable doubt. His evidence is entitled to full credit when you believe that he has spoken the truth, and the evidence of such witness is sufficient proof of any fact to which you believe he has truthfully testified."

There were other instructions to the same effect. Indeed, the jury were fully and correctly instructed as to every phase of the case, and there is no doubt the defendant had a fair and impartial trial.

We perceive no error and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(32 Cal. App. 128)

PIPER v. KELLERMAN. (Civ. 1585.)

(District Court of Appeal, Third District, California. Nov. 17, 1916. Rehearing Denied by Supreme Court Jan. 15, 1917.)

1. EVIDENCE 🔑439—PAROL EVIDENCE AFFECTING WRITING—NOVATION.

Although testimony is admissible to show that the execution of a written instrument was intended to constitute a novation and extinguish a prior written instrument, such agreement must be consistent with the terms of the writing, and where defendant contracted in writing to convey to plaintiff his interest in lease of oil properties, parol evidence that a written option subsequently given to defendant by plaintiff to repurchase such interest which did not in terms purport to cancel the contract, was inconsistent and not admissible, since if the contract was canceled, plaintiff had nothing upon which to give defendant an option to purchase.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. 🔑439.]

2. NOVATION 🔑12—EVIDENCE—SUFFICIENCY.

In an action seeking to enforce a written contract for the conveyance of defendant's interests in oil properties, evidence *held* insufficient to show a parol agreement that a written option given defendant to repurchase the interests was intended as a novation of rights and liabilities under the contract.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 12; Dec. Dig. 🔑12.]

3. APPEAL AND ERROR 🔑1177(8)—DISPOSITION OF CAUSE.

In an action seeking the enforcement of a written contract to convey defendant's interest in a lease of oil properties, where an allegation of the answer that defendant on a certain day had canceled the contract in accordance with its terms was supported by sufficient evidence, and a finding supporting the defense would have reduced the amount due, but the trial court made no finding upon the averment, the appellate court will not order the judgment modified, which would amount to making a finding for the lower court, but will reverse it.

[Ed. Note.—For other cases, see Appeal and Error, Cent.Dig. § 4599; Dec.Dig. 🔑1177(8).]

Appeal from Superior Court, Santa Clara County; J. A. Richards, Judge.

Action by T. A. Piper against J. M. Kellerman. Judgment for defendant, and plaintiff appeals. Reversed.

Randolph V. Whiting, of San Francisco, and C. W. Davison, of San Jose, for appellant. N. E. Wretman and B. A. Herrington, both of San Jose, for respondent.

BURNETT, J. The action was brought to enforce a certain contract made between plaintiff and defendant on April 22, 1912. The prayer was for a judgment ordering the defendant to execute to plaintiff an undivided one-half interest in a certain lease from the T. A. P. Oil Company and for $1,250, in money, together with general relief. An answer and counterclaim were filed, whereby defendant asked judgment for $1,187.85 and interest, and for a restraining order enjoining plaintiff from prosecuting certain actions against defendant. The counterclaim was upon an assigned account of one N. E. Wretman. At the time of the making of said contract of April 22d, defendant was the owner of a certain lease from the T. A. P. Oil Company, a corporation, and a contract with the Suburban Oil Company, a corporation, whereby respondent was to take a lease on certain property theretofore leased to said company. At the same time appellant was the owner of certain leases upon properties situated near those covered by said lease and contract of respondent. For the purpose of combining their respective interests, appellant and respondent entered into said contract of April 22, 1912, whereby the former agreed to cause to be assigned to the latter an undivided one-half interest in his said leases, and respondent made a similar agreement in favor of appellant as to said lease from the T. A. P. Oil Company, and agreed also that any profits or benefits which he might derive from the contract between himself and said Suburban Oil Company should be equally divided between appellant and respondent. The contract further provided that respondent should pay all rents due, or to become due on said leases theretofore owned by appellant, and that any other property leased by Piper in the neighborhood of the other lands should be held and operated for the benefit of both; furthermore, that respondent should pay to appellant a salary of $250 per month from the date of the contract, and that appellant should operate all of the property under the supervision of respondent. There was also a provision that respondent might cancel the contract at any time. On October 17th the parties met at the office of J. N. Turner in San Francisco and executed an instrument in writing, providing that:

> "The party of the first part (T. A. Piper) hereby gives to J. M. Kellerman an option to purchase all his right, title and interest in and to all said first party's interest in that contract entered into by and between the Suburban Oil Company, a corporation, party of the first part, and J. M. Kellerman, party of the second part, on the 19th day of April, 1912, wherein said Suburban Oil Company gave said J. M. Kellerman a contract of lease on the following leased lands together with personal property thereon. * * * Said party also gives said second party an option to purchase all of said second (first?) party's right, title and interest in that lease executed by the T. A. P. Oil Company * * * to J. M. Kellerman of April 20, 1912, wherein said T. A. P. Oil Company leased to said J. M. Kellerman those certain leased lands, together with all machinery and personal property thereon situate near Los Gatos. * * *
>
> "It is understood and agreed by and between the parties hereto that in the event that the said Kellerman discovers oil in paying quantities in any well on any part of the property known as the T. A. P. Oil Company's property, he will pay to said T. A. Piper the sum of $1,000 immediately upon the well becoming a commercial well.
>
> "It is understood and agreed by and between the parties hereto that in the event that the said Kellerman discovers oil in paying quantities in any well on any part of the property known as the Suburban Oil Company's property, he will pay said T. A. Piper the sum of $1,000 immediately upon the well becoming a commercial well.
>
> "It is understood and agreed that in the event that said Kellerman fails to exercise this option and does not make the payments in accordance with the terms of this agreement hereinabove mentioned at the time said well or wells are brought in, that is to say, should he make the payment as provided for when a well is brought in on the T. A. P. Company's property and fail to pay the $1,000 as provided for when a well is brought in on the Suburban Company's property, or vice versa, then the option shall be null and void as to the property that he has brought in a well on and fails to pay said first party the $1,000 as herein provided."

In the foregoing we have set out all of said agreement except the formal part and the specific description of the property covered by said leases and said contract. At the same time that this option was given, a lease was executed by J. N. Turner to J. M. Kellerman, covering nearly all the property still standing in the name of Turner and owned by appellant prior to April 22, 1912. This lease, however, was canceled by mutual consent on June 23, 1913, and seems to be of no importance here.

As to the transaction of said date, the court found:

> "That on the 17th day of October, 1912, the plaintiff and defendant entered into new arrangements under and by the terms and conditions of which the property described in the leases standing in the name of J. N. Turner were leased to the defendant on different terms and conditions than those provided for in contract of April 22, 1912, and as part of said arrangements, the said plaintiff and defendant entered into an agreement in writing which was duly made, executed and delivered and based upon good and sufficient considerations, moving from defendant to plaintiff, under the terms of which the said plaintiff gave to said defendant an option to purchase any and all right, title and interest, which plaintiff had or possessed in or to the said T. A. P. Oil Company lease, for the sum of $1,000, after a commercial well should be produced on any of the properties mentioned in said lease. That no commercial well has as yet been produced or developed on any of the said properties mentioned in said lease of the T. A. P. Oil Company to defendant. That said agreement and option is still in full force and effect. That on said October 17, 1912, and as a part of said new arrangements, the said agreement of April 22, 1912, was by mutual consent between the plaintiff and the defendant, and upon good and sufficient consideration, moving from the defendant to the plaintiff, terminated and ended, and the parties thereto released from all of the terms and conditions thereof, and that said agreement of April 22, 1912, has never been revived, and ever since October 17, 1912, said agreement of April 22, 1912, has been and is now entirely terminated, canceled, annulled and ended."

Of course, it is manifest that no language is used in the option of October 17th which expressly cancels the contract of April 22d. Upon the basis of respondent's contention, it is somewhat singular "that an attorney drawing a document for the purpose of terminating existing business arrangements and substituting wholly different matters therefor, should neglect entirely to say a single word upon the subject of canceling the former contract." And, as further suggested by appellant, there is nothing in the option which refers in any way to the contract of April 22d. This, if unexplained, is a remarkable circumstance if it was the intention that the former contract should be "terminated, canceled, annulled and ended." It is also plain that there is no inconsistency between said contract and the option which would prevent them from both existing at the same time. Another circumstance of some importance is that the option does not deal with all the subjects embraced in the contract of April 22d. But probably a stronger reason than any other for contending that said option of October 17th cannot operate as a cancellation and extinguishment of the contract of April 22d is found in the following recital by appellant: Before the contract of April 22d was executed, Piper had no interest in any of the leases held by the T. A. P. and Suburban Companies, and "it was only by that contract that he ever acquired any interest in such property. If that contract which gave him his interest was canceled, then he had nothing upon which to give Kellerman an option to purchase." This result would seem to reduce the option to mere waste paper. The effect of a total annulment of the former contract would be, naturally, to restore the parties to their condition prior to the execution of said agreement.

It is, at least, clear that we can find in the terms of the option itself no evidence of a purpose to substitute the new obligation for the old "with intent to extinguish the old obligation." Civ. Code, § 1531, subd. 1.

But parol evidence of such purpose was received by the court over the objection of appellant, and that involves a very important question in the case.

Respondent testified as to a conversation with appellant in which it was agreed that they would enter into another agreement, and—

> "that was what brought up the argument about making a contract, and we discussed that at times before I went to Mr. Wretman the first time. We sat on a pile of casing at the Suburban well and I said: 'Mr. Piper, I have expended much more money than we figured on, and I am ready now to enter into that other agreement.' 'Well,' he says, 'all right.' * * * On Tuesday I went to Mr. Turner's office, and we threshed over several propositions, and Wednesday we did the same. Thursday morning I made this proposition to them, that we would change the Turner lease, which was a contract between Turner and I, belongs to Piper and I—they signed many of these leases later on. 'Now, boys, wouldn't it be a better proposition if we changed the sublease of this property for a one-sixth royalty'—and we were paying a one-tenth to the landowners as Piper's lease called for, and they thought it over, and then we went into the whole matter and I had explained the whole thing the way I framed it in mind, that we would cancel the old contract of April—that is what I meant about in my mind at night. I made this memorandum of what I would like to do. * * * Well, they agreed to it, the Turner lease was made, and the option to me was drawn and executed. * * * Mr. Piper and I had agreed that we would sublease for a one-sixth royalty. * * * And then we agreed that Mr. Turner would make a straight lease to me for 3½, and that Mr. Piper—it would give it to Mr. Turner, but it was really Piper's—that would make him 3⅓; we agreed in lieu of the 2⅔ that we would just cancel the whole thing, the salary and all, and I would agree to give him $1,000 if I got a commercial well on either property, and then that ended it. * * * I mean to give the impression that it was understood at that time that the old contract was canceled; Mr. Turner used words something to the effect that the old contract might be of some use in the event that I failed to pay the $1,000 within a certain time after oil had been found in commercial quantities. * * * From the time Piper went to work, I paid him $250 a month until he quit; I paid him just any place I happened to meet him, except the last check that I gave him on the 17th of October, 1912, in San Francisco, in his office, that is the time we made this contract. * * * I made the remark to Piper when we had decided on everything, making this objection that his salary quit then and there, and I says to Mr. Piper, I said, 'You have so many days coming,' which made it five days less than a month, and I said, 'Tom, I have a check made out here for $250, so we will just let it go at a month up to the 27th'; he took the check; that was the last payment I ever made."

[1] The question as to novation is one of intention, and the general rule is that any competent testimony tending to show the understanding of the parties is admissible. 29 Cyc. 1139. But was parol evidence competent in this particular case?

In support of the negative, appellant quotes section 1856 of the Code of Civil Procedure, providing when an agreement reduced to writing is "deemed the whole," and it is claimed that the section applies to the present instance since "no mistake or imperfection of the option was put in issue and the validity of the instrument is not in dispute nor is there any extrinsic ambiguity to explain nor any fraud alleged." Furthermore, quotation is made of section 1860 of said Code as authority for the declaration that the judge is to interpret the language of the parties, and that evidence of the surrounding circumstances is admissible only for the purpose of construction of its provisions, and it is contended that this section "does not permit evidence to be given (particularly in the absence of pleadings on the subject) of other conditions and further terms and additional understandings, about which the written contract is wholly silent." In this connection it is insisted that the rule is properly stated in 17 Cyc. 669, as follows:

> "The conversations and statements of the parties at the time of or just previous to the execution of the contract between them may be admissible for the purpose of aiding in the construction of the writing; but oral declarations of the parties made at or before the time of the execution of the instrument are not admissible for the purpose of showing an intention or purpose not therein expressed."

The last above statement of the rule is rather too sweeping, as will be discovered by an examination of the cases cited in support of the text. Indeed, there are many instances wherein oral declarations are admissible for the purpose of showing an intention or purpose not expressed in the written instrument. They are collected in the article on Evidence from which said quotation is made. Each instrument must be viewed, of course, in the light of its own peculiar circumstances, and the well-recognized exceptions to the general rule must not be ignored. The terms of an agreement when reduced to writing are deemed to have been completely set forth therein, but it is submitted that this rule of the Code would not necessarily preclude such parol evidence as was admitted herein. In other words, such evidence may sometimes be received without affecting the terms of the written instrument.

if the instrument were shown to express the complete purpose or intention of the parties in reference to the subject-matter, then the inquiry would be at an end. But where the written instrument is not complete, it has been held, as stated in 17 Cyc. 672, that:

> "In order to correctly ascertain the intention of the parties to a deed, contract, or other instrument of writing and properly interpret the same, it is competent to inquire into the purpose for which the writing was executed, and to this end parol evidence is admissible."

It may be proved, of course, by parol that payment of another obligation was intended by the execution of a note or other written instrument, and in a proper case it may be likewise shown that the execution of a written instrument and the creation thereby of different rights and liabilities was intended to constitute a novation and to effect a total extinction of privileges and obligations growing out of a prior written instrument. In many cases such evidence would not vary nor affect the terms of the later instrument. The qualification of the rule, however, in point here is that:

> "In order to let in evidence of a collateral agreement between the parties, such agreement must be consistent with the terms of the writing; and the evidence must not tend to vary or contradict the terms of the written instrument or to defeat its operation." 17 Cyc. 714.

It seems manifest that the case before us is brought clearly within said qualification. The parol agreement contended for, if rendered effectual, would surely defeat the operation of said option.

If the contract of April 22d was completely extinguished, it is difficult to understand how there remained in appellant any interest in and to the property, the option to purchase which was extended to respondent. Appellant having no interest left to convey, respondent certainly could not enforce specific performance of the former's covenant. And appellant having surrendered all interest in the property would be in no position to recover the amount of money promised by respondent, since the consideration therefor had failed. Again, by the agreement of April 22d, as we have seen, appellant acquired an interest in certain real property belonging to respondent and the agreement of October 17th could not operate as a complete cancellation of that instrument for the reason that it does not convey or purport to convey any of said interest from Piper to Kellerman. The later instrument, therefore, by its terms, presents conclusive evidence that it was not intended as a complete extinguishment of the contract of April 22d, and we think that the parol evidence was not admissible. If there had been an attempt to show that it was intended simply to modify the earlier agreement, to discontinue the salary, or to make other modification not inconsistent with the provisions of the later contract, a different question might be presented.

[2] But whether the foregoing be sound or not, there is another view which we think necessitates the conclusion that said finding is not sufficiently supported. From the whole record, it appears that appellant did not agree that said contract of October 17th should annul the former one. Such is a fair inference from the testimony of respondent himself. He does, indeed, speak in general terms as though it were the understanding that the one should be substituted for the other, but it is apparent that he was testifying rather to a conclusion than of a probative fact that would show that such was the understanding and agreement of appellant. He does not relate any statement made by Piper; he does not recite any definite proposition that was submitted by either to the other and acquiesced in that would justify the conclusion that their minds met in the understanding and purpose that the first agreement should be annulled. The nearest approach to any satisfactory showing that such was their intention was his statement:

> "We agreed in lieu of the 2⅔ that we would just cancel the whole thing, the salary and all, and I would agree to give him $1,000, if I got a commercial well on either property, and then that ended it."

But therein he does not state what was said, but he concludes that there was such an agreement. Other statements made by him, however, rebut his inference as to appellant's agreement to the cancellation. For instance, he testified:

> "Well, it looked as though that he [Piper] did not understand about us canceling the contract of April 22d."

Furthermore:

> "In the conversation with Mr. Turner, in the presence of Piper, I asked him to destroy the old contract, that I did not see as he had any use for it, and he made the remark that, 'No, that the thousand dollars might not be paid, and Mr. Piper would have nothing to fall back on,' therefore he thought we better keep the old contracts."

The correspondence also between appellant and respondent is persuasive to the effect that Piper had no intention of canceling the earlier contract. Of course there could not be any novation unless both parties agreed to it.

As to the counterclaim upon which respondent prevailed in the court below, a charge of fraud is made by appellant. It is claimed that a misrepresentation was made by Wretman as to the payment of a certain note for $600 of which Piper was one of the makers. The counterclaim is based upon an account stated, which was dated April 26, 1912. In the stated account was the following paragraph:

> "In connection with the third proposition I hold your note for $728 dated September 15, 1911, interest 7 per cent. payable quarterly and secured by 7,300 shares of Suburban Oil Company stock."

This note was based upon a note for $600 dated January 9, 1909, signed by appellant, Morrison and Arbuckle to N. E. Wretman, which was indorsed on September 16, 1911:

"Paid in full by T. A. Piper, and he is entitled to reimbursement from his comakers. N. E. Wretman."

At the time this note was thus taken up, Mr. Piper gave the other note for $728, and pledged the said 7,300 shares of stock for its payment. Respondent calls attention to the fact that shortly after this note was given, Mr. Piper had an interview with Mr. Morrison, wherein he is told of a supposed settlement by Mr. Morrison and Mr. Arbuckle with Mr. Wretman of the $600 note, and on November 13th, Mr. Piper wrote a letter to Mr. Wretman, in which he said:

"I saw Mr. Morrison the other day, and he is trying to find Mr. Arbuckle in regards to the note in which I settled with you for on the 16th of last September for $600, signed by myself, C. A. Morrison, and F. W. Arbuckle. He stated to me that when he and Arbuckle made the settlement with you that this note was included and supposed to have been canceled."

He then cautions Mr. Wretman not to sell the stock by reason of the nonpayment of interest, and closes by saying:

"I am sorry that I cannot see you before leaving, but will take it up immediately upon my return."

Attention is then directed to the dates of these various transactions as follows: January 9, 1909, $600 note; September 16, 1911, $728 note; November 13, 1911, date of Piper's letter to Wretman; October 1, 1912, date of stated account. It can thus be seen that the stated account was consummated long after appellant was put upon inquiry as to the alleged settlement. He could hardly claim, therefore, that he should be protected in his own recklessness in relying upon respondent's representations that the note had not been paid. Moreover, Mr. Wretman testified:

"I never had a settlement with Mr. Morrison and Mr. Arbuckle in regard to that note. I had a transaction with them in April or May, 1909, whereby if I could sell the property to a client of Mr. Piper, Mr. Broder, that I would then surrender this note and pay them $300 apiece. This transaction was never closed and the stock never called for."

We must accept Mr. Wretman's testimony as reliable, and according to his version of the affair, it amounted simply to an offer of sale which was for the benefit of all the parties. There seems to have been nothing to prevent Mr. Morrison or Mr. Arbuckle from withdrawing their stock or offer to sell when it was not called for or the consideration paid by Mr. Wretman. The offer of cancellation was conditional, and the conditions not having become actualities, the note, as we understand the situation, still remained a valid evidence of indebtedness.

[3] One other feature should be noticed. In one of the defenses to the action it is alleged:

"That on or about the 16th day of November, 1912, this defendant, pursuant to the right and privilege given him in said agreement dated April 22, 1912, terminated, ended and canceled the same; and also on said November 16, 1912, released, dismissed and discharged the said plaintiff from his employ, and since October 17, 1912, the plaintiff has performed no work or service for or in behalf of this defendant."

Said contract provided that:

"It is also understood and agreed by and between the parties hereto that the second party may cancel this contract at any time."

It is also true that there is evidence ample to support said allegation that the contract was canceled on or about November 16th. However, the court made no finding upon this averment. If it had been found as alleged, the result would have been the same except that the judgment for defendant would be less by $250, the salary for one month.

As the record is presented, though, it hardly seems consonant with the orderly course of established procedure to direct a modification of the judgment, as that would be in effect for us to make a finding for the lower court.

The judgment and order are reversed.

We concur: CHIPMAN, P. J.; HART, J.

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32 Cal. App. 88

HANKE v. MARTIN. (Civ. 1848.)

(District Court of Appeal, First District, California. Nov. 16, 1916.)

1. EVIDENCE ⚷441(4)—PAROL EVIDENCE AFFECTING WRITING.

Where a lease was explicit as to the term and rental of the premises, testimony as to an oral understanding between the parties that the lessee need not pay part of the rent stipulated by the lease was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1736–1744, 2037; Dec. Dig. ⚷441(4).]

2. APPEAL AND ERROR ⚷1047(2)—HARMLESS ERROR—RESERVING RULING ON EVIDENCE.

In an action for rent, the court's failure to make a direct ruling on plaintiff's motion to strike out evidence, as to which its ruling was reserved, was not prejudicial to defendant, where the evidence was inadmissible, and where the court, though not directly deciding the matter involved, in effect did so by its finding and judgment against defendant's contention, but in accord with the terms of the written lease.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4147; Dec. Dig. ⚷1047(2).]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Louis Hanke against Joe Martin. From an order denying defendant's motion for new trial, he appeals. Order affirmed.

M. K. Harris, Thos. F. Lopez, and H. A. Savage, all of Fresno, for appellant. Everts & Ewing, of Fresno, for respondent.

RICHARDS, J. This is an appeal from an order denying the defendant's motion for a new trial in an action brought to recover the sum of $1,310, alleged by plaintiff to be due and unpaid under the terms of a lease of certain premises. The record shows that upon the trial of the case the lease was introduced in evidence, from which it appeared that the defendant on June 4, 1912, leased two certain tracts of land, containing respectively 125 and 110 acres, from the plaintiff for the term commencing, as to the 125 acres, on the date of the lease, and, as to the 110-acre tract, on the 31st day of December, 1912, and ending as to both tracts on the 31st day of December, 1921, upon the following terms and conditions:

> "The second party shall pay to first party as rental for the above-described premises $1,110 on the 31st day of December, 1912; $750 on the 30th day of June, 1913; $1,310 on the 31st day of December, 1913; and $1,310 on the 30th day of June and 31st day of December of each year thereafter during the life of this lease."

The evidence further showed that the lease was canceled by the written agreement of the parties on June 30, 1914, but in which written agreement the plaintiff expressly reserved the right to insist upon the payment of the rent claimed by him to be due under said lease prior to the date of its cancellation. The undisputed proofs also showed that the defendant had paid to his lessor the sum of $1,110 on December 31, 1912, $750 on June 30, 1913, $1,310 on December 31, 1913, and no more, and that it was the payment of $1,310. claimed to be due on the 30th of June, 1914, according to the terms of the lease, for which this action was brought. The defendant, however, by his pleadings, and also by oral evidence offered at the trial, undertook to assert and prove that prior to and at the time of entering into said lease there was an oral understanding and agreement between the parties thereto that the rent which was reserved in the lease to be paid on December 31, 1912, and each six months thereafter, was to be a payment in advance from said first-named date, and that no rent was to be chargeable or paid for any portion of the year 1912, for the reason that the rent of the premises for the whole of the year had been already received by the owner from prior lessees. When evidence to this effect was presented by the defendant during the trial, the court at first admitted the evidence over the plaintiff's objection, but after its admission reserved its ruling upon a motion made by the plaintiff to strike out all of this evidence relating to such oral understanding upon the ground that it was in contradiction of the terms of the written lease. The court did not thereafter during the trial directly pass upon this matter, but rendered its findings and judgment adversely to the defendant and to his contention as to the existence of such oral understanding. The appellant here contends that the court committed reversible error both by its failure to make a ruling upon the plaintiff's motion in respect to which its decision had been reserved, and also in making its findings and rendering its judgment contrary to the evidence.

[1, 2] While it is true, as the appellant contends, that the practice on the part of trial courts of reserving their rulings upon the admission, rejection, or retention of evidence is one which should be discouraged, and while it is also true that the failure of the trial court to decide a material question in respect to which it has reserved its ruling may, in certain cases, be reversible error, still we are of the opinion that in the case at bar the appellant has not been materially prejudiced by the failure of the trial court to make a direct ruling upon the plaintiff's motion in respect to which its ruling was reserved; and this for two reasons, the first of which is that the lease between the parties was clear and explicit as to the term and rental of the premises in question, and hence that the testimony as to the oral understanding between the parties was inadmissible in the first instance, as amounting to a variance of its terms, and for the further reason that the evidence which was actually before the court as to the existence of such oral agreement was conflicting, and the court, while not directly deciding the matter involved in its reserved ruling, in effect did so by its finding and judgment against the defendant's contention, but in accord with the terms of the written lease.

For these reasons the order denying the defendant's motion for a new trial is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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32 Cal. App. 150

TRYON et al. v. CLINCH et al. (Civ. 1801.)

(District Court of Appeal, Second District, California. Nov. 20, 1916.)

1. Principal and Agent ⚷107(1) — Authority to Contract for Street Improvement.

Where a party owning part of the land fronting on a street, who wished to have it improved, stated to two other parties owning land thereon, "I will leave it to you boys," he did not thereby constitute the other parties his agents to do anything more than bind him to pay the cost of the improvement of the street in so far as it affected his own property.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 313, 314; Dec. Dig. ⚷107(1).]

2. Contracts ⚷177—Contract for Street Improvements—Liability of Owner.

Where work of improving a street in which three landowners were interested was done under a contract signed by two of the landowners alone, no work being performed after the third signed the contract, the third was not bound for the entire cost of the improvement by the undisclosed intention of the contractors to contract with him as well as the others, the letter embodying the contract being addressed to the first two landowners alone, because the contractors did not know the third's initials, the third's subsequent act in signing the contract being merely a ratification of the acts of the other landowners in so far as they were authorized to act as his agents in binding him to pay his proportion of the cost of the work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 771–774; Dec. Dig. 🔑177.]

3. CONTRACTS 🔑10(1)—MUTUALITY.

Where a contract for the improvement of a street was embodied in a letter addressed to two owners fronting thereon, which contract they signed, as to a third owner, to whom the letter was not addressed because the contractors did not know his initials, but which he signed after the work was discontinued, the contract, which contractors intended should bind him for the entire cost, was lacking in mutuality, since after its breach such third owner could not in any event have recovered damages from the contractors for their failure to improve the property of the other owners.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21–27, 30–32, 35, 36, 38–40; Dec. Dig. 🔑10(1).]

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by R. G. Tryon and W. C. Brain, copartners doing business under the fictitious firm name and style of Tyron & Brain, against C. N. Clinch, Robert T. See, and W. F. Markham. From a judgment against defendants, Markham appeals. Judgment reversed.

Harlan G. Palmer, of Los Angeles, for appellant. A. J. Sherer and Arthur G. Baker, both of Los Angeles, for respondents.

SHAW, J. It appears that the defendants owned a tract of land through which they had opened a street, and prior to its dedication for public use they agreed, for their mutual advantage, that it should be improved. The ownership of the land was not joint, but held in severalty, Markham owning approximately two-thirds of the tract, and the remainder being owned jointly by Clinch and See, who entered into negotiations with plaintiffs for doing the work of improving the street known as Morning Gate court, as a result of which the latter caused to be delivered to Clinch and See a letter reading as follows:

"Los Angeles, Cal., Aug. 12, 1913.

"Messrs. C. N. Clinch & Robt. T. See, 6401 Hollywood Blvd., Hollywood, Cal.—Gentlemen: Confirming our verbal bid of this date, we hereby propose to improve Morning Gate court between Sunset boulevard and Selma avenue in Hollywood for the sum of $1,475.00, payable upon completion of the work. [Then follows a description of the work proposed to be done.]

"If satisfactory to you the signing of this may substitute a good and sufficient contract between us for the said work.

"Yours very truly, Tryon & Brain,
"By W. C. Brain"

—followed by the word "Accepted." On the day of the receipt of this letter Clinch and See attached their signatures thereto and ordered Tryon & Brain to proceed with the work. At this time the defendant Markham was not in California, and did not return to California until the latter part of September. Tryon & Brain proceeded with the work until September 7th, at which time, under instructions from Clinch and See, they discontinued the same, the value of which as performed the court found was the sum of $1,240. Upon Markham's return to California on or about the 24th day of September, he, at the request of Clinch and See, attached his name to the letter, which was then, and after Tryon & Brain had completed the work, delivered to them.

The complaint filed contained two causes of action, the first to recover upon a common count for the value of the labor and work done and materials furnished, and the other a cause of action based upon the alleged contract against the defendants jointly for the sum mentioned therein; it being claimed—and with truth so far as Clinch and See, who suffered default, are concerned—that defendants, without the fault of plaintiffs, prevented the completion of the work. The findings made were in favor of plaintiffs, upon which judgment was entered against the defendants jointly for the full value of the work done, which, including interest, was $1,364, and from which Markham alone appeals.

[1] As to the first cause of action stated, the court in effect found that Markham became indebted to plaintiffs for and on account of the services, work, and labor performed and materials furnished by the plaintiffs to said defendants and each of them at the special instance and request of said defendants and each of them in the sum of $1,475, which they and each of them promised to pay plaintiffs. The only evidence in support of this finding and upon which to base any authority in Clinch and See to have the entire work done at Markham's expense is the fact that he owned part of the land fronting on the street, was interested in and wished to have it improved, and according to See's testimony he, upon leaving for the East, said to Clinch and See: "I will leave it [the improvement of the street] to you boys." A part of the street, however, as we have seen, was owned by "the boys"; and this evidence cannot be construed as sufficient to constitute Clinch and See as Markham's agents to do anything more than bind him to pay the cost of the improvement in so far as it affected his own property. Aside from any question involving the statute of frauds (to answer for the debt of another), the evidence does not purport to authorize Clinch and See to make a contract binding Markham to pay for the improvement of their land.

[2, 3] Upon the second cause of action, wherein plaintiffs sought to recover upon the written contract, the court found, in substance, that while the letter of Tryon & Brain was addressed to Clinch and See alone, with whom their negotiations were had, they intended it for Markham as well; his name being omitted for the reason that they did not know his initals. There is nothing in the letter showing such intention. On the con-

trary, it clearly appears that, as understood by plaintiffs, the letter, when accepted by Clinch and See, should be a substitute for a "good and sufficient contract between us for the said work." Clearly the pronoun "us," as here used, had reference to the plaintiffs and Clinch and See, with whom only plaintiffs were contracting. As shown by the record, all the work was done under the contract signed by Clinch and See; no work being performed after Markham signed the letter. Markham, under the circumstances, could not be bound for the entire cost of the improvement by the undisclosed intention of Tryon & Brain. Moreover, as to him, the letter considered as a contract is wholly lacking in the essential element of mutuality, since for its breach he could not in any event have recovered damages from plaintiffs for their failure to improve the property of Clinch and See. It appears that some time after the completion of the work recovery of the cost for the whole of which is sought, and on his return from the East Markham signed the letter. In doing so, however, his act cannot be construed other than as a ratification of the acts of Clinch and See in so far as they were authorized to act as his agents in binding him to pay his proportion of the cost of the work. The circumstances and evidence clearly show this to be the fact. Construing the evidence most strongly in favor of plaintiffs it shows only that Clinch and See were authorized by Markham to make a contract for and on his behalf for the improvement of the street so far as it affected his ownership thereof; the agreement between them, as stated by appellant's counsel, being:

> "That Clinch and See would have the street put in, and that Markham was to pay of the entire cost of the construction the proportion which the frontage of his property bore to the frontage of all the property in the tract."

And this, in our opinion, is the extent of plaintiff's right to recover the cost of making the improvement from Markham.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

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32 Cal. App. 118

CONSOLIDATED LUMBER CO. v. FREW et al. (Civ. 2009.)

(District Court of Appeal, Second District, California. Nov. 17, 1916.)

1. TRIAL 🔑39—ADMISSION OF EVIDENCE—EXHIBITS.

A record, showing that certain exhibits were introduced in evidence and marked for identification, and that they were subsequently treated as evidence, shows that they were admitted in evidence, not merely offered for identification.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 92–98; Dec. Dig. 🔑39.]

2. SALES 🔑181(1) — DELIVERY — BURDEN OF PROOF.

Where defendant, after considerable negotiations concerning a lumber bill owing by him to plaintiff, gave a note for the amount thereof, that note was an admission that the lumber had been received, which, if not binding on defendant, at least put on him the burden of overcoming the admission by satisfactory evidence.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473–476; Dec. Dig. 🔑181(1).]

3. EVIDENCE 🔑441(11)—PAROL EVIDENCE—NOTE—CONSIDERATION.

In an action on a note given for the purchase price of lumber, evidence is inadmissible to show a previous oral agreement by the seller that he would adjust the claim for shortage when defendant was ready to settle the note; there being no claim of fraud or mistake.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1799–1812, 2043, 2044; Dec. Dig. 🔑441(11).]

Appeal from Superior Court, Los Angeles County; E. P. Unangst, Judge.

Action by the Consolidated Lumber Company against Will L. Frew and others. From an order granting plaintiff's motion for a new trial, defendants appeal. Affirmed.

Andrew M. Strong, of Los Angeles, for appellants. Frank D. McClure and R. A. Turner, both of Los Angeles, for respondent.

CONREY, P. J. This is an appeal by the defendants from an order granting plaintiff's motion for a new trial. The action is one to recover judgment for $7,500, with interest, upon a note dated September 30, 1911, made by the defendants in favor of plaintiff's assignor, one E. U. Wheelock. Execution and delivery of the note are admitted, as well as nonpayment thereof. A reduction is claimed on account of a so-called partial failure of consideration, the defendants offering to pay a sum slightly less than $4,000, together with interest thereon from date of the note to date of the commencement of the action. The case was tried to a jury, which returned a verdict for only $6,000, whereas the plaintiff contends for the entire indebtedness shown on the face of the note.

In December, 1910, the Consolidated Lumber Company and the Watts Lumber Company sold and delivered to the defendant American Aeroplane Company lumber which was used in the construction of grand stands, hangars and other structures on certain land known as Dominguez Aviation Field in Los Angeles county. Bills were rendered to the defendant company for such lumber, amounting to 648,710 feet, being the aggregate amount of the deliveries severally claimed to have been made by the lumber companies. The defendant company held a lease on the Dominguez Aviation Field lands whereon the structures above named had been erected The defendant company having failed to make prompt payment for its lumber, claims of lien against that property were filed by the lumber companies. Shortly before the time limited by law for the commencement of actions for the enforcement of such liens, conferences were held between the representatives of the lumber companies and of the Areoplane Company, which resulted in a settlement made for the purpose of preventing foreclosures. Mr. Will L. Frew was a director, and was secretary of the American Aeroplane Company, and seems to have represented that company in its dealings with the lumber companies when the lumber was ordered and delivered, and also in the subsequent settlement. As witness for the defendant company, Mr. Frew stated that Mr. Wheelock, who was representing the lumber companies, made a proposition that if the defendant company would pay 40 per cent. of the face of the claim, he would allow it to stand for a year on the condition that he would hold a transfer of the lease as security, and any time before the expiration of that year the debtor could pay the amount or adjust the amount of the claim, and the lease would be transferred back. This testimony was received subject to all legal objections which might be made to it. There was a stipulation covering such objections, both on general grounds and upon the special ground that such testimony tended to vary, modify, and alter the terms of the written contract between the parties, and that by reason of the acts, declarations, and transactions of the defendants they were estopped from proving, or offering to prove, a shortage of lumber delivered to the defendant company Following upon the negotiations above mentioned, the defendant company did pay 40 per cent. of the claim, and the defendant corporation executed an unconditional transfer of its lease to Wheelock in his own name, but really as trustee for the Consolidated Lumber Company, and the recorded lien claims were canceled. This transfer was made on April 25, 1911. It should be noted that on account of some objections made by Wheelock to the original lease held by the defendant company, a new arrangement was made, by consent of all the parties, with the lessors, whereby the old lease was canceled and a new lease made to the defendant company, which was dated and executed on April 25, 1911, and it was that lease which was on that day assigned by the defendant company to Wheelock. At the same time Wheelock executed to the defendant company a sublease of the property, which sublease recited Wheelock's ownership of the lease and provided that upon payments being made to Wheelock in the aggregate sum of $7,924.39, with interest as specified, on or before November 1, 1911, and further performing the conditions of the lease, Wheelock, in consideration of $1 agreed to assign and sell the buildings, structures and lease to the defendant corporation. It was provided that upon failure of the defendant corporation to make such payments and perform the conditions of the lease, its right to purchase the property and lease should terminate.

In September, 1911, the defendant company desired to have the lease returned, and asked Wheelock upon what condition it could be released. Negotiations followed as a result of which the lease was transferred by Wheelock to the defendant corporation, and that corporation, together with the other defendants in this action, executed to Wheelock two notes. One was for $724.19, which was paid when due; the other was the $7,500 note which is the subject of this action. Subject to like objections as those above stated, Will L. Frew was permitted to testify that at the time of negotiating the above-noted transactions of April 25, 1911, and also in September in connection with the execution of the notes, Frew and Mr. Temple, the president of defendant corporation, made a claim that there had been a shortage in the amount of lumber delivered, and were assured, both in the April and September transactions, that an adjustment would be made on account of any deficiency in the amount of lumber that had been delivered. Frew testified that as early as January, 1911, when Mr. Wheelock had asked Frew and Temple when the bill would be paid, the following occurred:

> "We told him we did not know, and that the bill was larger than we anticipated, more lumber than we looked for, and it was more than we expected to have to pay. We made our estimates from the architect's figures, and had not anticipated nearly that much, and we told him that we were sure that there was an error somewhere in the amount of the lumber delivered."

He said that Wheelock told him in reply that:

> "When you get ready to settle the bill we will look after the adjustment."

The court further permitted the defendants to introduce testimony of sundry witnesses for the purpose of showing that there were deficiencies in the amounts of lumber delivered, such deficiencies corresponding in value to the deduction claimed by the defendants in their answer as an offset to the note. The court having overruled plaintiff's objections to all of this testimony, the plaintiff introduced a considerable amount of evidence for the purpose of showing that all of the lumber was delivered. Also, Wheelock denied all of the statements above noted concerning objections to the account and any promised adjustment thereof.

[1] Counsel for appellants asserts that the testimony as to the alleged shortage of lumber is uncontradicted, and that there is no evidence of any delivery of lumber to the appellants. As to certain exhibits which were duplicates of bills rendered to the defendant company promptly after the time when lumber was delivered, counsel claims that they were never received in evidence. In this he is mistaken. The record shows that the exhibits "were introduced in evidence and marked for identification." This does not correspond with counsel's claim that they were merely produced for identification without being introduced in evidence. Moreover, further progress of the trial clearly shows

that these documents were treated as in evidence. It would require a very long statement to develop here the particulars in which the evidence was conflicting.

[2] In view of the transactions occurring between the parties in April, 1911, and in September, 1911, finally culminating in the execution of the note in suit here, the defendants thereby admitted that the lumber was delivered for which this note represents the unpaid balance of the purchase price. If defendants were not thereby estopped to dispute the matter any further, at least the burden would be upon the defendants to overcome that admission by satisfactory evidence that some part of it was not delivered. From our inspection of the evidence, we are not inclined to the opinion that the judge who tried this case misused the discretion vested in him, if insufficiency of the evidence to sustain the verdict was actually the ground which moved him to make the general order which was made granting a new trial of the case.

[3] But we also think the court erred in admitting the testimony introduced for the purpose of showing that the note was given subject to the terms of an oral understanding or agreement that a deduction would be made on account of some quantity of lumber not delivered. Since the defendants were not claiming that the note was obtained by fraud, or that by reason of any mistake the parties failed to understand the terms of the writing signed by them, all testimony offered by the defendants to contradict the terms of the note should have been excluded.

The order granting a new trial of this action is affirmed.

We concur: JAMES, J.; SHAW, J.

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32 Cal. App. 123

SILVER LAKE POWER & IRRIGATION CO. v. CITY OF LOS ANGELES et al. (Civ. 1887.)

(District Court of Appeal, Second District, California. Nov. 17, 1916.)

1. Eminent Domain 🔑265(5)—Costs—Statute.

Code Civ. Proc. § 581, subd. 1, provides that an action may be dismissed by the plaintiff himself upon written request to the clerk at any time before trial upon the payment of his costs, unless a counterclaim has been set up or affirmative relief sought by cross-complaint or answer. Section 1255a provides that the plaintiff may abandon condemnation proceedings before expiration of 30 days after final judgment by serving on defendant and filing in court a written notice of the abandonment, and that upon such abandonment, on motion of defendant, a judgment will be entered dismissing the proceedings and awarding defendant costs and disbursements, including expenses in preparing for trial and reasonable attorney fees. *Held*, that section 1255a relates to condemnation proceedings only and furnishes a special rule excluding the operation of section 581 in such cases.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 690; Dec. Dig. 🔑265(5).]

2. Eminent Domain 🔑265(5)—Costs—Statute.

Under Code Civ. Proc. § 1255a, the clerk not being authorized to enter dismissal of condemnation proceedings, the effect of plaintiff's request to the clerk for a dismissal of his action and notice of such request to defendant was to apprise defendant of plaintiff's determination to abandon the action and entitle defendant to proceed under the section and move for judgment of dismissal and for costs, so that filing of a cost bill on the day of the order of dismissal, after hearing of defendant's motion, was in time.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 690; Dec. Dig. 🔑265(5).]

3. Eminent Domain 🔑265(5)—Costs—Statute.

Where defendant in condemnation proceedings, on receipt of notice from plaintiff of intention to abandon the proceedings, filed a motion for dismissal and allowance of costs the next day and filed his bill for costs upon the granting of his motion and entry of the order of dismissal, he acted strictly in accordance with Code Civ. Proc. § 1255a.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 690; Dec. Dig. 🔑265(5).]

4. Eminent Domain 🔑265(5)—Costs on Dismissal—Statute—Constitutionality.

Code Civ. Proc. § 1255a, is constitutional.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 690; Dec. Dig. 🔑265(5).]

5. Eminent Domain 🔑265(3)—Attorney's Fees—Statute.

Where it appeared in a condemnation proceeding that the attorney for defendant city was employed by the city under a special contract upon a retainer of $300 a month to handle the instant case and others, and that the compensation was to cease when all of the cases had been concluded, and at the time of the dismissal of the instant case a total amount had been paid of $7,000, and that he had performed a great deal of labor, and that he had apportioned one-fourteenth of the total amount paid him as properly applicable to the instant case, the court properly allowed $500 as attorney's fees incurred by the city.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 692; Dec. Dig. 🔑265(3).]

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Eminent domain proceedings by the Silver Lake Power & Irrigation Company against the City of Los Angeles and others. From an order denying plaintiff's motion to retax costs under a judgment dismissing the proceedings on defendants' motion after plaintiff's abandonment, plaintiff appeals. Affirmed.

Newman Jones, of Riverside, for appellant. Albert Lee Stephens, City Atty., W. B. Mathews, and S. B. Robinson, all of Los Angeles, for respondents.

JAMES, J. This was an action in eminent domain. The case was originally brought in the county of Mono; thereafter, because of the disqualification of the judge of the superior court of that county, it was transferred to the county of Alpine for trial; thereafter, on a showing made that the convenience of the witnesses would be better subserved thereby, another order of transfer was made, and the suit was finally located in the superior court of the county of Orange. The defendants had answered in the action, but before trial the attorney for the plaintiff, claiming the right so to do under the provisions of subdivision 1 of section 581, Code of Civil Procedure, made his written request to the clerk for a dismissal of the action, which was filed on June 28, 1915. On the same day the clerk made this entry in his docket: "This case is hereby dismissed." On the 30th day of June, a written notice was given to the defendants of the action so taken, and on July 1st of the same year defendants served upon appellant their notice of motion for judgment of dismissal and for costs and attorney's fees, which they claimed under the provisions of section 1255a, Code of Civil Procedure. This motion came on for hearing on the 23d day of July, 1915; whereupon the court made its order agreeable to such motion, directing that the action be dismissed and that defendants recover their costs, including a reasonable attorney's fee. On the day of the making of that order, the defendants served and filed in the office of the clerk of the superior court of Orange county their memorandum of costs and disbursements, which included a charge of $500 as attorney's fee. Thereafter the plaintiff made a motion to retax costs, moving to strike out all of the items included in the cost bill, which motion, after hearing, was denied, and this appeal was then taken from the judgment.

[1] Subdivision 1 of section 581, Code of Civil Procedure, by the authority of which the plaintiff assumed the right to dismiss its action by filing written request therefor with the clerk, is a general section providing the rule of procedure in actions not subject to some special requirement made by law. Section 1255a relates to condemnation proceedings only and furnishes a special rule. That section reads as follows:

> "Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, by serving on defendant and filing in court a written notice of such abandonment; and failure to comply with section 1251 of this Code shall constitute an implied abandonment of the proceeding. Upon such abandonment, express or implied, on motion of defendant, a judgment shall be entered dismissing the proceeding and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees. These costs and disbursements, including expenses and attorney fees, may be claimed in and by a cost bill, to be prepared, served, filed and taxed as in civil actions; provided that said costs and disbursements shall not include expenses incurred in preparing for trial where the said action is dismissed forty days prior to the time set for the trial of the said action."

The propositions advanced by the appellant are mainly to be resolved upon the question as to the constitutionality of the section 1255a above quoted.

[2, 3] By an examination of the provisions of that section it readily appears that the judgment of dismissal, therein provided to be made where a plaintiff in condemnation proposes to abandon his action, is one which the clerk is not authorized to enter as he is in the generality of cases covered by section 581, Code of Civil Procedure. Viewing section 1255a as a valid enactment, then it appears that the only effect of a request to the clerk for a dismissal of the action and notice of such request to the opposite party would be to apprise the defendant in such a suit of the determination on the part of the plaintiff to abandon the action. Thereupon the defendant would be permitted to proceed as is provided by section 1255a and ask the court by a motion for a judgment of dismissal and for his costs. The procedure followed by the defendants, after they had been apprised that plaintiff had abandoned its action, was strictly in accordance with that outlined in the section under consideration. It is insisted that by the enactment of section 1255a the Legislature has attempted to put into effect a law special in its nature and in violation of the provisions of the state Constitution, which declares that laws of a general nature shall be uniform in their operation and that special laws shall not be passed touching procedure in courts of justice; and further that the fourteenth amendment of the federal Constitution is violated upon the ground that under the provisions of section 1255a a defendant in a condemnation suit is deprived of property without due process of law, and is denied the equal protection of the law. It is true, as has been held in numerous cases, that acts of the Legislature of a special nature must find their justification in the reason for the distinctions which they create and rest upon natural and constitutional differences in the subject-matter or persons treated of. Here the question is as to whether the allowance of attorney's fees as a part of the cost charges to a defendant, which are not provided to be allowed in all actions, amounts to the extending of a special consideration to one class of litigants as against others standing in a similar situation and in like classes.

[4] In the case of City of San Francisco v. Collins, 98 Cal. 259, 33 Pac. 56, our Supreme Court has pointed out that, as section 14 of article 1 of the Constitution provides that private property shall not be taken or damaged for public use without just compensation having first been made, the general statute relating to costs to be allowed to a plaintiff in an action cannot be made to apply in condemnation cases. In this decision it is quite clearly intimated that, by reason of the constitutional guaranty, suits in eminent domain are properly subject to different treatment in the

matter of the rights of the parties to costs than are civil suits in general. But our attention is called to the case of City of Sacramento v. Swanston, 29 Cal. App. 212, 155 Pac. 101, wherein the precise question here argued was fully considered by the court and the constitutionality of section 1255a, in the particulars here subjected to attack, fully sustained. The court in that decision has gone extensively into the authorities, and we think the reasoning used is sound, and we adopt it with the conviction that the law was there correctly declared. Having reached this conclusion, the main point of contention on this appeal is disposed of. Counsel has said that the memorandum of costs filed by the defendants was filed more than five days after the notice of the dismissal of the action was given. The point of that argument depends altogether upon the matter as to which order of dismissal was effectual. Under the conclusion already expressed on the main question, it follows that the clerk was without authority to enter the dismissal at the written request of plaintiff and that a judgment of dismissal could only be entered, as was done, by the court upon application made therefor by motion. The cost bill was filed in time.

[5] There is a further contention that requires brief consideration: Counsel who appeared for the city testified upon the hearing of the motion to tax costs as to the attorney's fees which had been charged in the memorandum. The court's allowance was for the sum of $500 on this account. Counsel for appellant argues that the attorney's fees were not shown to have been specially incurred by the city, in that the attorney who represented it had other employment with the city for which he received a fixed compensation. This is hardly a correct statement of the situation as shown by the testimony given. Mr. Robinson, the attorney in question, testified that he had been, up to June, 1913, a deputy city attorney, and while acting as such deputy had had charge of a number of cases which included this one; that, immediately after his resignation as such deputy, the city employed him under a special contract upon retainer of $300 per month to handle to conclusion this case and six or seven others; that the compensation was to cease when all of the cases had been concluded, and at the time of the dismissal of this action a total amount had been paid to him as attorney's fees of about $7,000; that he had performed a great deal of labor in and about this case and that he had apportioned what he considered a very reasonable amount, to wit, one-fourteenth of the total amount paid to him, as properly being applicable to the work he had done in connection with this particular litigation. Upon this showing, we think the court was furnished with ample evidence upon which to make the allowance in the amount specified in the cost bill as for attorney's fees incurred.

Other smaller items contained in the cost bill are not made the subject of attack, except as they are included in the general argument touching the constitutionality of the statute.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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32 Cal. App. 217

BAUMAN v. WUEST et al. (Civ. 2014.)

(District Court of Appeal, Second District, California. Nov. 27, 1916.)

TRUSTS 🔑92½ — RESULTING TRUST — ORAL AGENCY TO PROCURE LEASE — STATUTE OF FRAUDS.

Where plaintiff constituted a defendant his agent by parol for the purpose of securing a lease for more than one year which he was to take in his (the agent's) name, if necessary, and transfer to plaintiff, the agent had not sufficient authority to make a contract which could be enforced by the lessor against the plaintiff, or which the agent could compel the plaintiff to accept, and plaintiff, who has parted with no consideration, cannot compel the agent to transfer the lease taken to him, under Civ. Code, § 853, on the theory of a resulting trust, in spite of the statute of frauds.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 141; Dec. Dig. 🔑92½.]

Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Suit by William Bauman against Albert Wuest and another. Judgment for defendants, and plaintiff appeals. Affirmed.

L. E. Dadmun, of San Diego, for appellant. Morganstern, McGee, Henning & Hendee, of San Diego, for respondents.

JAMES, J. Plaintiff's suit was to enforce transfer to him of a certain lease of real property covering a term of years, in which lease defendant Wuest was named as the lessee. It was alleged that a transfer had been made without consideration by Wuest to defendant Morganstern. An answer was filed, and the case came on for trial. Judgment being entered in favor of the defendants, from which plaintiff appealed.

Plaintiff alleged in his complaint that he employed Wuest to secure a lease of certain real property for him, with the understanding that, if the lease could not be procured to be made directly to plaintiff, Wuest should, if possible, secure it in his own name and then transfer it to plaintiff. For this service it is alleged plaintiff agreed to pay Wuest the sum of $1,000. It was alleged that Wuest secured the lease to be made to himself, and denied any interest of this plaintiff, and assigned the lease to Morganstern. Plaintiff alleged that he had tendered payment of the $1,000 agreed upon as compensation for Wuest's services and had demanded that the defendants make assignment of the lease to him. In the answer of the defendants the making of any agreement constituting Wuest as the agent of plaintiff for the purposes alleged in the complaint was denied, and it was further alleged by way of defense that any agreement made in that behalf was void as not being expressed in writing. At the outset of the trial plaintiff proceeded to offer proof of the making of the agreement with Wuest by way of parol, and was met with the objection that such testimony was incompetent because of the provisions of the statute of frauds. Thereupon plaintiff made a complete offer to show the agreement, stating, however, that it rested altogether in parol, and that there was no writing evidencing the same. The whole case was submitted upon that offer, defendants objecting, as noted, and the objection being sustained by the court. The judgment appealed from was thereupon entered. The appellant contends that an agency of the kind alleged in the complaint may be established by parol, but does not contend that by the oral authorization made Wuest, as agent, would be empowered to execute on the plaintiff's behalf a binding contract of lease, as the term was for a period exceeding one year. Section 1624, subd. 5, Civ. Code. He seeks, however, to have his case brought within a classification of resulting trusts which equity by construction will enforce, and not permit the trustee to interpose the statute of frauds as a defense. He refers to the cases of Brown v. Spencer, 163 Cal. 589, 126 Pac. 493, and Bradley Co. v. Bradley, 165 Cal. 237, 131 Pac. 750; and we may add to the citation Hidden v. Jordan, 21 Cal. 92. Those cases all come within the express provisions of section 853 of the Civil Code, which declare that, where a transfer of real property is made to one person, and the consideration therefor is paid by another, a trust is presumed to result in favor of the person for whom the payment is made. In each of the cases cited the consideration was advanced by the person who sought to charge the agent as trustee. The section of the Code just referred to contains only a repetition of the well-established equitable rule that, when a person assuming to act for and on behalf of another, by actual fraud or that presumed from confidential relations, appropriates or gets into possession of the property which he should have delivered to his principal, and the principal is damaged thereby, he is chargeable as trustee, and may be required to account. It seems never to have been held, however, that an agency attempted to be created by parol in violation of the provisions of the statute of fraud will be held sufficient to impose a trust in a case like this where the principal who seeks its enforcement has parted with no consideration. Mr. Story, in his work on Equity Jurisprudence (volume 2, p. 537), declares the rule as follows:

> "For where a man employs another person by parol as an agent to buy an estate for him, and the latter buys it accordingly in his own name, and no part of the purchase money is paid by the principal, there, if the agent denies the trust, and there is no written agreement or document establishing it, he cannot by a suit in equity compel the agent to convey the estate to him; for (as has been truly said) that would be decidedly in the teeth of the statute of frauds."

Sustaining this statement of the text is Collins v. Sullivan, 135 Mass. 462, where the court, quoting with approval from Kendall v. Mann, 11 Allen (Mass.) 15, says:

> "Where a man merely employs another person by parol as an agent to buy an estate, who buys it for himself and denies the trust, and no part of the purchase money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him."

The English case of Heard v. Pilley, 4 Law Reports, Chancery App. Cases, 548, at first glance might seem to support a contrary rule, but when analyzed we think is in accord with the authorities just referred to. Considering the facts here: Wuest had no sufficient authority by which he could make any binding contract on behalf of his alleged principal, the plaintiff, and any attempt that he might make in that direction could not be enforced by the lessor. Neither could the agent compel his alleged principal to accept the fruits of his labor, with the result that there would be no mutuality as to the binding effect of the contract either between the plaintiff and the lessor of Wuest or between Wuest and the plaintiff. We have not been favored with either brief or oral argument on behalf of the respondents in this case. However, lacking that aid, we have made a careful examination of the case and of the authorities, and feel satisfied that the judgment of the court was the proper one to be entered.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(32 Cal. App. 266)

PACIFIC GAS & ELECTRIC CO. v. COLE, County Treasurer. (Civ. 1593.)

(District Court of Appeal, Third District, California. Dec. 6, 1916. On Petition for Rehearing, Jan. 5, 1917. Rehearing Denied by Supreme Court Feb. 1, 1917.)

1. Counties 🔑168(3)—Warrants — Order of Payment.

Under Pol. Code, § 3456, providing for assessments on lands in a reclamation district for reclamation work being collected and paid into the county treasury and placed to the credit of the district, and paid out for the work on warrants of the trustees of the district, and section 3457, providing that the warrants must be presented to the county treasurer, and if not paid on presentation, they must be indorsed to that effect and registered, and that, if not paid in four years, they may be extended for a like period by the trustees, and a record thereof filed with the treasurer, warrants are entitled to priority of payment in the order of their registration; so that payment of warrants cannot be required when there is on hand no more money than necessary for payment of prior registered warrants.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 252; Dec. Dig. 🔑168(3).]

On Petition for Rehearing.

2. COUNTIES 🔑168(3) — PAYMENT OF WARRANTS—DEFENSES.

The defense to a suit to compel payment by a county treasurer of warrants of a reclamation district that there are other warrants of the district, of the amount of all available funds, entitled to priority of payment, because first presented and registered, is available, though no demand was made by the holders of such warrants subsequent to their presentation and registration.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 252; Dec. Dig. 🔑168(3).]

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by the Pacific Gas & Electric Company against Roy E. Cole, Treasurer of the County of Yolo. From an adverse judgment, plaintiff appeals. Affirmed.

Harrison & Harrison, Leo H. Susman, and Wm. B. Bosley, all of San Francisco, for appellant. Arthur C. Huston and Harry L. Huston, both of Woodland, for respondent.

CHIPMAN, P. J. Mandate. The action was commenced in the superior court of Yolo county to obtain a writ of mandate commanding defendant to immediately pay to petitioner the amount of each of two warrants, to wit, warrants No. 524 and No. 567 of reclamation district No. 730, with the interest legally due thereon, "out of any moneys deposited with or held by defendant for the purpose of paying outstanding unpaid and registered warrants of said reclamation district No. 730."

It is alleged in the petition: That reclamation district No. 730 is, and at all times mentioned in the petition it was, a reclamation district duly organized by the board of supervisors of Yolo county. That certain named persons were on June 29, 1912, the duly elected, qualified and acting trustees of said district. That on said June 29, 1912, for value received, there was executed and delivered to petitioner by said trustees a warrant, No. 524, reading in part as follows: "* * * The treasurer of Yolo county will pay out of the reclamation fund, district No. 730, to the order of Pacific Gas & Electric Company, five hundred and one and $^{85}/_{100}$ dollars"—duly signed. That said warrant was approved by the then board of supervisors of said county, and thereupon there was written upon the face of said warrant, by order of said board of supervisors, as follows: "Approved by the board of supervisors of Yolo county, Cal., July 1, 1912. M. H. Stitt, Chairman." That thereafter, thus approved, said warrant was presented for payment to defendant as treasurer of said county, "but said warrant was not paid and said warrant has never been paid." That when said warrant was so presented for payment, defendant as such treasurer indorsed thereon as follows: "Not paid for want of funds. July 1, 1912. Roy E. Cole, Treasurer, Yolo County, Cal." That "thereupon said warrant was duly registered." Like averments are set forth touching warrant No. 567, which was dated and delivered to petitioner May 4, 1914, for the sum of $416.98, approved by the board of supervisors May 5, 1914, presented to defendant for payment on that day, and on the same day indorsed by him as in the case of warrant 524, and was likewise "thereupon duly registered." That each of the said two warrants "is a valid outstanding unpaid and registered warrant of said reclamation district No. 730."

It is further alleged that on October 26, 1914, in an action theretofore commenced in said superior court by petitioner herein as plaintiff against said reclamation district as defendant pursuant to section 3457 of the Political Code, based upon said two warrants and upon certain other warrants theretofore drawn and issued by the trustees of said district, there was duly given and made by said superior court a final judgment in favor of the two warrants hereinabove mentioned, establishing their validity and adjudging that petitioner herein have and recover from said district the sum of $7,034.04, which was the aggregate of the principal amounts of said two warrants and of certain other warrants mentioned in the complaint in said action and of the interest accrued on said several warrants referred to; that no part of said judgment has been paid; that at the time said judgment was made "all of the warrants therein referred to in compliance with an order made by the above-entitled court were marked by the clerk of said court as having been canceled by order of said court and all of said warrants, after having been so marked, were surrendered to said reclamation district No. 730"; that thereafter execution upon said judgment was issued out of said court and delivered to the sheriff, and was by petitioner caused to be served upon defendant as treasurer and caused a demand to be made upon said treasurer on the ——— day of July, 1915, for the payment of the warrants referred to in said judgment, "which said warrants, at the time when said demand was made, had already been surrendered to said reclamation district No. 730 in compliance with said order of said superior court as aforesaid"; that none of said warrants at the time of said demand had ever been surrendered to said reclamation district otherwise than in compliance with said order of said superior court. It is then alleged that prior to the service of the writ of execution upon defendant, and when said demand was made upon him, said reclamation district had caused certain moneys to be deposited with defendant as such treasurer for the purpose of paying outstanding unpaid and registered warrants of said district, and at said time said defendant had in his possession and under his control, and ever since has had and now has in his possession and under his control, as petitioner is informed and believes, and so alleges, more than sufficient, of said moneys to pay said two warrants, together with the interest due thereon, and that said moneys are applicable to the payment of said two warrants; that nevertheless defendant refused to comply with said demand, and ever since has refused and still refuses to pay said two warrants or either of them.

In his answer defendant denied that either of said warrants is a valid outstanding registered warrant of said district; denied that petitioner is the owner of said two warrants or either of them; averred that petitioner on October 26, 1916, canceled and surrendered said warrants to said district, and immediately delivered the same to defendant and they have ever since been and now are in his possession; denied that there was a judgment, as alleged in the petition, made by said superior court on October 26, 1914, in the action referred to in said petition establishing the validity of said two warrants; averred that the complaint and judgment in said action were as shown in Exhibits A and B, respectively, made part of said complaint, and also made part of the answer herein, and that said district surrendered all of the warrants the subject of that action to defendant herein; admitted service of the execution referred to in the petition and that there is now in petitioner's possession the sum of $1,032.71 belonging to said district; denied that said moneys have been or now are available for or properly applicable to the payment of said two warrants; averred that said sum is on deposit with defendant as such treasurer for the purpose of paying outstanding unpaid registered warrants of said district "in their regular order of registration"; that "warrants Nos. 288, 292, 297, 312, and 313, issued by reclamation district No. 730, were registered and are payable out of said moneys prior to any warrants mentioned in the petition herein"; that after the payment of said last-named warrants "there will not be sufficient funds in the hands of respondent to pay any of the warrants mentioned in the petition herein."

The action referred to in the petition was an action against said district to recover judgment upon six different warrants of said district, among which were the two involved in this action. It was alleged in each cause of action set forth in the complaint in that action that, "although payment thereof [the warrants sued upon] has been frequently demanded, said warrant has not, nor has the debt evidenced thereby or any part thereof been paid," and the whole amount is due and unpaid. The prayer is for "judgment against defendant for the sum of $6,757.20 in gold coin of the United States of America, together with interest, * * * and for such other and further relief as may be proper in the premises." It appears from recitals in the judgment that defendant answered admitting the averments of the complaint and that defendant did not otherwise appear at the trial. The judgment was that plaintiff recover from defendant $7,034.04, being the amount of the principal and interest "as set forth in the complaint" and plaintiff's costs of suit. There is no averment in the complaint and nothing in the findings or judgment showing that the action was to "establish the validity of said two warrants" as charged in the petition herein.

To the present action the court found as facts: I. That the said two warrants have been at all times since they were registered as alleged in the petition, and now are, valid registered warrants of said district and are unpaid. II. That in the action referred to in the petition "an order was made by this court on the 26th day of October, 1914, directing the clerk of this court to mark as canceled the warrants referred to in said complaint," including the two warrants here involved, "and to deliver said warrants when so marked to the attorney for the defendant in said action"; that in obedience to said order the clerk so marked and canceled and delivered said warrants to said attorney; that neither of said two warrants "was ever canceled at all except as aforesaid, or was ever surrendered to said district except as aforesaid"; that said two warrants at the time they were issued were issued to petitioner, and petitioner was the holder thereof thenceforward until marked as aforesaid by the clerk of said court, "and each of said warrants has been at all times since it was issued as aforesaid, and is now, owned by the petitioner herein." Each of said warrants was delivered to defendant herein with the consent of said district subsequent to the 26th day of October, 1914, "and has been ever since it was so delivered to him and is now in his possession." III. That at the time when said demand was made upon defendant by petitioner there was in the hands of defendant belonging to said district the sum of $1,032.71, which was not sufficient to pay both said warrants and accrued interest, but was sufficient to pay warrant No. 524, and petitioner has offered to accept said sum of $1,032.71 in full satisfaction of said two warrants. IV. That when said demand was made there were outstanding certain other warrants "all of which had been duly issued and registered prior to the date of the earlier in date of said two warrants and all of which are unpaid"; that the aggregate of the amount of said last mentioned warrants is such that, "if all of said prior warrants were to be paid out of said money, * * * the balance would be less than the amount of either of said two warrants."

As conclusion of law the court finds that defendant is entitled to have the writ of mandate dismissed and judgment was accordingly entered. Plaintiff appeals from the judgment on the judgment roll.

Respondent advances certain propositions in support of the judgment which were anticipated by appellant and made the subject of its points and authorities in its attack upon the judgment. Respondent contends: I. That the legal effect of the action brought by the electric company "was to destroy or annul them as outstanding, subsisting obligations of the district, and the recovery of judgment based upon them substituted a new and different obligation in a new and different form—that of the general judgment"; that the warrants have ceased to exist; that the general judgment substituted for them does not meet the requirements of sections 3456 and 3457 of the Political Code, and to pay the judgment would be a violation of the terms of the statute. II. Appellant having reduced its claim on the warrants to judgment, whatever rights or remedies it had as holder of the warrants were merged in its rights as judgment creditor. III. Reclamation district warrants must be paid, under section 3457, Political Code, in the order of the date of their issuance, or, if registered as outstanding, unpaid warrants, in the order of registration. IV. All moneys collected by a reclamation district must be deposited in the county treasury to the credit of the district and "paid out for works of reclamation upon the warrants of the trustees, approved by the board of supervisors." The court is authorized to proceed against a reclamation district in two ways only: First, issue a writ of mandate to compel the trustees to draw a warrant for the amount found by the court to be due in the mandamus proceeding; second, "to establish the validity of a warrant in order to prevent the same from being barred and so as to authorize the payment of the same or its application on an assessment after the expiration of four years from the date of its issuance."

Section 3456 of the Political Code provides for the appointment by the board of supervisors of commissioners to assess upon the land within the district the sum estimated as necessary for the proposed work.

> "The same must be collected and paid into the county treasury as hereinafter provided, and be placed by the treasurer to the credit of the district, and paid out for the works of reclamation upon the warrants of the trustees, approved by the board of supervisors."

Then follow provisions for the payment of bonds, if bonds have been issued, not involved in this case.

The more important provisions of the statute are found in section 3457, from which we quote:

> "The warrants drawn by the trustees must be presented to the treasurer of the county, and if they are not paid on presentation, such indorsement must be made thereon, and they must be registered and bear interest from the date of such warrant * * * and such warrants are and shall be considered as contracts in writing for the payment of money, and the period prescribed for the commencement of an action based upon said warrants, or connected therewith, is and shall be the term of four years from the date of their issuance; provided, that all warrants in excess of the sum of fifty dollars * * * shall be approved by the board of supervisors before the same shall be paid by the county treasurer.
>
> "Any owner of land in the district may at any time pay any assessments thereon (excepting an assessment upon which bonds have been issued), or any part hereof, with warrants of the district. No warrant shall be paid or received on an assessment, except within four years after the date of its issuance. The board of trustees and the treasurer must cancel all warrants not paid within four years after date of issuance; provided, that any warrant not paid or received on assessment within four years after the issuance may, before the expiration of such four years, upon the demand of the owner or holder, be extended for a like period of four years, upon the presentation of the same to the board of trustees of the district, such extension being indorsed thereon by said board and a record thereof filed with the treasurer. In case an action or proceeding based upon any warrant or connected therewith, be commenced within four years after the issuance of such warrant, and final judgment be obtained in favor of the holder or owner thereof, such warrant shall be paid or received on assessment the same as if it had been paid or received on assessment before the expiration of said four years from the date of its issuance.
>
> "In any proceeding for a writ of mandate to compel the trustees to issue a warrant, if a controversy arises as to the amount that may be due to the plaintiff, the court must determine the same in the manner provided for determining controversies in other civil actions, and shall cause a writ to issue for such sum as may be found to be due."

The action by appellant on the warrants here involved was commenced, under section 3457, July 7, 1914, as to warrant No. 524, two years and a few days after its issuance, approval, and registration, and, as to warrant No. 567, two months after its issuance, approval, and registration. The action was not necessary to establish the validity of the warrants or to determine any controversy over the amount due thereon; for they had the approval of the board of supervisors and had been registered as outstanding obligations of the district. Neither was the action brought for such purpose nor was any such relief given, nor was it necessary to bring the action in order to obtain an extension of time for payment, for one of the warrants had two years and the other three years and ten months to run. Besides the statute expressly provides that any needed extension of time may be given by the board of trustees on presentation of the warrant. "As contracts in writing for the payment of money," which the statute declares them to be, the action seems to have had no other object than to change these contracts into the form of a general judgment against the district with interest added and precisely this is what was accomplished. As found by the court in the present action, the warrants were introduced as evidence in the former action by plaintiff therein and by the direction of the court were canceled by the clerk, so far as appears, without objection by plaintiff and delivered to defendant therein with the consent of the district, and are now in defendant's possession. The usual course where an action is brought upon a written instrument, a promissory note, for example, is to surrender the instrument for cancellation precedent to judgment. It is true the court found that petitioner was the holder and owner of these warrants from their issuance until "marked as aforesaid by the clerk," and that at all times since they were issued plaintiff has been the owner of said warrants, and they are "now owned by petitioner herein." This fact does not nullify the finding that the warrants were surrendered by petitioner and were without objection canceled and are now in defendant's possession.

The statute does not authorize the treasurer to pay out money of the district except "upon the warrants of the trustees, approved by the board of supervisors." Whether or not petitioner by its judgment in the action on its warrants obtained any right except to have a warrant issued by the trustees for the amount of the judgment, which was for the aggregate amount of six different warrants and accrued interest, is a question in the case, and if such was the result of the action, a further question arises: Was the treasurer authorized to pay any money out of the treasury on the judgment, inasmuch as he can only pay out money upon presentation of a warrant. Fresno Canal & Irrigation Co. v. McKenzie, 135 Cal. 497, 67 Pac. 900. If he was not so authorized, mandamus would not lie in this case.

The petition states that the demand made upon the treasurer was by service of the execution issued out of the superior court on the judgment in said action, and it is alleged that the demand made was "for the payment of the warrants referred to in said judgment." The judgment made no mention of any warrants and furnished no information to the treasurer that the amount therein found to be due from the district was based upon warrants theretofore issued. Was the treasurer bound to inquire into the nature of the action and pay out the money of the district on such demand? These are questions of more or less importance in determining whether the writ should issue. But, as we think respondent was justified in refusing payment on other grounds, we refrain from passing upon the effect of the said judgment.

[1] Conceding that petitioner did not, by this judgment, lose its right to have the warrants paid, we think that holders of warrants on which demand for payment and registration had been made prior to petitioner's demand were entitled to priority of payment in the order of their registration, and hence, upon the facts found, the treasurer was justified in refusing payment of petitioner's warrants.

In La France Fire Engine Co. v. Davis, Treasurer, 9 Wash. 600, 38 Pac. 154, as we understand the decision, the warrants in question were issued at a time when there was no law requiring warrants to be paid in any particular order, but such a law was afterwards passed. The court said:

> "But, in our opinion, even before the passage of such act, it was the duty of the treasurer to pay warrants drawn upon any particular fund in the order either of their date, or of the time of their presentation to him for payment."

This rule was followed in Bardsley v. Sternberg, 18 Wash. 612, 52 Pac. 251, as applicable to the payment of city warrants, the court holding that:

> Warrants like those involved "are payable, in the absence of legislative direction, either in the order of their issuance or of their presentation, and not at the direction of the particular officer whose duty it is to pay them."

In First National Bank of Northampton v. Arthur, 10 Colo. App. 283, 50 Pac. 738, neither the charter nor the ordinance of the city prescribed the precise order in which the treasurer should pay the city warrants. A section of an ordinance of the city provided, that, whenever a city warrant was presented for payment and there were no funds for the payment of the same, it became the duty of the treasurer to register such warrants in a book kept for that purpose showing the date and amount of such warrant and the name of the person to whom payable, together with the date of presentation, and to indorse upon the face of such warrant the time and date of registry. The court said:

> "Ordinarily the debtor is required to seek the creditor, if he desires to discharge an obligation, and no place of payment is prescribed therein, but this rule does not prevail as to the warrants or orders of municipal corporations of this character. When, therefore, the holder of a city warrant presents it for payment, and this is refused on account of want of funds, and the warrant is registered by the treasurer, he has a right to assume, in the absence of any law or ordinance to the contrary, that his warrant will be paid in the order of his demand for payment, and of its registration. He has been diligent and has done everything in his power to secure and protect himself in his rights, which ought, in justice, to be superior to those who may secure evidences of indebtedness subsequently issued."

Referring to the registration required, the court said further:

> "This object, undoubtedly, was the ultimate redemption of the warrants in the order of their registration. Any other construction of the ordinance would tend to seriously impair the credit of the city, by making a creditor depend for the satisfaction of his claim solely upon the will and caprice of the treasurer."

Replying to the contention that the order of payment was within the discretion of the treasurer, the court said:

> "The ordinary rule of law is that a debtor can direct the application of payment. In this case, however, the city, not the treasurer, is the debtor; and in the absence of any direction by it, or by the general or special law which controls it, the courts will direct such application as will not be inequitable or unjust to the creditor, and at the same time subserve the best interests of the municipality."

After thus dealing with the question, the court calls attention to a general statute which the court thought did in terms require warrants to be paid in the order presented for payment. What measure of force was given this law in deciding the case we do not know, but we cannot assume that it was the controlling or only factor. However, we think the decision might well have rested upon the reasoning of the opinion apart from the law referred to.

Appellant contends that the question was directly presented in Meyer v. Widber, 126 Cal. 252, 58 Pac. 532, and decided favorably to its contention. That case was mandamus against the treasurer of the city and county of San Francisco to compel the payment of certain Dupont street bonds. The decision was by a divided court, and all the reasons advanced in support of the prevailing opinion were very earnestly assailed by the late Chief Justice Beatty in the dissenting opinion concurred in by Justices Henshaw and Temple. The concluding declaration is as follows:

> "The truth is the doctrine of this case, carried to its logical conclusion will permit the custodian of a fund in the position of this defendant to pay or refuse to pay those who make demands as his fancy inclines. As long as he is not sued he may refuse one and pay another, irrespective of the order of their demands, or he may refuse them all until some favored claimant serves him with a writ of mandate. The doctrine is, in my opinion, without reason to support it, and is pernicious in its consequence."

Notwithstanding that we think the views expressed by the court in First National Bank of Northampton v. Arthur, supra, and the decision by the Washington court are satisfactory and warrant our holding to the rule announced in those cases, we should feel bound to follow the rule laid down in Meyer v. Widber, until overruled by that court, if it could not be distinguished from the present case. We think the facts in the two cases are essentially different. It was stated in Meyer v. Widber in the prevailing opinion of the court, among other reasons for the decision, as follows:

> "There is no law requiring a record to be kept of the respective dates when demands may be made upon the treasurer for the payment of these bonds. The treasurer succeeding the present incumbent will have no knowledge whatever of any demands outstanding against the bond fund when he assumes his office. And at that time, if there be money in the fund, and demand be made upon him for the payment of certain bonds, we cannot see how he would be justified in refusing to apply these moneys to the payment of such bonds."

The statute made no provision for the registration of these Dupont street bonds or that any record should be kept of the holders of any such bonds. All that the treasurer knew when the demand was made upon him by Meyer was that there were other outstanding bonds in the hands of unknown persons of whose demands for payment, if such had been made, the treasurer had no means of knowing. In the present case the warrants held by the trial court to have priority were presented for payment, and of that fact and of the number of the warrants, a registration was made and the reason for nonpayment indorsed thereon.

As was said in the Arthur Case, 50 Pac., supra, the warrant holder "has been diligent and has done everything in his power to secure and protect * * * his rights, which ought, in justice, to be superior to those who may secure evidences of indebtedness subsequently issued." We think, as was there said, that the courts should "direct such application as will not be inequitable or unjust to the creditor, and at the same time subserve the best interests of the municipality."

In holding, as we do, that the treasurer was justified in refusing to comply with plaintiff's demand for the reason assigned by him, we are but giving to sections 3456 and 3457 of the Political Code a construction in harmony with the general law with reference to the payment of county warrants. Pol. Code, §§ 4108, 4109.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

On Petition for Rehearing.

PER CURIAM. [2] The point emphasized on petition for rehearing is a challenge to the right to the writ, by the warrant holders held entitled to priority, for the reason that no demand was made by them for payment. It will be observed from a reading of the statute that the warrants bear interest from their date, and not from the date of registration, as is the case of warrants generally authorized by boards of supervisors, and they were therefore not required to present the warrants for payment in order to obtain interest.

Section 3457 provides as follows:

> "The warrants drawn by the trustees must be presented to the treasurer of the county, and if they are not paid on presentation, such indorsement must be made thereon, and they must be registered," etc.

It seems to us that this "presentation" is a demand for payment. The clause "if they are not paid on presentation" would seem to imply that the presentation was for payment.

However, the holders of these registered warrants who are given priority of payment are not seeking the writ. The respondent is justifying himself in refusing payment to petitioner because of the rights of these prior warrant holders. It seems to us that respondent could interpose this defense without showing a demand of the holders of these warrants made subsequently to their presentation and registration.

Upon other points we have no further comment to make. The petition for rehearing is denied.

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32 Cal. App. 220

LICHTENTHALER v. SAMSON IRON WORKS. (Civ. 2011.)

(District Court of Appeal, Second District, California. Nov. 27, 1916.)

1. SALES 🔑442(1) — CONDITIONAL SALE — BREACH OF WARRANTY—ACTION.

Where title is reserved in the seller, a breach of warranty will not entitle the buyer to recover general damages, because the rule as to the measure of damages applicable to such a case does not apply.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284, 1295; Dec. Dig. 🔑442(1).]

2. SALES 🔑442(3)—BREACH OF WARRANTY—DAMAGES.

On a seller's breach of warranty in a sale of machinery, the measure of damages is the difference between its value as fixed by the contract of sale and its actual value at the time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1286; Dec. Dig. 🔑442(3).]

3. SALES 🔑273(3)—WARRANTY OF FITNESS—STATUTE.

Under Civ. Code, § 1770, proving that the manufacturer of an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose, a warranty of fitness will be implied where the seller contracts with the buyer with full knowledge as to the particular use to which the article contracted to be sold is to be put.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 774; Dec. Dig. 🔑273(3).]

4. SALES 🔑434 — CONDITIONAL SALE — ACTION FOR DAMAGES—SUFFICIENCY OF COMPLAINT.

A complaint, alleging that plaintiff desired to install a pumping plant to obtain water for domestic purposes, and for the irrigation of trees and crops to be planted, and that defendant, with knowledge thereof, proposed to furnish a gasoline engine, a pump and fittings, and guaranteed the engine to be well made and of good material, and guaranteed against defective material and workmanship for one year, that plaintiff accepted the proposal and the engine and pump were installed, and that by reason of poor material, workmanship, faulty plans and installation it was worthless, and alleging damages to crops, trees, and vines which plaintiff was prevented from raising by reason of the defective engine, and showing that plaintiff was not in default of payments prior to the breach, stated a good cause of action for some amount of damages, and was good against a general demurrer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1234–1238; Dec. Dig. 🔑434.]

5. ACTION 🔑38(1) — JOINDER OF CAUSES — BREACH OF WARRANTY.

A complaint, alleging a seller's breach of his contract and warranty to furnish and install an engine and pump for irrigation purposes, and a loss of crops in reliance upon the seller's promises to replace and repair the defective pumping plant, was not objectionable for attempting to join two causes of action, as the allegation of such promises were proper to be considered only as showing a reason for the continuing damages alleged to have resulted.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 549; Dec. Dig. 🔑38(1).]

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Mrs. J. E. Lichtenthaler against the Samson Iron Works. Judgment for defendant, dismissing the complaint on demurrer, and plaintiff appeals. Reversed.

Daniel M. Hunsaker, of Los Angeles, for appellant. Valentine & Newby, of Los Angeles, for respondent.

JAMES, J. Plaintiff brought this action to recover a sum of money as damages alleged to have been sustained through the failure of defendant to furnish an engine and pump and erect the same as contracted for. A demurrer was interposed to the complaint, in which the general ground of objection was first stated that sufficient facts were not set forth in the complaint to constitute a cause of action. The complaint was also demurred to on the ground that it attempted to state two causes of action and was ambiguous and uncertain for the same reason. The superior court sustained the demurrer, and plaintiff declining to amend, judgment of dismissal followed. This appeal was then taken.

In the complaint it was alleged that about April, 1910, the plaintiff was the owner of certain real property in the county of Los Angeles on which she was residing and "on which, as defendant well knew and understood, plaintiff was desirous of, and intended, erecting and installing a pumping plant, for the purpose of obtaining water for domestic purposes and for the irrigation of certain trees and vines then planted and growing on said premises, and of trees and vines and crops to be planted, cultivated and grown by her on said premises." It is next alleged that about the same date defendant made a written proposal to her to furnish a gasoline engine with its fittings and accessories, also a vertical pump and its connections, together with an iron frame. The written proposal then proceeded with the following statement:

> "Foundation to be built by Samson I. Works per our plans, you to do all teaming and furnish all common labor. We furnish one competent man to assist in the erection of this engine and Samson Iron Works pay his traveling expenses to and from Stockton; you board and lodge him until his return to the depot. You haul him and his tools to and from depot. * * * We guarantee this engine to be well made, of good material, with best workmanship. We guarantee this engine against defective material and workmanship for one year."

Further terms of the proposal required that the purchase price should be paid in installments, $150 down and $100 every three months, with interest, and that title to the property should not be acquired by the vendee until it had been fully paid for, and that in default of payment as agreed, the vendor might take possession and remove the engine and pump "and collect reasonable charges for the use of same." Plaintiff then alleged that before April 14, 1910, she accepted the proposal, and that on or about May 1, 1910, pursuant to the contract, defendant delivered to the plaintiff a gasoline engine and pumping plant, and furnished a man to assist in the erection of the same on her premises; that the engine and plant were erected and installed under the direction and with the assistance of the man so furnished. It is then alleged:

> "That the man so furnished by defendant, for such purpose, was not competent, and that he erected and installed said engine and pumping plant in an unskillful and negligent manner. That said engine was not well made, or of good material, nor was it of the best workmanship, and said engine and pumping plant were carelessly and unskillfully erected and installed by the man so furnished by defendant; and the plans and specifications for the foundation of said plant, as prepared by defendant, were faulty and defective. That by reason of the incompetency of the man so furnished by defendant to assist in the erection of said engine and pumping plant, and the unskillful and negligent manner in which he caused the same to be erected and installed, and by reason of the fact that said engine was not well made or of good material or constructed with the best workmanship, and by reason of the further fact that the plans and specifications for both the foundations of said plant, as prepared by defendant, were faulty and deficient, said engine and pumping plant did not work properly, the same failed to pump or lift water, and was in consequence thereof rendered valueless to plaintiff, to her damage in the sum of $2,281, as follows."

The complaint then proceeds in its statement of facts to set forth that the plaintiff, relying upon the warranties and representations of the defendant, did, during the spring of 1910, plant 3 acres of potatoes and 1½ acres of onions and 4½ acres of fruit trees, with the expectation that the same would be irrigated with water to be raised by the pumping plant; that by reason of the failure of the plant to work, the trees and crops died, and she was damaged thereby in the sum of $1,550. She further alleged that at the time the plant was erected there were growing on the ground certain trees and vines which she had expected to irrigate with water to be raised by the plant, and that these trees died through the failure of the plant to raise water, and that she was damaged thereby in the sum of $398. It was then set out that she had paid on account of the purchase price, about May 18, 1910, the initial payment of $150; on or about August 22, $102; on or about December 11, $50; on or about January 25, 1911, $29; that in about May, 1911, the defendant, without the consent of plaintiff, removed, tore out, and took away the pumping plant. It was further alleged that many times after September 1, 1910, defendant had promised and agreed to replace and repair the engine and the defective parts thereof, and that the plaintiff, relying upon such representations and promises, did, in the spring of 1911, plant certain crops, which failed to grow by reason of lack of water, and that she purchased certain seed and caused ground to be specially prepared for particular crops, all of which failed because water was not produced from the pumping plant with which to irrigate them. It may be noted here that the pump was installed about the 1st of May, 1910, and that the plaintiff was not in default as to her payments until November, the same year. According to the allegations of her complaint, the pumping plant never did work properly by reason of the unskillful installation thereof, and by reason of deficiency in workmanship and material of the engine.

[1, 2] Respondent, in support of its demurrer, alleges: First, that no action can be maintained on the warranties of the defendant because by the contract no title would pass to the vendee until full payment had been made. It is also contended that under the facts alleged there was no implied warranty of the fitness of the machinery to do the work had in view by the plaintiff, and that therefore the special damages which she alleges to have suffered cannot be recovered. It is true that where title is reserved in the seller, a breach of warranty by the latter will not entitle the other party to recover what are termed "general damages." This is not because no actionable injury has been caused by the breach, but because the rule as to the measure of damages applicable to such a case does not apply, to wit, the difference between the value of the machinery as fixed by the contract of sale and its actual value at the time. This proposition is well stated in New Hamburg Manufacturing Co. v. Webb, 23 Ontario Law Repts. (Can.) 44, where the court said:

> "No one, in short, can be injured by a diminution in value, simply, of a chattel, until he owns it; but he may be injured by the failure of a machine to do the work he wants it for, no matter who owns the machine. * * * The purchaser says to the vendor, 'You furnish me a machine to do a certain kind of work and with a warranty the implementing of which implied the capacity of the machine to do the work—the machine will not do the work, and I have lost money thereby.' It would be no answer for the vendor to say, 'It is not your machine; it is mine.' The purchaser would say: 'What of that? You furnished me with the machine and warranted it to do my work—it is of no importance whose machine it is, yours, mine, or a third person's.' And he would be right."

In that case damages were allowed of a special nature, which included the loss of three seasons' profits occasioned by the engine furnished not developing the capacity contracted for or warranted.

[3] Section 1770 of the Civil Code provides that:

> "One who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose."

Under the provisions of this section, it is well established that a warranty of fitness will be implied where the vendor contracts with the vendee with full knowledge as to the particular use to which the article contracted to be sold is to be put. Such was the condition of fact in Snyder v. Holt Manufacturing Co., 134 Cal. 324, 66 Pac. 311, and in Luitweiler, etc., Co. v. Ukiah, etc., Co., 16 Cal. App. 198, 116 Pac. 707, 712. In the case first cited the written order given for the harvesting machine contained an agreement on the part of the manufacturer and vendor in the following terms:

> "These machines are all warranted to be made of good material, and durable with proper care."

The Supreme Court there declared that, because of the circumstances of the case, under which it appeared that the machine was ordered for a particular purpose, and that the vendor had knowledge of the special purpose for which it was desired to be used, an implied warranty arose, under section 1770, Civil Code, for the protection of the vendee.

[4] Damages such as those in the main alleged in plaintiff's complaint may be recovered where such a warranty exists. We quote from Mechem on Sales, vol. 2, § 1756:

> "But there may be cases in which the buyer had in view such a special or unusual use or purpose that this mere difference in value will not measure it. If he had, two conditions will suggest themselves: Did he keep that peculiar use or purpose to himself, so that the seller had no intimation that any other than the ordinary consequences would ensue? Or did he, or did the circumstances, so fully disclose this special or unusual purpose that the seller may fairly be said to have had in his contemplation when he made the contract the losses which might accrue as a probable result of his breach of his agreement?"

We find no established rule which will prevent a vendee who has not obtained title to the property sold from prosecuting an action to recover any special damages which may have been caused him through breach of the warranty of his vendor. While it is shown by the complaint that plaintiff was in default as to payments to be made on account of the purchase price, it also appears that she had committed no default prior to the first breach of the defendant as to its warranty. She alleged that the entire plant was defectively constructed, both as to design and method, that the engine was not of the material and workmanship guaranteed, and that the plant would not pump water. This condition, it would appear as a proper inference to be drawn from the complaint, existed from the time of the installation of the machinery. The complaint, in our opinion, clearly states a good cause of action for some amount of damages, and, that being true, the objection made by the general demurrer is answered against the contention of respondent.

[5] The second objection raised by the special demurrer is that two causes of action are attempted to be joined, in that promises alleged to have been made by the defendant after September, 1910, that it would replace and repair the defective pumping plant, constituted a different cause for damages than that furnished by the breach of the original conditions stated. We think that this position is not correctly taken, and that the allegations last referred to are proper to be considered only as showing a reason for the continuing damage which is alleged to have resulted to the plaintiff, and for the further reason, as is stated in Luitweiler, etc., Co. v. Ukiah, etc., Co., supra:

> "The buyer's retention and use of the article beyond the stipulated time will not operate as a waiver of the benefits of the warranty when it was at the instance of the seller or his agent or when it was for the purpose of giving the seller or his agent an opportunity to remedy defects" (citing 30 Am. & Eng. Ency. of Law, p. 188).

While the complaint might have been more concisely drawn in its statement of the facts, we think that it contained sufficient to render it unobjectionable to the demurrer, and that the special damages alleged were such as might, under sufficient proof, be recovered, measured by the rule prescribed by section 3314, Civil Code.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

174 Cal. 185

HAYNE et al. v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 6802.)

(Supreme Court of California. Jan. 8, 1917. Rehearing Denied Feb. 7, 1917.)

1. MUNICIPAL CORPORATIONS 🔑450(1)—PUBLIC IMPROVEMENTS—ASSESSMENTS—POWERS OF SUPERVISORS.

St. 1911, pp. 1686, 1691, amending San Francisco Charter, by adding chapter 8 to article 6, empowering the board of supervisors to order construction of tunnels and levy expenses on private property, and section 33 to chapter 2, art. 6, authorizing the board of supervisors by ordinance to use any method of procedure in any general law of the state, while not directly conferring authority on the board of supervisors to define districts benefited by the proposed improvement and to be assessed to pay the expense thereof, does authorize an assessment on a district to be approved by the supervisors.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1073; Dec. Dig. 🔑450(1).]

2. MUNICIPAL CORPORATIONS 🔑460—PUBLIC IMPROVEMENTS — ASSESSMENTS — "COST AND EXPENSES."

Under San Francisco Charter, art. 6, c. 8, § 1, authorizing assessment for cost and expenses of tunnel construction, the city may assess the damages to owners of abutting lots caused by the construction; such necessarily being part of the cost within the term "cost and expenses."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1102–1104; Dec. Dig. 🔑460.

For other definitions, see Words and Phrases, Second Series, Costs and Expenses.]

3. MUNICIPAL CORPORATIONS 🔑447—PUBLIC IMPROVEMENTS — ASSESSMENTS — PREREQUISITES.

It is not prerequisite to the validity of an assessment for tunnel construction that the order for construction of the proposed tunnel or contract therefor shall actually have been made.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1068; Dec. Dig. 🔑447.]

4. MUNICIPAL CORPORATIONS 🔑447—PUBLIC IMPROVEMENTS — ASSESSMENTS — PREREQUISITES.

Since San Francisco Charter, art. 6, c. 2, § 33, authorizes the supervisors to adopt any method of procedure in any general law of the state for the collection of assessment and construction of tunnel, and there are several general statutes authorizing assessment to defray expenses of similar public work in advance of construction thereof, the implied meaning of the grant is that the supervisors may provide for collection of assessments before doing the work or letting a contract therefor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1068; Dec. Dig. 🔑447.]

5. MUNICIPAL CORPORATIONS 🔑455—PUBLIC IMPROVEMENTS — ASSESSMENTS — PREREQUISITES.

Where the ordinance providing for a public improvement authorized the assessment to be made by the board of supervisors and estimates to be made by the board of public works, and the supervisors increased the estimate of the board of public works at the regular time for determining the assessment, there was no arbitrary action without notice or authority in so raising the assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1084–1093; Dec. Dig. 🔑455.]

6. MUNICIPAL CORPORATIONS 🔑455—PUBLIC IMPROVEMENTS — ASSESSMENTS — PREREQUISITES.

Where the ordinance providing for public improvements provided that the hearing on the special assessments might be continued from time to time and all persons interested should be deemed to have notice of the continuance, notice of the first hearing having been given, no notice of proceedings after continuance was required.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1084–1093; Dec. Dig. 🔑455.]

7. MUNICIPAL CORPORATIONS 🔑545—PUBLIC IMPROVEMENTS — ASSESSMENT — PREREQUISITES.

Under San Francisco Charter, art. 6, c. 2, § 33, empowering the board of supervisors to adopt any method of procedure in any general law providing for special assessments, a summary sale of the property assessed is authorized; there being several statutes providing for summary sale after special assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1256; Dec. Dig. 🔑545.]

8. MUNICIPAL CORPORATIONS 🔑545—PUBLIC IMPROVEMENTS — ASSESSMENT — PREREQUISITES—"LEVY."

Since San Francisco Charter, art. 6, c. 2, § 33, provides for levy of special assessments to pay for public improvements, a summary sale of property so assessed is authorized; the word "levy" being sufficiently broad to cover that mode of collection.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1256; Dec. Dig. 🔑545.

For other definitions, see Words and Phrases, First and Second Series, Levy.]

9. MUNICIPAL CORPORATIONS 🔑58—POWERS—CHARTER—CONSTRUCTION.

The rule that a city has no powers not expressly given or necessarily implied from its charter does not do away with the rules of interpretation, and all of the charter is to be considered in arriving at the meaning of any part of it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 145–147; Dec. Dig. 🔑58.]

10. MUNICIPAL CORPORATIONS 🔑554—POWERS—CHARTER—CONSTRUCTION.

Under ordinance providing that on summary sale of property assessed for public improvements, if for any reason the sale does not take place, it may be continued from day to day or postponed to another day not more than ten days thereafter, postponements from day to day or from time to time may be made indefinitely, but a single postponement must not exceed ten days.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. 🔑554.]

11. MUNICIPAL CORPORATIONS 🔑490—POWERS—CHARTER—CONSTRUCTION.

If an assessment is made by a valid procedure, property levied upon is justly liable for its due proportion, and the owner is not entitled to any relief in the court of equity unless he pays, or offers to pay, the amount actually due upon the assessment of his property.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1196–1198; Dec. Dig. 🔑490.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Duncan Hayne, executor of Agnes Howard Hayne, deceased, and another, against the City and County of San Francisco. Judgment for plaintiffs, and defendant appeals. Reversed.

Percy V. Long, of San Francisco (George Lull and Theodore J. Savage, both of San Francisco, of counsel), for appellant. J. A. Cooper, of San Francisco, for respondents.

SHAW, J. The appeal is from the judgment. The complaint alleges that the plaintiffs are owners in common of a lot on the corner of Stockton and Washington streets in San Francisco, and that the defendant, without right, claims an interest therein adverse to plaintiffs. They ask judgment quieting their title. This relief the court below awarded to them. The defendant in its answer claims a lien upon the lot by virtue of an assessment levied thereon to pay the cost of a tunnel constructed under Stockton street from Bush street to a point near Sacramento street. The court below decided that the assessment was invalid and created no lien.

The same assessment was under consideration by this court in Mardis v. McCarthy, 162 Cal. 94, 121 Pac. 389. The objections there made to the validity of the assessment were held to be untenable. Additional objections are now made, and, as the plaintiffs here were not parties to that action, the new objections must be considered.

The assessment was levied by proceedings under an ordinance of the board of supervisors passed in pursuance of powers given to the board by tne amendments of 1911 to article 6 of the city charter of San Francisso (Stats. 1911, p. 1686), consisting of a new chapter designated "Chapter VIII" and a new section to chapter 2, numbered 33. For convenience, we quote section 1 of the chapter and section 33 in full. Section 1 of chapter 8 is as follows:

> "The board of supervisors are hereby empowered to order the construction of any tunnel, subway or viaduct, in, on, under, or over, any accepted or unaccepted open public street, avenue, lane, alley, place or court, within the city and county, or any other land of the city and county, or in, on, under, or over, any land in which and where the city and county may then have an easement or right of way therefor, and to levy the cost and expenses thereof upon private property, in the manner and under and subject to the proceedings, powers, restrictions and limitations in chapter II and chapter VII of this article provided for street work and street improvement." (There is no chapter VII.)

Section 33 of chapter 2 of article 6 reads as follows:

> "The methods of procedure in this article provided for the improvement of streets, or for the construction of tunnels, subways or viaducts and appurtenances thereto, and for the assessment of the expense thereof or any portion of such expense upon private property shall not be deemed exclusive, but the board of supervisors by an affirmative vote of not less than two-thirds of the members thereof, may by ordinance substitute therefor any method of procedure in any

general law of the state of California now in force and effect, or as the same may be amended, or that may hereafter be enacted, providing for any such improvements in municipalities, and levying assessments for the expense or portion thereof upon private property; or the said board may by a like affirmative vote of the members thereof adopt an ordinance which may from time to time be revised or amended, providing a method of procedure for such improvement and assessment; and in such ordinance if said board deems it expedient provision may be made for the payment of any assessment levied in pursuance of the provisions thereof in annual installments covering a term not to exceed ten years upon conditions as to said board may seem reasonable and just, the rate of interest to be paid on such payments not to exceed seven per cent. per annum." St. 1911, p. 1691.

[1] 1. In Mardis v. McCarthy, we held that the charter amendments above mentioned authorized the board of supervisors to provide by such ordinance that the cost and expenses of the tunnel should be levied upon a special district. It is now claimed that the statement in the opinion in that case that by section 5 of chapter 2 of article 6 "the board of supervisors is expressly authorized to define the districts benefited by the proposed improvement and to be assessed to pay the expense thereof" is erroneous. It is true, as claimed, that section 5 does not directly confer such authority upon the board of supervisors. It gives that authority to the board of public works, which, after delimiting the district, must report and recommend its action to the board of supervisors. Other parts of chapter 2, especially section 2, in effect, require that the board of supervisors shall either reject or approve such report. The section therefore authorizes the assessment upon a district to be approved by the supervisors, which is the vital point of the decision. We adhere to the decision in that case.

[2] 2. The assessment included an item of $191,512 made up of allowances to owners of abutting lots for damages caused to them by the tunnel and by the construction thereof. Plaintiffs claim that this was unauthorized, that the phrase "cost and expenses," in section 1 of chapter 8, does not include such damages. We think the phrase should be given a broader meaning. The grant of power to cause the construction of the tunnel, of itself, implies a grant of sufficient incidental powers to accomplish that object. The Constitution (section 14, art. 1) requires the payment of all damages to abutting owners before such tunnel can be constructed. The payment thereof would be one of the necessary expenses of accomplishing the result desired. It is true it would not be a part of the expense of actual construction. The right thus paid for would not technically be a part of the material for the construction of the tunnel, but it is none the less an expense essential to such construction. The making of plans and surveys which precede the construction creates no material which goes into the work, but the cost thereof is uniformly understood to be an expense of the work. We think the payment of damages made imperative by the Constitution is as much an expense or cost of the tunnel as the expense of preliminary surveys and plans, and that the charter gives the power to include it in the assessment.

This meaning is also indicated strongly, if not made imperative, by the fact that the modes for charging upon private property the damages caused by public improvements, provided in other parts of the charter, do not appear to be applicable to damages caused to property not taken, where a tunnel is made in a street already opened. Furthermore, to deny the phrase "cost and expenses" a meaning broad enough to cover such damages would make the power to provide the procedure by ordinance practically inoperative and defeat the grant thereof. Such effect should never be given to words of a law if a more consistent meaning is reasonable. In re Mitchell, 120 Cal. 386, 52 Pac. 799. There are cases where words of like import in statutes relating to public works have been held to a more restricted meaning. We do not regard them as controlling authority. Each case must depend upon its own context and upon the object and purpose to be accomplished and the effect of the narrower or broader meaning upon such object, which considerations here point to the more liberal construction above stated.

We need not consider the point that this objection was waived by the failure to protest before the board, or the point that the objection admits the validity of the assessment, in part, and plaintiffs have not paid or tendered the part admitted to be valid.

[3] 3. At the time this action was begun and down to the time of the trial thereof, the board of supervisors had not yet ordered the construction of the proposed tunnel nor let a contract for such construction, although it had duly passed a resolution of intention to construct such tunnel. It is claimed that the power to collect the assessment lies dormant until such order has been made or such contract let. Counsel say:

> "It would seem that the point is unanswerable. The levying of the cost and expenses must have been after the order was made for the construction of the tunnel. After the board has made such order, then the power is given to it to levy the cost and expense upon private property."

Neither the charter, nor the ordinance under which this proceeding was had, makes the existence of the power to collect the assessment conditional upon the previous exercise of the power to order the construction of the tunnel. The city and county is nowhere prohibited from collecting the necessary funds before ordering the doing of the work. It is a well-established proposition that a municipal corporation may be empowered to levy and collect an assessment for a local public improvement before the work is ordered to be done. In Cooley on Taxation it is said:

> "But there is no reason in the nature of things why an assessment should not be made before the work is actually done, and before the cost shall be finally and conclusively determined." And further that the municipality acts as agent for the parties benefited, and that, in order to properly perform its functions as such agent, it may be "allowed to make the assessment, and even the collection if it shall be deemed proper, in advance." Volume 2 (3d Ed.) 1266.

The following cases sustain this doctrine: Henderson v. Baltimore, 8 Md. 352; Kingman's Petition, 153 Mass. 584, 27 N. E. 778, 12 L. R. A. 417; Scovill v. Cleveland, 1 Ohio St. 134; Davies v. Los Angeles, 86 Cal. 47, 24 Pac. 771; and Felker v. New Whatcom, 16 Wash. 183, 47 Pac. 505. The remedy in such a case, if the improvement is abandoned, it has been held, is that the property owner will be entitled to have his payment returned. Valentine v. St. Paul, 34 Minn. 446, 26 N. W. 457. The Constitution of 1879 originally went further and actually prohibited the doing of such work or the making of contracts therefor to be paid by special assessment upon private property, until after the assessment had been levied and collected. Article 11, § 19. That plan was evidently then considered to be not only within the governmental power, but also consistent with the best public policy. In Thomason v. Ruggles, 69 Cal. 467, 11 Pac. 21, speaking of the amendment of 1884, the court said:

> "The Constitution was amended by striking out the said clause, thus leaving no constitutional restriction as to performing work before the collection of the money, and leaving it to the Legislature to pass such laws in that regard as it might deem expedient."

There is therefore no constitutional objection to the plan.

[4] Section 33, above quoted, authorizes the supervisors to adopt the procedure prescribed in article 6 of the charter, or "any method of procedure in any general law of the state," or to enact an ordinance prescribing a procedure. There were and are in force several statutes providing for the making and collection of assessments to defray the expenses of similar public work in advance of the construction thereof, namely, the act of 1889, the act of 1893, and the act of 1903, each providing a mode for the opening of public streets through private lands (Stats. 1889, p. 70; Stats. 1893, p. 220; Stats. 1903, p. 376); the act of 1901, and the act of 1909, each for the improvement of public streets (Stats. 1901, p. 34; Stats. 1909, p. 1042); and the acts of 1891 and 1893 for changing the grades of streets and for doing the necessary work for that purpose (Stats. 1891, p. 116; Stats. 1893, p. 91). The act of 1901 provides that the assessment for the costs and expenses must be collected before the contract is let for the work to be done. Therefore, when the board of supervisors by the same section is empowered to enact a procedure as a substitute for these various modes, the implied meaning of the latter grant is that such ordinance may also provide for the collection of the assessment before the doing of the work, or the letting of a contract therefor.

There is no force in the argument that before the assessment can be collected the owner must have the security of a positive order by the supervisors that the tunnel shall be constructed, and that he cannot be held liable upon a mere resolution of intention to construct it. One would be no greater protection than the other. Either could be repealed immediately after it was adopted.

The plaintiffs cite as contrary to this: Waukegan v. Burnett, 234 Ill. 460, 84 N. E. 1061; Clark v. Chicago, 214 Ill. 318, 73 N. E. 358; Gage v. Chicago, 191 Ill. 210, 60 N. E. 896; Holdom v. Chicago, 169 Ill. 109, 48 N. E. 164; Swenson v. Board, 95 Minn. 161, 103 N. W. 895; and Hanscom v. Omaha, 11 Neb. 37, 7 N. W. 739. These cases merely decide that the assessment is void if it is based on benefits which may accrue in the future, not from the improvement to be made or thing to be done with the money raised, but from some other improvement which may or may not be made and which is not included in or provided for by the proceedings; in other words, that the benefits assessed must be produced by the improvement to be made therewith. Thus in Waukegan v. Burnett, the assessment was to condemn a right of way for a sewer. No proceeding to lay the sewer across this land had been commenced. It was held that the land assessed would not be benefited by the acquirement of the mere right to use the strips of land, nor until some provision was made for laying a sewer therein, and that it could not be assessed until that was done. But it was not even suggested that an assessment could not be collected after the proceeding was begun, but before the sewer was laid in pursuance thereof. The statement in Page & Jones on Taxation, §§ 417 and 418, that the property owner "must have a vested right to the improvement, and to the benefits which accrue therefrom," and that a local assessment cannot be levied for an improvement which the city is free to make or not at its discretion, is based on these decisions and can mean nothing more than that where the assessment for one improvement is founded on benefits to flow solely from another improvement which is not made, or which will not accrue at all unless some other thing is done for which, as yet, no proceeding has been begun and no order has been made, such future and contingent benefit will not support the assessment. These authorities do not contravene or affect the proposition that, in the absence of constitutional restrictions, the state may provide for the payment of the assessment before the doing of the work or the letting of the contract therefor. In Bellevue I. Co. v.

Bellevue, 39 Neb. 887, 58 N. W. 446, also cited by respondent, the language of the opinion is somewhat loose; but the point decided was that the assessment was void because it had been made without any regard whatever to the cost of the proposed improvement and without any estimate thereof. In the present case the ordinance enacted by the board of supervisors makes full provision for a complete and accurate estimate of the expenses of the proposed tunnel before the levying of any assessment therefor, and this procedure was scrupulously followed.

[5] 4. Another objection is that the supervisors, arbitrarily and without notice or authority, as it is claimed, raised the amount assessed against the plaintiffs from $3,317.50 to $3,351.57. We think this claim is unfounded. The raise was made in the regular course of procedure prescribed by the ordinance under which the supervisors were acting and in pursuance of the authority given thereby and sanctioned by the charter as aforesaid. It was made by the board of supervisors upon the hearing which the ordinance authorized that body to hold to consider and determine, finally, the limits of the assessment district, the damages to be allowed, and the amount of the assessment. Such raise was necessary because of the fact that the damages estimated by the board of public works in its tentative report to the supervisors were increased by the supervisors by the addition of $4,440. Under the terms of the ordinance, the assessment was to be made by the supervisors at the close of the hearings, not by the board of public works as claimed; it was not deemed to be made and completed until that time, and the so-called raise was not a raise of the assessment, but only an increase made by the supervisors in the proposed estimate thereof reported by the works board. Such increase by the supervisors was expressly authorized by the ordinance and was not without authority.

[6] There was no want of notice. The supervisors met at the time and place fixed for the hearing. Due notice thereof had been given as required by the ordinance. Plaintiffs did not appear and filed no protest. The supervisors proceeded with the hearing of the protests filed and decided to allow the addition of $4,440 to the damages to be paid, ordered an increase of the assessment to cover the additional sum, and then continued the hearing four weeks to give time to make the calculations made necessary by the change. No additional or personal notice was given to the plaintiffs of this continuance or of the increase in the damages and in the assessment. This is the want of notice complained of. No such additional notice was required. The ordinance provided that "said hearing may be continued from time to time by the board of supervisors and all parties interested shall be deemed to have notice of such continuance or continuances." The plaintiffs were bound by the notice of the hearing previously given, and were required to take notice that a continuance might be ordered. They had the privilege of attending at the hearing and of contesting any claim made for increase of damages. By failing to appear they waived the right and are concluded by the result.

[7] 5. Next it is claimed that the charter does not authorize the board of supervisors to direct a summary sale of property to pay the amount assessed against it for tunnel construction, nor to enact an ordinance authorizing such sale by the street superintendent.

Section 33, chapter 2, art. 6, above quoted, empowers the board of supervisors to adopt "any method of procedure in any general law" providing for "levying assessments for the expense" of public improvements upon private property, or, at its option, to enact an ordinance "providing a method of procedure for such improvement and assessment." We have referred to these general laws in discussing the third objection. Each statute provides, as part of the procedure, a mode for enforcing from the property owner payment of delinquent assessments. The act of 1889, the act of 1903, and the act of 1893, each provides for the collection of the assessment, if delinquent, by a summary sale of the property, to be made by the street superintendent. The acts of 1891 and 1893, for the grading of streets, provide a like mode of collection. The act of 1901 and the act of 1909, for the improvement of streets, each provides for such sale by the tax collector, if necessary to compel payment of the assessment for the cost and expenses. The conclusion seems clear that it was intended to give power, by the ordinance thus to be adopted as a substitute for the statutory procedure, to likewise provide a method of collection by summary sale; and, as every statutory method of procedure referred to includes a mode of collection of delinquent assessments, it is not reasonable to suppose that it was intended to limit the board of supervisors to the adoption of a procedure which did not include some method of enforcing collection.

[8] Another consideration leads to the same conclusion. It is to be presumed that the charter intended to authorize a procedure that would be practical and effectual to accomplish the object in view, the construction of the tunnel. In all cases where damages may be claimed by property owners from the doing of public work, the funds necessary to pay the same must be first provided; the collection thereof must precede the doing of the work. Some method of enforcing the collection of the assessments in such cases must therefore be provided. The collection could not be intrusted to a contractor, since there would be none at that time. It was necessary, or at least appropriate, to authorize the collection thereof by a public officer in advance of the doing of the work and by a summary sale rather than

by a foreclosure proceeding. Section 1, c. 8, authorizes the board to "levy the cost and expense" upon private property. The word "levy" has a meaning broad enough to cover such mode of collection. In its usual sense it means the obtaining of money by seizure and sale of property. 2 Bouvier's Dic. 194; Standard Dic.; Webster's Dic.; State v. Camp Sing, 18 Mont. 145, 44 Pac. 516, 32 L. R. A. 635, 56 Am. St. Rep. 551. It is true that the word may, according to the context, mean other things; as, for example, the apportionment of the amount to be raised, the fixing of the rate, the ordering of the tax, the extending in the tax roll of the sums to be charged, or the determination of the total amount thereof. But the amendments of the charter adopted at the same time and relating to the same subject are to be considered as a whole. The presumption is that they were intended to be consistent and harmonious. In view of the provisions of section 33 giving power to adopt a procedure which includes a summary sale to enforce collection of assessments, we are of the opinion that the word "levy" in section 1, c. 8, is to be given the broader meaning, and that it includes the sale of property to raise money. For these reasons, we conclude that the sale by the street superintendent was lawfully authorized by the ordinance.

[9] We are aware of the rule that a city has no powers not expressly given by the terms of its charter or necessarily implied therefrom. This does not do away with the rules of interpretation. All of a charter is to be considered in arriving at the meaning of any part of it, wherever it appears that the context aids or controls such meaning. If with the aid of the context, or by the application of other correct rules of interpretation, the conclusion is reached that a power is granted, the rule first stated is fully satisfied.

6. Lastly, the plaintiff objects that the sale is void because it was made more than ten days after January 14, 1913, the time fixed therefor in the notice of sale. Three days before that time a property owner obtained a temporary injunction restraining the sale. This injunction was dissolved on January 31, 1913. The findings state:

> "That afterwards, the said tax collector proceeded to continue the sales, * * * stating that he would sell the same on Friday, the 7th day of February, 1913."

It is further found that on February 7, 1913, without request from any person connected with these proceedings, the tax collector continued the sale until Tuesday, February 11, 1913. There are two grounds upon which it must be held that this objection is untenable.

[10] (a) The provision of the ordinance upon the subject is that on the day fixed for the sale, "if for any reason the sale does not take place, the sale may be continued until the next day and so on from day to day, or postponed until another day, not more than ten days thereafter, and all parties shall be deemed to have notice of all or any such continuance or postponements." The contention of the plaintiff is that this clause forbids the postponement for more than ten days either by continuances from day to day, or by postponements for periods exceeding one day. There is nothing in the ordinance expressly authorizing a postponement where the sale is enjoined. It is reasonable to presume that this provision was intended to give power to postpone the sale from time to time or from day to day if an injunction or any other matter made it necessary to postpone the day of sale. It seems to favor the property owner as much as the city or general public. Its object is to save the expense of readvertising. We think the natural construction of the language is that postponements from day to day or from time to time may be made indefinitely, but that a single postponement for a time exceeding one day must not exceed ten days, that it does not forbid successive postponements of ten days or less each, nor daily postponements exceeding in all ten days.

[11] (b) As we find the assessment to be valid, the property of the plaintiffs is justly liable for its due proportion thereof. In such cases, the plaintiff is not entitled to any relief in a court of equity unless he shall pay, or offer to pay, the amount actually due upon the assessment against his property. As was said in Ellis v. Witmer, 134 Cal. 253, 66 Pac. 303:

> "This being the case, they cannot successfully invoke the assistance of a court of equity against the irregularities in the sale complained of, unless on the condition of paying what is due from them. * * * Here, no such condition has been imposed by the court, nor is there an offer in the complaint to pay what is due. The plaintiffs were therefore not entitled to relief."

This states precisely the fact and the law with respect to the present case.

We find no ground upon which the decision of the court below can be sustained.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

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174 Cal. 814

TELEGRAPH HILL NEIGHBORHOOD ASS'N v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 6801.)

(Supreme Court of California. Jan. 8, 1917. Rehearing Denied Feb. 7, 1917.)

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Proceeding by Telegraph Hill Neighborhood Association against the City and County of San

Francisco. Judgment for plaintiff, and defendant appeals. Reversed.

Percy V. Long, George Lull, and Theodore Savage, all of San Francisco, for appellant. J. A. Cooper, of San Francisco, for respondent.

PER CURIAM. This appeal involves the same tunnel assessment that was under consideration in Hayne et al. v. City and County of San Francisco, 162 Pac. 625 (S. F. No. 6802), this day decided. The parties have stipulated that the facts are the same, except as to the parties and the amount of the assessment, and that the decision in this case shall be the same as in No. 6802. The same judgment is therefore given. The judgment is reversed.

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174 Cal. 813

COOPER v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 6810.)

(Supreme Court of California. Jan. 8, 1917. Rehearing Denied Feb. 7, 1917.)

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Proceeding by J. A. Cooper against the City and County of San Francisco. Judgment for plaintiff, and defendant appeals. Reversed.

Percy V. Long and George Lull, both of San Francisco, for appellant. J. A. Cooper, of San Francisco, in pro. per.

PER CURIAM. This appeal involves the same tunnel assessment that was under consideration in Hayne et al. v. City and County of San Francisco, 162 Pac. 625 (S. F. No. 6802), this day decided. The parties have stipulated that the facts are the same, except as to the parties and the amount of the assessment, and that the decision in this case shall be the same as in No. 6802. The same judgment is therefore given. The judgment is reversed.

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174 Cal. 815

SIMPSON v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 6817.)

(Supreme Court of California. Jan. 8, 1917. Rehearing Denied Feb. 7, 1917.)

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by A. M. Simpson against the City and County of San Francisco. Judgment for plaintiff, and defendant appeals. Reversed.

Geo. Lull and Percy V. Long, both of San Francisco (Theo. J. Savage, of San Francisco, of counsel), for appellant. J. A. Cooper, of San Francisco, for respondent.

PER CURIAM. This appeal involves the same tunnel assessment that was under consideration in Hayne et al. v. City and County of San Francisco, 162 Pac. 625 (S. F. No. 6802), this day decided. The parties have stipulated that the facts are the same, except as to the parties and the amount of the assessment, and that the decision in this case shall be the same as in No. 6802. The same judgment is therefore given. The judgment is reversed.

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174 Cal. 156

UTAH CONST. CO. v. WESTERN PAC. RY. CO. (S. F. 7020.)

(Supreme Court of California. Jan. 9, 1917.)

1. ARBITRATION AND AWARD ⟹73 — JUDGMENT—APPEAL.

In view of Code Civ. Proc. § 1289, providing that a decision upon a motion to modify or set aside an award is subject to appeal, a separate appeal will not lie from the judgment entered on an award, even though the entry occurs after a decision on a motion to vacate made under sections 1287 and 1288; only appeal allowable being from the decision on the motion.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 368–398; Dec. Dig. ⟹73; Appeal and Error, Cent. Dig. § 140.]

2. ARBITRATION AND AWARD ⟹80—STATUTES —REASONABLE INTENDMENT.

Every reasonable intendment will be indulged in to give effect to arbitration proceedings.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 420–427; Dec. Dig. ⟹80.]

3. ARBITRATION AND AWARD ⟹76—REVIEW.

Where the submission to arbitration is unqualified, a court will not set aside the award on the ground that it is contrary to the law or evidence, unless error appears on the face of the award.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 399–402; Dec. Dig. ⟹76.]

4. ARBITRATION AND AWARD ⟹1 — UNDER STATUTE.

The common-law principles of arbitration have not been changed by statute.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 1–6; Dec. Dig. ⟹1.]

5. ARBITRATION AND AWARD ⟹76—TERMS OF SUBMISSION—EFFECT.

Where arbitrators are required by the terms of submission to determine a matter according to law, a failure to so determine is sufficient ground to avoid the award.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 399–402; Dec. Dig. ⟹76.]

6. ARBITRATION AND AWARD ⟹29—RECORDING PROCEEDING—"JUDGE PRO TEMPORE."

An agreement that a submission to arbitration shall be entered as an order of the court under Code Civ. Proc. § 1283, does not make the arbitrator a judge pro tempore of such court under Const. art. 6, § 8, as amended.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 147–154; Dec. Dig. ⟹29.

For other definitions, see Words and Phrases, Second Series, Judge Pro Tempore.]

7. BILLS AND NOTES ⟹429 — PAYMENT BY CLERK.

Where the payee of a genuine check indorsed it to his bank for collection, and the bank in turn, instead of cashing it, deposited it in the bank upon which it is drawn, there being no fraud, the drawer is relieved from liability, even though the drawee is insolvent, as the giving of credit on deposit will be treated as payment, though the drawer knows that this is the usual way in which his checks are disposed of.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1245–1250, 1262, 1263; Dec. Dig. ⟹429.]

8. CORPORATIONS 🔑428(9) — KNOWLEDGE OF OFFICER IMPUTED TO CORPORATION.

Although the president of a bank was also treasurer of a corporation which was drawer of a check on the bank, and knew that the bank was insolvent, such knowledge will not be imputed to the corporation, not having been obtained in the regular discharge of duties as treasurer of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1757, 1758; Dec. Dig. 🔑428(9).]

9. NOVATION 🔑4—ACCEPTANCE OF CHECK.

The giving of a check to a payee who indorses it to his bank for collection, the bank in turn depositing it to his credit with drawee, is not, as to drawer and payee, a novation under Civ. Code, § 1530, providing that "novation is the substitution of one obligation for an existing one," and hence section 1533 is not applicable.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 4; Dec. Dig. 🔑4.

For other definitions, see Words and Phrases, First and Second Series, Novation.]

10. BILLS AND NOTES 🔑429—EXONERATION OF DRAWER.

Civ. Code, § 3255, exonerating drawers of checks from liability, applies only where there has been delay in presentment, and not to cases in which a check has been presented to the drawee and his credit accepted in lieu of cash.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1245–1250, 1262, 1263; Dec. Dig. 🔑429.]

11. ARBITRATION AND AWARD 🔑73 — TERMS OF SUBMISSION—SUFFICIENCY OF EVIDENCE.

Unless otherwise provided by the terms of submission to arbitrator, the sufficiency of the evidence to sustain the award will not be reviewed on appeal.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 368–398; Dec. Dig. 🔑73.]

12. ARBITRATION AND AWARD 🔑73—AWARD —REVIEW.

Code Civ. Proc. § 1287, does not authorize the court on appeal to determine the sufficiency of evidence to sustain an award.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 368–398; Dec. Dig. 🔑73.]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Utah Construction Company against the Western Pacific Railway Company. From an order denying plaintiff's motion to set aside an award in favor of defendant, plaintiff appeals. Affirmed.

Gavin McNab, B. M. Aikins, R. P. Henshall, and Luther Elkins, all of San Francisco, for appellant. Warren Olney, Jr., O. K. McMurray, F. W. McCutcheon, John S. Partridge, and A. R. Baldwin, all of San Francisco, for respondent.

SHAW, J. A controversy existed between the plaintiff and the defendant with regard to a claim by the plaintiff that the defendant was indebted to it in the sum of $236,735.28 on account of the construction by the plaintiff of the defendant's railroad, and the claim of the defendant that such indebtedness had been discharged by the execution and delivery to the plaintiff by defendant of fifteen checks aggregating $153,562.24 and nine checks aggregating $83,175.04 upon the California Safe Deposit & Trust Company, bearing date October 22, 1907. On April 29, 1910, the parties agreed in writing to submit said controversy to Charles P. Eells as arbitrator. The agreement empowered him to hear the evidence, judge and determine said controversy, and make a final award thereon, which should be a complete and final adjudication of all the matters so submitted, and provided that the submission should be entered as an order of the superior court of the city and county of San Francisco, in accordance with section 1283 of the Code of Civil Procedure. Pursuant to this agreement the parties produced evidence, submitted the matter, and the arbitrator made his award thereon declaring that the plaintiff take nothing and that the defendant should have judgment for its costs incurred in the proceedings. This award, signed by the arbitrator, was delivered to the parties and filed with the clerk of said court on April 19, 1913, and a note thereof was thereupon made in the clerk's register. Notice of such filing was served on the plaintiff. On April 23, 1913, the plaintiff duly served and filed a notice of motion in the superior court to vacate and set aside the award. This motion was denied on September 24, 1913. On September 27, 1913, the award was regularly entered by the clerk as a judgment in the judgment book of said court. The plaintiff has filed two notices of appeal—one from the judgment entered by the clerk upon the award; the other from the order of the superior court denying the motion to vacate the award.

The respondent contends that no appeal lies from the judgment entered by the clerk upon the award of the arbitrator. The judgment here involved was entered by the clerk, but the entry was made after the decision by the court on the motion to vacate the award. Section 1289 of the Code of Civil Procedure provides that:

> "The decision upon the motion is subject to appeal in the same manner as an order which is subject to appeal in a civil action; but the judgment entered before a motion made cannot be subject to appeal."

This embraces the motions authorized by sections 1287 and 1288 only.

[1-3] We are of the opinion that the Code does not allow a separate appeal from the judgment entered upon the award. The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil

action to obtain an adjustment of their differences by a tribunal of their own choosing. The statutory provisions for a review thereof are manifestly for the sole purpose of preventing the misuse of the proceeding where corruption, fraud, misconduct, gross error, or mistake has been carried into the award to the substantial prejudice of a party to the proceeding. The design was to avoid useless proceedings and to make the practice simple and as speedy as would be consistent with justice. In Peachy v. Ritchie, 4 Cal. 207, it is said that the statute providing for the review of such awards "gives to the parties no higher rights than they might have asserted in a court of equity in case of mistake, fraud or accident." It has also been said that, "by reason of the fact that the proceeding represents a method of the parties' own choice and furnishes a more expeditious and less expensive means of settling controversies than the ordinary course of regular judicial proceedings, it is the policy of the law to favor arbitration. Therefore every reasonable intendment will be indulged to give effect to such proceedings." 5 Cor. Jur. 20; Fluharty v. Beatty, 22 W. Va. 705; Payne v. Crawford, 97 Ala. 607, 11 South. 725; Wilson v. Wilson, 18 Colo. 620, 34 Pac. 175; Russell v. Smith, 87 Ind. 457; Groat v. Pracht, 31 Kan. 656, 3 Pac. 274; Snyder v. Rouse, 58 Ky. (1 Metc.) 627; Mickles v. Thayer, 96 Mass. (14 Allen) 119; Brush v. Fisher, 70 Mich. 473, 38 N. W. 446, 14 Am. St. Rep. 510; Tucker v. Allen, 47 Mo. 490; Caldwell v. Elevator Co., 10 N. D. 580, 88 N. W. 700; Bishop v. Valley, etc., Co., 78 S. C. 315, 58 S. E. 939; Jensen v. Deep Creek, etc., Co., 27 Utah, 75, 74 Pac. 427. In view of this policy of the law the reasonable conclusion is that section 1289 was intended to cover all the methods of review by appeal in arbitration proceedings. Where the submission is unqualified an award cannot be set aside by the superior court, or by the court on appeal, on the ground that it is contrary to the law or the evidence, unless the error appears on the face of the award. Carsley v. Lindsay, 14 Cal. 395. The same rule prevails generally. 5 Cor. Jur. 161. Where a motion, under section 1288, to modify or correct the award, is granted, the order should, of course, direct the judgment to be entered. In that case the appeal from the decision on the motion would embrace the judgment so entered, and would authorize a review of it for any errors on the face of the record and subject to review by the terms of the submission. If a motion, under section 1287, to vacate the award, is granted, the appeal from the order granting it will afford the aggrieved party all the relief he is justly entitled to. If such motion is denied, and the award has not then been entered by the clerk as a judgment, as provided in section 1286, but is entered afterward, the order refusing to vacate the award is equivalent to an order directing a judgment on the award, and the judgment then entered by the clerk will also be embraced in the appeal from the decision on the motion, and errors therein apparent on the face of the record, and made subject to review by the submission, may be reviewed on such appeal. And in any case where an appeal is taken from a decision denying the motion, whether to vacate, correct, or modify the award, such appeal must, of necessity, embrace any judgment on the award, whensoever entered, and make it subject to review for errors on its face. It is clear, therefore, that there is no necessity for a direct appeal from such judgment. Such appeal would be futile. No reason can be found for denying a direct appeal from a judgment on the award entered by the clerk before a decision on a motion made, and allowing it when the clerk enters it after such decision. The Legislature, as we believe, did not intend such distinction, but intended to allow appeals only from the decision on the motions provided for in sections 1287 and 1288. We will therefore consider only the appeal from the decision on the motion.

[4, 5] The Code provisions are in aid of the common-law remedy of arbitration a reaffirmance thereof, and do not alter its principles. Muldrow v. Norris, 2 Cal. 77, 56 Am. Dec. 313; Tyson v. Wells, 2 Cal. 130; Headley v. Reed, 2 Cal. 325; Peachy v. Ritchie, supra. An award made upon an unqualified submission cannot be impeached on the ground that it is contrary to law, unless the error appears on its face and causes substantial injustice. Carsley v. Lindsay, supra; Morse on Arbitration, 296. A different rule is applicable here because of the terms of the submission.

> "Whenever the arbitrators are required, by the terms of the submission, * * * to determine the rights of the parties according to law, a plain mistake in their construction of the law is sufficient ground upon which to avoid the award. * * * In the absence of special requirements the arbitrators are not bound to decide according to law." 5 Cor. Jur. 183; Id. 172; Morse on Arbitration, 300.

The latter statement would probably not be applicable in this state, even upon an unqualified submission, if the mistake of law appears on the face of the award. Tyson v. Wells, supra; Muldrow v. Norris, supra. The submission in this case was not without qualification. The second paragraph of the agreement provided that, if the arbitrator should find that the defendant did not discharge the debt by the checks in question, he should determine whether "in equity and fairness," upon all the circumstances, it should be required to pay interest upon the debt, and the plaintiff agreed to abide the decision on that point and waive its legal right to interest to the extent of the abatement thereof. The seventh paragraph, referring to the same subject, provided that the arbitrator should "make his judgment and award, according to the legal right of the parties except as to the matter of interest, which shall, as hereinafter provided, be determined in accordance with equity and fairness under all the circumstances of the case." It further provided that the arbitrator might appoint a stenographer to report the evidence; that after the parties had filed their briefs he should make his award in writing stating separately the facts found and conclusions of law, and should attach thereto a transcript of the proceedings and evidence taken before him. All this was done.

[6] There is no merit in the suggestion that the submission constituted the arbitrator a judge pro tempore of the superior court, under the amended section 8, art. 6, of the Constitution. The submission made him an arbitrator, not a judge. The award being for the defendant, the matter of interest is eliminated. As to all other matters, the provisions above mentioned bound the arbitrator to decide in conformity with the law, and left him without authority to do otherwise. 5 Cor. Jur. 183; Morse on Arbitration, 302.

Section 1287 of the Code of Civil Procedure provides that the superior court, on motion, may vacate an award and may order a new hearing before the same arbitrator, or not, in its discretion, on the grounds:

> "1. That it was procured by corruption or fraud; 2. that the arbitrators were guilty of misconduct, or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which rights of the party were prejudiced; 3. that the arbitrators exceeded their powers in making their award; or that they refused, or improperly omitted, to consider a part of the matters submitted to them; or that the award is indefinite, or cannot be performed."

No motion was made to modify or correct the award as provided in section 1288; therefore its provisions are immaterial.

The grounds of the motion to vacate the award were, in substance, as follows: (1) That the award and the findings of fact on which it was based were contrary to the evidence; (2) that it was against law; (3) that the arbitrator committed gross error and was guilty of misconduct: (a) In failing to consider the evidence of the financial condition of the California Safe Deposit & Trust Company from October 22 to October 30, 1907, and of the money it had on hand and of its ability to pay the checks in controversy during said period; (b) in failing to consider evidence upon the question whether or not it would have paid the checks if they had been presented for payment; (c) in failing to consider the evidence of the debit and credit entries made by such company on its books concerning said checks. Under the first ground the notice of motion specifies ten particulars in which it is claimed the evidence does not support the special findings of fact upon which the award is based.

[11, 12] Neither the terms of the submission nor the provisions of section 1287 authorize us to consider the weight of the evidence or to overrule the arbitrator where he has drawn reasonable inferences from the facts proven. There is no foundation for the claim that the arbitrator refused to consider the evidence, or any part thereof, or that his findings are contrary to the evidence. They are fully sustained by the evidence and the inferences legitimately arising therefrom. No mistake of law appears, so far as his consideration of the evidence and its sufficiency is concerned. We cannot inquire further on these subjects. Pratt v. Connor, 128 Cal. 282, 60 Pac. 862; Peachy v. Ritchie, supra.

The only questions remaining for consideration arise out of the claim that, under the qualification of the submission above mentioned, a mistake in the conclusions of law upon the findings should be considered a mistake appearing upon the face of the award, and good ground for vacating it if it affects the substantial rights of the plaintiff on the merits of the case, the theory being that in that event, as he did not decide according to the legal right, he has exceeded his limited power under the agreement in making the award as he did. Our final conclusion on the merits renders it unnecessary to determine whether the submission agreement, when properly construed, did or did not empower him to decide the law wrongly as well as rightly. We may assume, for the purposes of the case, that he was empowered only to decide correctly as to the law, and proceed upon that theory without deciding the point.

The facts on which the decision of the case depends are as follows: The Western Pacific Railway Company on October 23, 1907, owed the Utah Construction Company $236,735.28. It kept money on deposit with the California Safe Deposit & Trust Company, which was doing a general banking business in San Francisco. It drew 24 checks in various sums aggregating said amount, each dated October 23, 1907, payable to the Utah Company, upon said Safe Deposit Company, and forwarded them by mail from San Francisco to said Utah Company at Ogden, Utah. They were received there, and by the Utah Company indorsed to the First National Bank of Ogden, for collection only. Said Ogden bank at that time kept a deposit account with said safe deposit company. The said Ogden bank forwarded the checks to the safe deposit company with instructions to credit the same to its account upon the books of said safe deposit company. Upon receipt of these advices the said safe deposit company charged the amount of the checks against the railway company on the books of said deposit company and entered the same as a credit upon the account of said Ogden bank on its books. The railway company then had deposits more than sufficient to cover the checks. All this was done prior to 2 o'clock in the afternoon of the 30th day of October, 1907. Said safe deposit company was during all this time, and for a long time previous thereto, insolvent, but this fact was unknown to the Utah Company, the railway company, and the Ogden bank. On the day last named, shortly after 2 o'clock in the afternoon, said safe deposit company closed its doors and suspended its banking business. Its assets were insufficient to pay its depositors. Upon ascertaining these facts, the Utah Company demanded of the railway company payment of the amount of the checks and the debt aforesaid. At the time said checks were drawn the customary course of business of the Utah Company with respect to checks it received from the railroad company on said safe deposit company was to deposit the same with the said Ogden bank for collection from said safe deposit company in San Francisco, by obtaining credit in the manner above detailed. The railway company was aware of this custom. The checks, however, were sent in due course of business, and there was no direction, order, or understanding by the railway company that they should not be presented to the safe deposit company for payment in money, or that they should be presented for credit only by said Ogden bank with said safe deposit company. At the time these checks were presented to the safe deposit company and credited by it on its books to the Ogden bank, as directed, the safe deposit company had on hand cash and cash resources immediately available sufficient to pay all of the said checks, and would not have refused to do so if payment had been demanded.

[7] Upon these facts, as said by the learned arbitrator:

"The case would seem to turn upon the single question whether the First National Bank of Ogden, plaintiff's agent, having the opportunity to cash these checks and preferring to deposit them and to take credit for the amount for its own purposes, thereby exonerated the drawer, notwithstanding the insolvency of the bank on which they were drawn; the checks having been drawn by defendant and received by plaintiff in good faith."

There is no doubt in our minds that the arbitrator correctly decided this question in the affirmative.

"A credit given for the amount of a check by the bank upon which it is drawn is equivalent to, and will be treated as, a payment of the check. It is the same as if the money had been paid over the counter on the check, and then immediately paid back again to the account or for the use for which the credit is given." 2 Morse on Banks, § 451; Oddie v. Bank, 45 N. Y. 735, 6 Am. Rep. 160; Bartley v. State, 53 Neb. 337, 73 N. W. 744; American, etc., Bank v. Gregg, 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 171; National Bank v. Burkhardt, 100 U. S. 686, 25 L. Ed. 766; Bank v. Burns, 68 Ala. 267, 44 Am. Rep. 138.

"The giving of credit is practically the same as paying the money to the depositor and receiving the cash again on deposit." 2 Morse on Banks, § 569.

"When a check on itself is offered to a bank as a deposit, the bank has the option to accept or reject it, but if it is received as a deposit, there being no fraud or lack of good faith, and the check being genuine and is credited to the depositor, it will operate as a payment." 7 Cyc. 1008.

The rule is the same where the holder of the check obtains credit by having the bank certify the check; the drawer is discharged. 5 Am. & Eng. Ency. of Law, 1055. The fact that the safe deposit company was insolvent at the time of these transactions, they having been made in good faith, and the insolvency being unknown to all the other parties, does not change the effect of the conduct of the bank of Ogden in taking credit with the safe deposit company instead of demanding payment. First National Bank v. Currie, 147 Mich. 82, 110 N. W. 499, 9 L. R. A. (N. S.) 698, 118 Am. St. Rep. 537, 11 Ann. Cas. 241.

"An indorsee may always insist that the conditions requisite to make his undertaking enforceable shall be strictly complied with, namely, presentment for payment and notice of dishonor." Id.

The drawer of a check has the same rights. Civ. Code, §§ 3177, 3254, 3255. The presentation of the check and the acceptance of credit instead of payment was a waiver of payment. The railway company did not authorize the taking of credit. That act created the relation of debtor and creditor between the safe deposit company and the Ogden bank and satisfied the check. The railway company cannot be held responsible because of the fact that, unknown to both parties, the safe deposit company was insolvent and has been unable to pay and has not paid its debt to the Ogden bank. The fact that the railway company was aware of the custom of the Utah Company to collect checks by creating such indebtedness, instead of exacting payment, does not make the railway company a guarantor of that indebtedness, nor otherwise responsible for its payment.

The plaintiff insists that "the giving of a check upon an insolvent bank is not a payment of the debt for which it is taken." This may be admitted. A check is never a payment of the debt for which it is given until the check itself is paid or otherwise discharged, unless expressly agreed to be taken in payment. Morse on Banks, §§ 543, 544. But here the checks, though not agreed to be taken as payment, were satisfied by the taking of credit therefor. This satisfaction exonerated the railway company, regardless of the solvency or insolvency of the drawee.

The finding that the safe deposit company could and would have paid the checks in cash had payment been insisted on, conceding it to be material, is based on inferences which we cannot say are unreasonable, even if we could inquire into such matters. Hence we cannot disturb the finding.

[8] The fact, that Brown was president of the safe deposit company and also treasurer of the railway company, and that he had, as president, personal knowledge of the insolvency of the safe deposit company, does not make that knowledge imputable to the railway company. He did not control the money of the railway company, nor cause it to be deposited in the safe deposit company, nor have power to do so. That matter was controlled by the latter's board of directors. The duties of Brown as treasurer of the railway company gave him no knowledge of the insolvency of the safe deposit company. His knowledge was not communicated to the former, and therefore cannot be charged to it. Lothian v. Wood, 55 Cal. 162; Wittenbrock v. Parker, 102 Cal. 102, 36 Pac. 374, 24 L. R. A. 197, 41 Am. St. Rep. 172; Iverson v. Metropolitan, etc., Co., 151 Cal. 750, 91 Pac. 609, 13 L. R. A. (N. S.) 866; 2 Cor. Jur. 863.

[9] Plaintiff also invokes section 1533 of the Civil Code, relating to novation. A novation is the substitution of a new obligation for an existing one. Civ Code, § 1530. The clause of section 1533 relied on provides that a rescission of a contract of novation may be made, when an order of a third person "is accepted in satisfaction," if at the time the order is received the third person on whom it is drawn is insolvent and the fact is unknown to the creditor. The checks of the railway company were not given as payment nor "accepted in satisfaction" of its debt. They were given merely as a convenient mode of payment, and were to operate as payment and satisfaction only in the event that they were paid or otherwise satisfied. The giving and acceptance of the checks was therefore not a novation. The only novation that took place was that between the Ogden bank and the safe deposit company when the former accepted the obligation of the latter in the place of and in discharge of the checks. To that novation the railway company was not a party. A rescission thereof by the two banks and the plaintiff could not place the railway company in statu quo, nor revive its extinguished liability on the checks. Section 1533 has no application to the case.

[10] It is also contended that since, under section 3255 of the Civil Code, the drawer of a check is exonerated by delay in its presentment only to the extent that he suffers injury thereby, and as the safe deposit company was at the time of presentment, and ever since has been, hopelessly insolvent, the railway company has suffered no injury by the delay and is not exonerated. This argument loses sight of the fact that the arbitrator has found that payment could have been made if it had been insisted on. But in any event the section applies only to a case where there has been delay in presentment, not to a case where there was a presentment to the drawee and credit with the drawee was accepted in lieu of cash.

We find no other points deserving of notice. The judgment and order are affirmed.

We concur: SLOSS, J.; LAWLOR, J.

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174 Cal. 199

SMITH v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.

(S. F. 7750.)

(Supreme Court of California. Jan. 10, 1917.)

1. Master and Servant 🔑416—Workmen's Compensation Act—Injury—Finding—"Knowledge."

Under Workmen's Compensation Act (St. 1913, p. 291) § 20, as amended by St. 1915, p. 1089, § 8, providing that notice in writing, stating the name and address of the person injured, the time, place, and nature of the injury, shall be served upon the employer, provided that actual notice of such injury by the employer or his managing agent or superintendent in charge of the work on which the injured employé was engaged shall be equivalent to such service, a finding of the Industrial Accident Commission that the "employer had knowledge or notice of the happening of said accident within the time prescribed by law" was not a finding of the actual knowledge required by the statute, as the word "knowledge" may include that which is imputed.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. 🔑416.

For other definitions, see Words and Phrases, First and Second Series, Knowledge.]

2. Master and Servant 🔑405(1)—Workmen's Compensation Act—Knowledge of Injury—Sufficiency of Evidence.

Evidence *held* not to support a finding that the employer had knowledge or notice of the happening of the accident within the time prescribed by law, even assuming that the word "knowledge" in the finding imports actual knowledge as prescribed by Workmen's Compensation Act, § 20, as amended by St. 1915, p. 1089, § 8.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. 🔑405(1).]

3. MASTER AND SERVANT ⚿416—WORKMEN'S COMPENSATION ACT—KNOWLEDGE OF "ACCIDENT"—"INJURY."

Under Workmen's Compensation Act, § 20, as amended by St. 1915, p. 1089, § 8, requiring that written notice, stating the name and address of the person injured, the time, place, and nature of the injury, shall be served upon the employer, a finding of the Industrial Accident Commission that the employer had knowledge of the "accident" was insufficient, as the term "accident" has a narrower meaning than the term "injury," and as the employer might be fully aware that an accident had occurred without even suspecting that an employé thereby suffered an injury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⚿416.

For other definitions, see Words and Phrases, First and Second Series, Accident; Injury.]

In Bank. Proceeding under a writ of review by James H. Smith, petitioner, to annul an award made by the Industrial Accident Commission of the State of California in favor of Charles Rives, an employé of the petitioner. Award annulled, without prejudice to further proceedings before the Commission.

John H. Crabbe, of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

LAWLOR, J. This is a proceeding under a writ of review to annul an award made in favor of Charles Rives, the employé of the petitioner. The Commission found that Rives was injured by accident in the course of his employment by straining his wrist while endeavoring to release a clamp. It is admitted by the respondent that no written notice of the injury was served upon the defendant employer, and the sole question presented is whether he had actual knowledge of the injury, within the meaning of section 20 of the Workmen's Compensation Act. It was denied by the petitioner in his answer and in his testimony at the hearing that he had any such knowledge of the injury,

[1] We are convinced that the contention of the petitioner must be upheld. The only finding made by the Commission touching the question of knowledge is in these words:

> "That said defendant employer had knowledge or notice of the happening of said accident within the time prescribed by law."

We do not think that this finding on the point of knowledge is sufficient. The statute calls for "actual knowledge," while the word "knowledge" may include that which is imputed. Section 20 provides that:

> "Notice in writing, stating the name and the address of the person injured, the time and the place where the injury occurred, and the nature of the injury * * * shall be served upon the employer; provided, however, that actual knowledge of such injury on the part of such employer, or his managing agent or superintendent in charge of the work, upon which the injured employé was engaged at the time of the injury, shall be equivalent to such service."

It is clear from these provisions that any kind of knowledge, other than actual, or first-hand knowledge, would be insufficient, for the statutory equivalent of the information required to be given in the notice is actual knowledge.

[2] But even assuming that the word "knowledge," as it appears in the finding, imports actual knowledge, and is sufficient under the requirements of section 20, yet we do not think that the finding is supported by the evidence. It is to be noted in this behalf that the finding only refers to the knowledge of the petitioner, and is silent as regards the "managing agent or superintendent." The question, then, is whether there is sufficient evidence to justify a finding that the petitioner himself had actual knowledge of the injury.

On this question it may be remarked that the testimony of Rives is neither very clear nor convincing. He was asked whether any one saw him get hurt, and answered:

> "The foreman, the man acting as foreman, he saw me do it; yes."

The evidence shows that the "foreman" referred to was in the East at the time of the hearing, and there was testimony to the effect that he had never been a foreman in that shop. Other testimony follows:

> "Q. Did any one else know at the time you got hurt? A. I do not know if they saw me. They knew I got hurt. Q. Did you complain to Mr. Smith that you were hurt? A. Yes; he knew I was hurt. Q. When did you report to him? A. About the time I got hurt. Q. What did you tell him? A. I told him I hurt my hand, my wrist. Q. Did you tell him how you hurt it? A. Yes; on the Monday morning I did not go to work. * * * Q. Was any one present when you told Mr. Smith that you had been hurt? A. No; I do not think so. I could not say as to that. * * * Q. Did you see Mr. Smith any time you were laid off that month—not working? A. Yes; he asked how I was and I told him, 'Pretty good.' Q. When was the first time you told him that you got hurt while working in his employment? A. The same day I got hurt. Q. Did you tell him then, explain to him how you got hurt? A. Yes. He never listened though, much. He walked away. * * * Q. You say that the very day the accident occurred you reported it to Mr. Smith? A. Yes. Q. Mr. Smith denies that he had any knowledge of the fact, or the assertion on your part that you were injured in his shop, until he had received a notice from the Commission. Is that true, or not? A. It is not true. It is a lie. Q. Will you state when, as nearly as you can recall, the same day as you were injured, when you told Mr. Smith? A. Right after I got hurt. Q. Was Mr. Smith in the shop at the time you were injured? A. It was Scott or Smith. They were both bosses. Q. Was Smith there? I am speaking of Smith. A. I do not know about that. Q. You said you told Smith immediately after. It was Smith, and not Scott?

A. Scott knows about it, too. Q. Will you state in which part of the shop Smith was standing when you told him you were injured. A. I do not know what part of the shop. Q. But you know you told him? A. Of course, I know."

The petitioner in his testimony flatly denied that Rives ever spoke to him about being hurt. And Scott testified that he was the foreman of the shop when the accident occurred, but only learned of it from others. We have quoted all the testimony of Rives bearing on the subject of the petitioner's alleged knowledge of the injury, because it clearly shows that it was information conveyed to the petitioner, rather than his actual knowledge of the injury upon which the award was made. It is plain that, in the contemplation of section 20, the petitioner had no actual knowledge of the injury. It is not even suggested that he was on the premises at the time. From an examination of the record it is evident that the Commission proceeded on the theory that, in the absence of a written notice, it is sufficient to prove that oral information of the injury was given to the employer within the statutory period of 30 days.

[3] It is also proper to note that the Commission found that the employer had knowledge of the "accident," while the present statute (St. 1915, p. 1089) requires knowledge of the "injury." We think the term "accident" has a narrower meaning than "injury." The employer might be fully aware that an accident had taken place in his shop without even suspecting that his employé thereby suffered an injury. That a wider meaning is to be given to the term "injury" than to "accident" is further indicated by the fact that formerly the statute required actual knowledge of the "accident and injury." Stats. 1913, p. 291. We have examined these questions with great care for the reason that they involve the jurisdiction of the Commission, for unless the provisions of section 20 have been complied with, by its express terms "no claim to recover compensation under this act shall be maintained."

The second proviso of section 20 reads:

"Provided, further, that the failure to give any such notice, or any defect or inaccuracy therein, shall not be a bar to recovery under this act if it is found as a fact in the proceedings for the collection of the claim that there was no intention to mislead or prejudice the employer, and that he was not in fact misled or prejudiced thereby."

Evidence was introduced by the petitioner thereunder, but the Commission made no finding.

Award annulled, without prejudice to further proceedings before the Commission.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LORIGAN, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

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174 Cal. 198

UNITED STATES FIDELITY & GUARANTY CO. v. PILLSBURY et al.

(S. F. 7773.)

(Supreme Court of California. Jan. 10, 1917.)

MASTER AND SERVANT ⚷419—WORKMEN'S COMPENSATION ACT—LIMITATIONS—ANSWER.

Where the insurance carrier which had made voluntary payments to a disabled employé, in answer to his claim for permanent partial disability benefits made more than six months after the last voluntary payment did not rely on the six months' limitations for filing claims prescribed by the Workmen's Compensation Act (St. 1913, p. 287), § 16a, it could not raise the issue of limitations on a petition for a rehearing of the award.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⚷419.]

In Bank. Proceedings under the Workmen's Compensation Act by James E. McGee, employé, to recover compensation for partial disability. Opposed by United States Fidelity & Guaranty Company, insurance carrier. A. J. Pillsbury and others, commissioners of the Industrial Accident Commission, awarded compensation to the employé, and the insurance carrier brings certiorari. Award affirmed.

Lloyd S. Ackerman, of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

LAWLOR, J. Writ of certiorari to review and annul an award for disability indemnity made by the Industrial Accident Commission in favor of James E. McGee, and against the petitioner as the insurance carrier for the Daniel Contracting Company.

For a time after the accident the petitioner made voluntary payments to the injured employé. But the payments were finally discontinued on May 12, 1915, upon the ground that the disability had ceased. After more than six months had elapsed from the date of the last payment, the employé applied to the Commission for compensation, and was awarded a permanent partial disability indemnity. The petitioner raises the objection that the Commission, under the provisions of section 16 (a) of the Compensation Act, was without jurisdiction to make the award. This identical question was decided adversely to the employer in Red River Lumber Co. v. A. J. Pillsbury et al., 161 Pac. 982, filed December 15, 1916. The ruling therein is decisive of this appeal.

It is proper to note, however, that the case at bar differs in one particular. Here the petitioner filed an answer. But he does not, directly or indirectly, plead therein the statute of limitations under section 16 (a), or otherwise suggest or raise the point that the claim of the applicant is barred. The answer, after alleging full payment of compensation in certain installments which are set forth, reads as follows:

> "That applicant's disability arising out of the alleged accident ceased and terminated on or before said May 12, 1915, and defendants deny that applicant is entitled to any further compensation than the amount paid as above alleged."

There are no further allegations. It is obvious that the answer was intended merely as a defense on the merits of the claim. Although the date of the last payment is alleged, the answer does not refer to the time of filing the application for compensation, or even suggest that it was filed more than six months after the said payment. The petitioner did not, in fact, assume to interpose any form of plea based upon the statute of limitations, but raised the point for the first time in the petition for a rehearing of the award.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J; HENSHAW, J.; LORIGAN, J.

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174 Cal. 205

HUNT, County Treasurer, v. WICHT.
(L. A. 3742.)

(Supreme Court of California. Jan. 12, 1917.)

1. Deeds 🔑61—Delivery to Third Person—Death of Grantor.

Where a deed is deposited by the grantor with a third person, to be delivered to the grantee on grantor's death, with the intention that title shall vest only on such delivery to the grantee, the deed is inoperative, as an attempt by the grantor to make a testamentary disposition.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 140, 141; Dec. Dig. 🔑61.]

2. Deeds 🔑61 — Delivery to Third Person—Death of Grantor—Effect.

A deed deposited by the grantor with a third person for delivery to the grantee on grantor's death, with intention by the grantor to make his delivery absolute, vests present title in the grantee, the grantor retaining only a life estate.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 140, 141; Dec. Dig. 🔑61.]

3. Taxation 🔑861 — Inheritance Tax — Retroactive Effect.

The Inheritance Tax Law (St. 1911, p. 713), taxing transfers "to take effect in possession or enjoyment at" grantor's death, "whether made before or after the passage of this act," cannot lawfully be given retroactive effect to tax a transfer effected by a deed which, before the passage of the act, was delivered absolutely to a third party to be delivered to the grantee on the grantor's death, since such grant vested a present title in the grantee, subject to grantor's life interest, which vested property right could not thereafter be lawfully destroyed, impaired, or burdened under the guise of a succession tax on account of the transfer; it being immaterial that such transfer was made in contemplation of death or without valuable consideration.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1676; Dec. Dig. 🔑861.]

4. Taxation 🔑861—Transfer Tax.

The question of liability to a transfer tax must be determined by the law in force at the time of the vesting in interest of property rights, and not that in force at the time when the grantee has the right to actual physical possession.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1676; Dec. Dig. 🔑861.]

In Bank. Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Proceeding by John N. Hunt, as county treasurer, against Mathilde Wicht, executrix. From judgment for defendant, petitioner appeals. Affirmed.

U. S. Webb, Atty. Gen., Robert A. Waring, of Sacramento, and John W. Carrigan, of Los Angeles, for appellant. Ernest C. Griffith and Frederick H. Griffith, both of Los Angeles, for respondent.

ANGELLOTTI, C. J. This proceeding was instituted against Ulrica Garms in the superior court of Los Angeles county for the purpose of having it determined that a tax was due the state from her under our act establishing a tax on gifts, inheritances, transfers, etc. (Stats. 1911, p. 713), on account of a transfer of certain real property to her by her husband, William Garms, having the amount of such tax fixed, and collection of such amount enforced. A demurrer to the petition was sustained, and petitioner refusing to amend judgment was given that the proceeding be dismissed. We have here an appeal from such judgment.

[1] The whole theory of the petition is that there was an effectual transfer by deed which was subject to a tax under our law. It is on the theory only of such a transfer that the proceeding is based, and any tax claimed. The material facts as to the transfer are substantially stated in the petition as follows: On April 12, 1905, William Garms was the owner of three small parcels of land in Los Angeles county. On that day he "executed a deed conveying to" said Ulrica Garms all of said property, "and thereupon delivered said deed to one Mathilde Wicht in escrow, to be delivered to the grantee therein named, * * * upon the death of said William Garms." On April 18, 1913, he died, and on the same day Mathilde Wicht delivered the deed to the grantee named therein. The allegations of these facts are followed in the petition by the following, viz.:

> "Your petitioner is informed and believes and therefore alleges that said deed was made, executed and delivered by said decedent as aforesaid in contemplation of his death and without valuable consideration, and that the same was intended to take effect in possession and in enjoyment as to the grantee therein named, respondent herein, after the death of said grantor."

So far as the statement herein contained as to the intention of the grantor with regard to the taking effect of the deed is concerned, it must necessarily be limited to his intention as to the mere actual possession and enjoyment of the property conveyed incidental to the ownership of a life estate therein, and cannot be taken as alleging an intention that title to the property should not immediately pass to the grantee upon the delivery of the deed in escrow. Otherwise we would have no operative transfer at all, and consequently nothing whatever upon which to base this claim for a tax. The case would fall within the rule declared in Williams v. Kidd, 170 Cal. 631, 637, 151 Pac. 1, 3 (Ann. Cas. 1916E, 703), as follows:

> "So, too, if it be the intention of the grantor when he deposits a deed that it shall only be delivered to the grantee by the depositary after the death of the grantor, *and that the title is to vest only upon such delivery after his death*, then the deed is entirely inoperative as constituting an attempt by the grantor to make a testamentary disposition of his property. This may only be done by will executed as required by the law of wills of this state, and a deed, the purpose of which is intended to be testamentary, cannot be given effect."

The petition must be taken as presenting the case of one making an absolute, unconditional conveyance of property and delivering it to a third party to be delivered to the grantee on the death of the grantor, with the intention on his part of making the delivery absolute and placing it beyond his power thereafter to revoke or control the deed. Such clearly was the intention of the pleader.

Concededly such a transfer may be taxed by the state. The difficulty in the case at bar is that at the time the deed was so executed and delivered to Mathilde Wicht in escrow there was no law imposing any tax on such a transfer as was here made. At that time the so-called "Collateral Inheritance Act" of 1893 (Stats. 1893, p. 193) was in force, the subsequent act approved March 20, 1905 (St. 1905, p. 374), which contained a provision repealing the act of 1893, being made by its express terms to take effect only from and after July 1, 1905. There was no effectual repeal of the act of 1893 prior to the date last named. The act of 1893 expressly excepted from the operation of its provisions any transfer to specific relatives including the wife of a grantor. It is conceded here that the grantee was the wife of the grantor at the time of the execution and delivery of the deed in escrow and that if reliance must be based on the act of 1893 there is no liability for a tax on account thereof. The claim is that the act in force at the time of the death of the grantor, viz., the act approved April 7, 1911 (Stats. 1911, p. 713), is the one that governs, especially as that act in terms provides for a tax on any transfer by deed "made without valuable and adequate consideration in contemplation of the death of the grantor, * * * or intended to take effect in possession or enjoyment at or after such death," when the party taking "becomes beneficially entitled in possession or expectancy to any property or the income therefrom, by any such transfer, *whether made before or after the passage of this act*." The words we have italicized are relied on as clearly showing an intention to impose the tax on transfers previously fully and effectually made. It may be conceded for the purposes of this decision that such was the intent. The question then is whether such a retroactive effect may lawfully be given to the statute.

[2-4] The well-settled effect of such a transaction as is shown by the petition is well stated by Mr. Justice Lorigan in the opinion in Williams v. Kidd, 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E, 703, which was concurred in by all the members of the court. It was said:

> "It is well settled that a person may make a conveyance of property and place it in the hands of a third party to be delivered to the grantee named in it on the death of the grantor, *and that such a delivery will be effectual to pass a present title to the property to the grantee*, if the intention of the grantor is to make such delivery absolute and place it beyond the power thereafter to revoke or control the deed. Where delivery is made under these circumstances and with this intention, *it is fully operative and effective to vest a present title in the grantee, the grantor retaining only a life estate in the property* and the third party or depositary holds the *deed* as a trustee for the grantee named in it. Bury v. Young, 98 Cal. 451 [33 Pac. 338, 35 Am. St. Rep. 186]; Moore v. Trott, 156 Cal. 353 [104 Pac. 578, 134 Am. St. Rep. 131]." (The italics are ours.)

Other decisions such as Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304, Estate of Cornelius, 151 Cal. 550, 91 Pac. 329, and Husheon v. Kelley, 162 Cal. 656, 124 Pac. 231, may be cited in support of this statement of the law in this state. We have then the case of a grant of land so executed and delivered on April 12, 1905, as to be fully operative and effective on that date to vest a *present title* in the grantee, subject only to a life interest in the grantor; "an executed conveyance" (Estate of Cornelius, supra) of this property in fee-simple absolute, subject only to this life interest. Could the Legislature subsequently lawfully impose a succession tax upon this fully executed *transfer of title*, such tax accruing at the termination of the grantor's reserved life estate, simply because in the meantime the grantee was debarred by the intervening life estate from actual possession of the property conveyed and the other incidents of a life estate? It appears to us that to state the question is to answer it. The succession to the property by the grantee which is the thing attempted to be taxed, was complete upon the delivery of the deed in escrow, notwithstanding the reservation of the life estate. The whole estate conveyed vested irrevocably in interest at once, not withstanding that actual possession of the property itself and enjoyment of the profits thereof were deferred until the death of the life tenant. His death added nothing to the title theretofore acquired by the grantee, and there was no transfer of any property in any legal sense at the time of such death, or at any time subsequent to the delivery in escrow. The right of the grantee to have actual physical possession of the property itself, and enjoyment of the other incidents of an estate for life upon the death of the life tenant was absolutely vested by the delivery of the deed in escrow, and nondefeasible, and the Legislature could not thereafter lawfully destroy, impair, or burden this property right under the guise of a succession tax on account of the transfer. As said in Matter of Craig, 97 App. Div. 289, 89 N. Y. Supp. 971 (affirmed 181 N. Y. 551, 74 N. E. 1116):

> "The underlying principle which supports the tax is that such right (the right of succession) is not a natural one, but is in fact a privilege only, and that the authority conferring the privilege may impose conditions upon its exercise. But when the privilege has ripened into a right it is too late to impose conditions of the character in question, and when the right is conferred by a lawfully executed grant or contract it is property and not a privilege, and as such is protected from legislative encroachment by constitutional guarantees."

It is the vesting in interest that constitutes the succession, and the question of liability to such a tax must be determined by the law in force at that time. This view is not opposed to Estate of Woodard, 153 Cal. 39, 94 Pac. 242, cited by appellant, where the statute in force at the time of death of a testator was held applicable, rather than a later act, simply because it was at the time of such death that the estate vested in the devisee and legatee. What we have said appears perfectly clear on principle, and is sustained by practically all of the authorities in other states where the question has arisen. In New York the matter is thoroughly settled by several decisions. In the Matter of Pell, 171 N. Y. 48, 55, 63 N. E. 789, 791 (57 L. R. A. 540, 89 Am. St. Rep. 791), it is said that such a transfer tax being one not imposed on property, but upon the right to succession, it "follows that where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation," and also, "if these estates in remainder were vested prior to the enactment of the Transfer Tax Act, there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so to impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract and take private property for public use without compensation." See, also, Matter of Craig, supra.

It was said in the Matter of Delano, 176 N. Y. 486, 68 N. E. 871, 64 L. R. A. 279, referring to In re Pell, supra:

> "In that case the transfer was completed without the aid of a will and the effect was the same as a deed inter vivos. There was no foundation for a succession tax."

There is no New York decision that can fairly be construed as opposed to this view. It is clearly recognized as correct in People v. Carpenter, 264 Ill. 400, 106 N. E. 302, a case relied on for a contrary conclusion, and we have found no case which would sustain a conclusion that were an estate is fully vested by reason of a lawfully executed grant or contract, the Legislature may subsequently lawfully impose a succession tax on account of the transfer.

It is immaterial so far as the question we have discussed is concerned, that it is alleged that the transfer was made "in contemplation of his death and without valuable consideration." The estate conveyed fully vested at the time of the delivery of the deed in escrow, entirely regardless of the motives of the grantor for the conveyance, and without regard to whether the transfer was without valuable consideration, and there was then no law imposing a tax on any such transfer.

The judgment is affirmed.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

31 Cal. App. 719

PACIFIC POWER CO. v. STATE et al.
MONO COUNTY IRR. CO. v. SAME.

(Civ. 1460–1463.)

(District Court of Appeal, Third District, California. Oct. 19, 1916.)

1. Appeal and Error 🔑151(4) — Right to Appeal—"Party Aggrieved"—Statute.

Under Code Civ. Proc. § 938, giving a right of appeal to a party aggrieved, the state of California, made a defendant with certain fictitious parties in a condemnation proceeding, and disclaiming ownership of the property and alleging that it was improperly joined as a defendant, where the court found against such claim and rendered judgment for the plaintiff against the state, with damages, was a "party aggrieved" entitled to appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 943; Dec. Dig. 🔑151(4).

For other definitions, see Words and Phrases, Second Series, Party Aggrieved.]

2. Appeal and Error 🔑771—Briefs—Time for Filing—Rule of Court.

Under a rule of court, requiring that appellant, within 30 days after the filing of the transcript, file with the clerk his printed points and authorities, with proof of the service of one copy upon the attorneys for respondents who shall have appealed separately in the superior court, and providing for an extension of time for good cause shown, appellant state, showing by affidavit of the Deputy Attorney General in charge of a condemnation proceeding against it, that he had filed his affidavit for an extension of time to file briefs, setting forth that the appeals involved a question presented in another case pending before the Supreme Court of the United States, and that there was no attorney of record in such action on appeal; that he believed that if any attorney should appear, it might be stipulated that the hearing of the appeals would be continued until the decision of such pending action; that the firm of attorneys indorsing the complaint had discontinued practice, on which ground and the pressure of official business the time for filing had expired—presented a sufficient excuse, so that a motion to dismiss the appeal for failure to file briefs would be denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3105; Dec. Dig. ⚷771.]

3. APPEAL AND ERROR ⚷771—DISCRETION OF TRIAL COURT — DEFAULT IN FILING BRIEF.

A large discretion is committed to the court in the exercise of its judgment as to whether a party should be relieved from a default in filing briefs within the time allowed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3105; Dec. Dig. ⚷771.]

Appeal from Superior Court, Mono County; W. S. Wells, Judge.

Condemnation proceedings by the Pacific Power Company against the State of California, John Doe, and Richard Roe, and by Mono County Irrigation Company against the same defendants. Judgments for plaintiff in each case, and defendants appeal. Motions to dismiss the appeal in each case denied.

U. S. Webb, Atty. Gen., and John T. Nourse, Deputy Atty. Gen., for appellants. Wm. O. Parker, of Bridgeport, and J. D. Murphy, of Berkeley, for respondents.

BURNETT, J. A motion has been made to dismiss the appeal in each of the above-entitled causes. The facts are identical, and the cases may be considered together. The motion is made upon the grounds:

"(1) That the said defendant and appellant is not a 'party aggrieved' by the judgment in this case within the provisions of section 938 of the Code of Civil Procedure of the state of California; (2) that the said defendant and appellant has failed to comply with the provisions of rule II, subd. 4, of the rules of this court in that it has failed to file its printed points and authorities within the period prescribed."

[1] As to the first point, it may be said that the state of California was the only party against whom the action was brought, except certain fictitious parties, and it is the only party against whom a judgment was obtained, said judgment being:

"That the plaintiff is entitled to judgment in its favor herein as prayed for in its complaint herein, and that it be adjudged and decreed in and by said judgment that the corporation plaintiff pay as compensation and damages to the said defendant, the state of California, for the land herein sought to be condemned, the sum of $1,200," etc.

It is true that defendant in its answer had denied "that the defendant state of California claims to be or is the owner of the property sought to be condemned in said action, and particularly described in paragraph 4 of said complaint," and alleged "that by reason of the facts hereinbefore set forth, the state of California is improperly joined as a party in said action, and that the whole fee estate and interest in the land described in paragraph 4 of said complaint is in the United States of America, and not in the state of California," but the court was more generous toward the defendant than was demanded by its claims, and it was found that:

"It is not true that by reason of the facts, or any of the facts set forth in said answer, or by reason of any facts, the state of California is improperly joined as a party to this action; and it is not true that the whole fee, or any part of the fee, or any interest in the lands herein sought to be condemned, is in the United States of America and not in the state of California."

This was followed by a finding that the value of the land was $1,200, and this, by the judgment, as we have before set out. The court, therefore, having found that defendant was the owner of the land, and having decreed its condemnation, it would necessarily follow that appellant is an aggrieved party. It is said in Estate of Colton, 164 Cal. 5, 127 Pac. 645:

"Under our decisions, any person having an interest recognized by law in the subject-matter of the judgment, which interest is injuriously affected by the judgment, is a party aggrieved and entitled to be heard upon appeal."

[2, 3] As to the second point, the rule requires that:

"Thirty days after the filing of the transcript, the appellant shall file with the clerk his printed points and authorities with proof of the service of one copy thereof upon the attorney or attorneys of each respondent who shall have appealed separately in the superior court."

It is further provided, however, that the time may be extended for good cause shown. In this case, the time was extended, but the period thus enlarged had expired a few days before the motion to dismiss the appeal was given. Appellant, though, was ready, and was granted permission to file its opening brief at the time said motion came on for hearing.

To excuse its failure to file the brief in time, appellant filed the affidavit of John T. Nourse, Deputy Attorney General of the state, in which, among other things, he declared:

"That he had charge of the litigation involved in the above-entitled actions on behalf of the state of California, appellant therein; that on or about the 21st day of December, 1915, affiant filed in this court his affidavit in support of appellant's application for an extension of time to file its opening briefs in each of said cases, setting forth that the appeals in each of said cases involved the question presented in the case entitled Deseret Water, Oil & Irrigation Co. v. State of California, 243 U. S. 415, 37 Sup. Ct. 394, 61 L. Ed. —, then pending before the Supreme Court of the United States, and that there was no attorney of record in the said actions on appeal in this court; that affiant believed that if any attorney should appear of record in said action, a stipulation would be entered into continuing the hearing of said appeals until the determination of said Deseret Case; that the complaints in each of the above-entitled actions were indorsed by Parker & Parker, as attorneys for each of the plaintiffs; that all of the proceedings therein were conducted by Pat R. Parker who on the 2d day of January, 1915, became judge of the superior court in and for the County of Mono; * * * that on numerous occasions the said Pat R. Parker informed affiant that his father, William O. Parker, had long discontinued the practice of the law, that he was no longer associated with him, and that he (William O. Parker) was not associated with him in any of said actions; * * * that said William O. Parker is not the successor to Parker & Parker, and never has been, but said firm has long since been dissolved; * * * that said William O. Parker never has been at any time an attorney or counsel for any of the respondents in any of the above-entitled actions; * * * that all the extensions of time to file appellant's briefs in said actions were obtained from this court by the representatives of the Attorney General's office, located in the city of Sacramento, and affiant had assumed that the time of appellant to file its said briefs was being protected in that manner, and the representatives of said office assumed that affiant, intending to prepare the briefs in said actions, was protecting the time of appellant to file its briefs, and that by reason of these misunderstandings, and by reason of the press of official business of said office, including matters involving the recent primary election and preparation for the coming general election, the time to file said briefs was inadvertently allowed to expire."

It is further stated:

"That affiant was led to believe that another attorney would be substituted for said Parker & Parker, and that he would be notified of the same, so that he might obtain a stipulation continuing these cases, and that he received no such notice."

It has been often stated that courts in the determination of such motions as far as possible should lean toward a hearing of the case upon its merits. It may be said, also, that manifestly a large discretion is committed to the court in the exercise of its judgment as to whether a party should be relieved from such default. The rule itself is, of course, somewhat flexible, and may be set aside when justice requires it.

We have no reason to doubt the good faith of appellant; and, as we are impressed with the showing made to excuse the delay, and, believing that it is the better policy to consider the merits of the cause, the motion to dismiss the appeal in each of said cases is denied.

We concur: CHIPMAN, P. J.; HART, J.

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32 Cal. App. 175

PACIFIC POWER CO. v. STATE et al.

(Civ. 1463.)

(District Court of Appeal, Third District, California. Nov. 24, 1916. Rehearing Denied by Supreme Court Jan. 22, 1917.)

1. PUBLIC LANDS 🔑51—SURVEYED LANDS—FOREST RESERVE—STATE'S TITLE.

The state's title to surveyed land is not divested by the subsequent creation of a United States Forest Reservation, in the boundaries in which it is included, and the land is not a part of such reservation.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 138, 146; Dec. Dig. 🔑51.]

2. PUBLIC LANDS 🔑53—STATE LAND—LIEU LAND—INDEMNITY—STATUTE.

Rev. St. §§ 2275, 2276, as amended in 1891 (U. S. Comp. St. 1913, §§ 4860, 4861) providing that whenever school sections conveyed to the state are lost by inclusion within any reservation, other lands of equal acreage may be selected by the state in lieu of such land as may be lost, is strictly an indemnity grant in case the state never acquired title, but where land had been surveyed and afterwards included in the boundaries of a United States Forest Reservation, and the state's application to have other lands listed in lieu thereof was pending before the General Land Office, the state's title to the land, in the absence of any law of Congress authorizing an exchange, was not divested.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 143–145; Dec. Dig. 🔑53.]

3. EMINENT DOMAIN 🔑46—LAND SUBJECT—STATUTE.

Pol. Code, § 3408b, prohibiting the sale of state lands lying within a national forest reservation, does not affect the power of a corporation entitled to exercise eminent domain to condemn such lands in accordance with Code Civ. Proc. § 1240, subd. 2, amended by St. 1915, p. 711, declaring all lands of the state subject to condemnation, saving such lands alone as are not appropriated to some public use, and providing that surveyed and unsurveyed sixteenth and thirty-sixth sections owned by the state or the United States included within a national reserve shall not be condemned as against the United States or the state, where the state's title to land so included has not been thereby divested.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 91–93; Dec. Dig. 🔑46.]

4. EMINENT DOMAIN 🔑263—STATE LANDS—CONDEMNATION—JUDGMENT—AFFIRMANCE.

Code Civ. Proc. § 1240, subd. 2, in force when an action to condemn land alleged to be owned by the state and situated within the boundaries of a subsequently created national forest reserve, provided that lands belonging to the state might be taken for public use, and as amended in May 21, 1915, effective August 8, 1915 (St. 1915, p. 711), provided that all sixteenth and thirty-sixth sections, both surveyed and unsurveyed, owned by the state or the United States, then or hereafter included within a national reserve, should not be condemned as against the United States or the state. In a proceeding by a power company to condemn such land, there was a judgment for the petitioner filed and recorded May 29, 1915, sustaining its right to sue the state, though the final order of condemnation as provided in section 1253 had not been entered. *Held*, on appeal from the preliminary order or judgment of condemnation, that as the judgment was permitted by the statute in force when it was rendered, it would be affirmed.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 535–540; Dec. Dig. 🔑263.]

5. JUDGMENT 🔑2 — VALIDITY — CHANGE IN LAW.

The validity of a judgment is to be determined by the laws in force at the time of its rendition, and is not affected by subsequent changes therein.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 2; Dec. Dig. 🔑2.]

Appeal from Superior Court, Mono County; W. S. Wells, Judge.

Condemnation proceedings by the Pacific Power Company against the State of California, John Doe, and Richard Roe. Judgment for plaintiff, and defendants appeal. Affirmed.

U. S. Webb, Atty. Gen., and John T. Nourse, Deputy Atty. Gen., for appellants. W. O. Parker, of Bridgeport, and J. D. Murphy, of Berkeley, for respondent.

BURNETT, J. [1, 2] The action was brought in the superior court of Mono county for the purpose of condemning certain lands alleged to be owned by the state and situated within the boundaries of a United States forest reserve, to wit, the Stanislaus Forest Reserve. The land is a portion of the southwest quarter of section 16, T. 2 N. R. 25 E., M. D. B. and M., and was included in said forest reserve by proclamation of September 7, 1906. All of the lands sought to be condemned were surveyed lands at the time of the creation of said forest reserve, and the state has applied to the United States for other lands in lieu of the entire southwest quarter of said section, but such lands have not been listed to the state. Appellant states in its reply brief that:

> "The case at bar is different from the Deseret Case in that the offer of the state was actually accepted by the United States, and other lands in lieu of the greater portion of the lands here under consideration were listed to the state prior to the commencement of this action."

In this statement appellant seems to be in error. The land described in the amended complaint is all located in the southwest quarter of said section, and, according to the records in the surveyor general's office, the state has offered to exchange said land for other lands, but the application is still pending in the General Land Office at Washington, D. C. It may be said, though, that under the decisions, the result would be the same in either case. The status of school lands included within a federal reservation received able and elaborate consideration in Hibberd v. Slack (C. C.) 84 Fed. 571, and Deseret, etc., Co. v. State of California, 167 Cal. 147, 138 Pac. 981. In the former, it is said:

> "In construing the act of February 28, 1891 ('An act to amend sections 2275 and 2276 of the Revised Statutes of the United States, providing for the selection of lands for educational purposes in lieu of those appropriated for other purposes'), there are certain well-established principles of law, applicable to school sections, which should be constantly borne in mind, as follows: First. Title to a school section, if unincumbered at date of survey, then vests absolutely in the state. Cooper v. Roberts, 18 How. 173 [15 L. Ed. 338]; Haydenfeldt v. Mining Co., 93 U. S. 634 [23 L. Ed. 995]. And this is the principle recognized and acted upon by the Department of the Interior. * * * After title has thus vested, the section is not subject to any further legislation by Congress. Therefore the school sections which were the bases of the selections of the lands sued for in the case at bar, although situated within the limits of forest reservations, are not parts of such reservations. Wilcox v. Jackson, 13 Pet. 513 [10 L. Ed. 264]; Railroad Co. v. Whitney, 132 U. S. 357 [10 Sup. Ct. 112, 33 L. Ed. 363]. Second. Until the surveys in the field of the school sections, to wit, 16 and 36, the United States has full power of disposition over them; and by the exercise of this power said sections may be lost to the state. Hence, and through various enactments of Congress, has arisen the law of indemnity, whose cardinal doctrine is compensation for loss. Thus, it has been said, 'the principle upon which indemnity is given to a state is for a loss. It is not given for that which the state has already received.' Poisal v. Fitzgerald, 15 Law Dec. Dep. Int. 19."

In the Deseret Case, in reference to said United States statute, it is declared through Mr. Justice Henshaw:

> "The federal grant was strictly an indemnity grant and nothing else. Such would appear manifest from a reading of the language of the federal statutes, and such is the decision of the Circuit Court of the United States in the carefully considered and elaborately reasoned case of Hibberd v. Slack, 84 Fed. 571, and the conclusion necessarily follows that a section such as this may not be exchanged with the United States under the indemnity grant provided for by section 2275 of the Revised Statutes of 1891."

In the Hibberd Case, it is to be observed, the matter of exchange had proceeded much farther than in the instant case. Therein the action was for ejectment, and, as stated in the opinion:

> "The complaint alleges that on the 26th day of May, 1893, the surveyor general of California, acting as general agent of said state, and under authority of the act of Congress of February 28, 1891, * * * selected said fractional quarter section, in lieu of certain sixteenth and thirty-sixth sections of school lands, which had been included within the limits of forest reservations created by order of the President of the United States; * * * that this selection was accepted by the Commissioner of the General Land Office, under his interpretation of the aforesaid act of Congress of February 28, 1891; that on the 14th day of February, 1895, one Anders Paterson purchased said land from said state, and thereafter, for a valuable consideration, sold and assigned his certificate of purchase to plaintiff, who is now the owner thereof; that on April 17, 1896, defendant, without authority of plaintiff, and against his will, took, and continues to hold, possession of said land, and excluded, and now excludes, plaintiff therefrom. The answer does not controvert the foregoing facts, but denies that said facts make plaintiff the owner of the land, or entitle him to the possession of the same. In the answer, the further defense is set up that two of the school sections, which were the basis of the selections of the lands sued for, were surveyed by the United States, before they were included within the forest reservations, and that the title to said sections thereupon became, and still remain, vested in the state of California."

A demurrer to said answer raised the question which the court determined in favor of defendant, holding that the state of California was not entitled to select other lands in lieu of the sixteenth and thirty-sixth sections of school lands situated within the exterior boundaries of a public reservation where said sections were surveyed and became the property of the state prior to the date when the reservation was created. This conclusion was reached, notwithstanding, as we have seen, that the selection of the lieu lands was made by the surveyor general of the state, that the selection was approved by the federal authorities, and the land thus selected was sold for a valuable consideration to an innocent purchaser. It is based upon the theory that as to such surveyed school lands there exists no authority for exchange, that the attempted transfer was utterly void, and that of this infirmity in the title of the United States and of the state in and to the respective tracts a purchaser is charged with notice. However, it may be said as to this that the law contemplates in such cases that the purchase price of the scrip or land shall be refunded.

The Deseret Case, supra, it may be remarked, was entirely similar in its facts to the case at bar. Therein, as here, the action was for condemnation of school lands included within the exterior boundaries of a forest reservation. The tract had been surveyed prior to said inclusion, and an application was pending before the General Land Office of the United States to have other land listed to the state in lieu thereof. It was declared to be beyond the power or authority of the land department of the government "to give, to sell or exchange the public domain without authority from Congress," that Congress had not conferred such authority in reference to the land therein involved, and that:

> "The conclusion upon this branch of the consideration, therefore, necessarily must be that, while the state of California has by appropriate legislation offered to exchange such lands for other lands of the United States, there is no law of the United States authorizing such an exchange, and no act of the Congress of the United States taken in contemplation of any such exchange, present or future."

The main proposition, therefore, of appellant, as to the title of the United States in and to the involved portion of said section 16 much be resolved in favor of respondent.

[3] Another point made by the Attorney General is that section 3408b of the Political Code withdrew these lands from sale, and consequently from the operation of the eminent domain proceedings of the Code of Civil Procedure. The same position was taken in the Deseret Case, supra, and it was answered by the Supreme Court in this way:

> "A further argument upon the general subject is that the state has withdrawn such sections from sale, and that therefore the right of eminent domain may not be exercised regarding them. This, however, cannot be, in contemplation of the general law touching the right of eminent domain. Our statutes do not say that state lands reserved from sale, or state lands not offered for sale, shall not be subject to the right of eminent domain. They declare that all the lands of the state shall be subject to this right, saving such lands alone as are devoted to a public use. The state might to-day have no laws for the sale of its proprietary lands. But this would not affect the power to exercise the right of eminent domain as accorded by the statutes of the state."

Likewise, the contention that this land was devoted to another public use by virtue of its having been included within the boundaries of a national reservation and therefore exempt from the operation of the statute of eminent domain is answered in the negative by said Deseret Case, from which we need make no further quotation.

[4, 5] One other question remains to be considered. Subdivision 2 of section 1240 of the Code of Civil Procedure, as it was when this suit was brought, provided that "lands belonging to this state" might be taken for public use. By an amendment passed in 1915 the following proviso was added:

> "Provided, that all sixteenth and thirty-sixth sections, both surveyed and unsurveyed, owned by the state or the United States, which may now or may hereafter be included within the exterior boundaries of a national reservation, or of a reserve, or within the exterior boundaries of lands withdrawn from public entry, shall be and are hereby withheld from the operation of this title and shall not be condemned as against the state or the United States." St. 1915, p. 711.

It is the claim of appellant that:

> "This amendment is a clear withdrawal of the right to sue as against the state or the United States for the purpose of condemning these lands."

To this respondent answers:

> "It is difficult to understand how this amendment shall be said to have any effect upon this case or the judgment given below for the reason that the judgment herein was filed and recorded in Mono County, on May 29, 1915. The act amending section 1240, C. C. P., was approved May 21, 1915, but did not go into effect until August 8, 1915."

In the reply brief of appellant, the following statement appears:

> "The judgment in this case having been had under a judicial interpretation of the effect of the Thompson Act, which sustained the right to sue the state, and that judgment not having become final by reason of the appeal taken herein, the subsequent act of the state, expressly and definitely withdrawing the right to sue the state in such proceedings, demands a reversal of the judgment by this court because at this time, the right to sue the state having been denied, the right to enforce a judgment previously entered, but not yet effective, has been taken away."

In support of this contention, the following cases are cited: Messenger v. Kingsbury, 158 Cal. 611, 112 Pac. 65; Ayers v. Kingsbury, 25 Cal. App. 183, 143 Pac. 85; and Railroad Co. v. Alabama, 101 U. S. 832, 25 L. Ed. 973. In the first of these it was held that:

> "Since the enactment of section 3443a of the Political Code on March 25, 1909 (Stats. 1909, p. 774), further sales by the state of tidelands forming the shore or bed of navigable waters is forbidden. If such lands had theretofore been offered for sale, the Legislature, in passing section 3443a, manifested its intent to withdraw them from further sale under sections 3440 and 3443 of that Code."

The vital question was what effect said section 3443a had as to one who had made application to purchase such land before the section went into effect, but who had not paid the purchase price or any portion of it. The case was learnedly considered by Mr. Justice Sloss, the author of the opinion, and he declared:

> "The disposition of the public lands is a matter resting entirely within the control of the Legislature, and that body has the undoubted right to withdraw or reserve from further sale any part of the public domain. * * * Where a valid contract of sale has been entered into pursuant to law between the state and a purchaser, so that an equitable interest in the land is vested in the latter, the state will, of course be prevented by force of familiar constitutional provisions from destroying the right so vested. * * * But where there is no contract, and no vested right in the intending purchaser, the withdrawal of the land from sale, by repeal of the statute authorizing sales or otherwise, absolutely terminates the power of the officers of the government to take the steps necessary to transfer title."

The plaintiff not having made any payment, it was held that he had no vested right under the law that was repealed, and therefore the conclusion followed that it would be of no avail to compel the surveyor general to file his application since the amendment had operated to withdraw the privilege to purchase such lands. Ayers v. Kingsbury, supra, is to the same effect. The additional point was decided therein that the deposit of $20 required by the act of 1889 (Stats. 1889, page 434)—

> "was intended to be nothing more than a mere conditional deposit, and that the receipt to be given therefor does not become a part of the purchase price, and cannot be accepted as such, before the application to purchase has been approved."

In Railroad Co. v. Alabama, supra, certain statutes, authorizing suit to be brought against the state on its contract, were repealed. The proceedings in the case were begun while these laws were in force, but the repeal took place before the final hearing, and thereupon the suit was dismissed for want of jurisdiction. The Supreme Court of the United States was called upon to determine whether the repealing statute was valid and constitutional so far as it affected the pending cause of action which accrued while the right to sue existed. Following the decision in a case from Tennessee, the court held that:

> "Under both the Tennessee and Alabama statutes the courts are made little else than auditing boards. If funds are not * * * provided to meet the judgment, the courts are not invested with power to supply them. In Alabama, a warrant for the payment may be secured, but the state may stop payment by withholding an appropriation. * * * In neither state has there been granted such a remedy for the enforcement of the contracts of the sovereignty as may not, under the Constitution of the United States, be taken away."

The Tennessee Case, therein referred to, is reported in 101 U. S. 337, 25 L. Ed. 960. In that decision it was held to be an elementary principle that a state cannot be sued in its own courts without its consent, and that:

> "The right to sue, which the state of Tennessee once gave its creditors, was not, in legal effect, a judicial remedy for the enforcement of its contracts, and * * * the obligations of its contracts were not impaired, within the meaning of the prohibitory clause of the Constitution of the United States, by taking away what was thus given."

It was said by the court:

> "Here the state has consented to be sued only for the purposes of adjudication. The power of the courts ended when the judgment was rendered. In effect, all that has been done is to give persons holding claims against the state the privilege of having them audited by the courts instead of some appropriate accounting officer. When a judgment has been rendered, the liability of the state has been judicially ascertained, but there the power of the court ends. The state is at liberty to determine for itself whether to pay the judgment or not. * * * Everything after the judgment depends on the will of the state. It is needless to say that there is no remedy to enforce a contract if performance is left to the will of him on whom the obligation to perform rests."

The foregoing as to the facts involved are manifestly quite dissimilar to the case before us. They have to do, however, with the question whether subsequent legislation is within the constitutional prohibition of the enactment of any law "impairing the obligation of contracts." The difficulty, of course is in making proper application of the principle to the particular case. A later decision of the United States Supreme Court (Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363), holds that:

> "An application for land, under the Oregon Act of 1870, was not rendered void by state act of 1878, where the first payment for the land was made within the time required by the former act; by such payment the contract with the state became executed, so as to be protected by the United States Constitution against impairment by a state law." "In other words," it was said, "by such payment, this contract with the state became so far executed as to be embraced in the class of contracts protected by section 10 of article 1 of the Constitution of the United States, which declares that 'no state shall pass any law impairing the obligation of contracts.'"

It is certainly a debatable question here whether plaintiff has acquired such vested right in the land in controversy as to be unaffected by the said amendment to section 1240. The record does not show that it has paid anything for the land, and it may be doubted whether it is in a position wherein it would be inequitable to apply said amendment. The final order of condemnation, as provided in section 1253 of said Code, has not been entered, and it may be that this contention of appellant could be successfully urged against the entry of such judgment or against its enforcement. But the question should not be determined without fuller argument and more deliberate consideration. This is an appeal from what is generally called the preliminary order of condemnation, and the rule seems well settled that:

> "The validity of a judgment is to be determined by the laws in force at the time of its rendition and is not affected by subsequent changes therein." 23 Cyc. 674.

In Anderson v. Hygeia Hotel Co., 92 Va. 687, 24 S. E. 269, it was said:

> "This is not a court of original, but appellate, jurisdiction, and the writ of error must be disposed of in accordance with the law as it existed at the time of the rendition of the judgment. This court must affirm it, if there is no error therein according to the law as it stood when the judgment was rendered, and, if erroneous, reverse it and enter such judgment as the circuit court 'ought to have entered.'"

In Kansas Pacific Ry. Co. v. Twombly, 100 U. S. 79, 25 L. Ed. 550, it is said:

> "Neither can we, as is asked, send the case back to the court below, with instructions to enter a judgment of nonsuit, because since the judgment below, and while this writ of error has been pending, the statute authorizing the action has been repealed. A writ of error to this court does not vacate the judgment below. That continues in force until reversed, which is only done when errors are found in the record on which it rests, and which were committed previous to its rendition. Here there are no such errors."

Therefore, the judgment was affirmed.

So here, under the decisions as we read them there was no error committed by the trial court, and the judgment was one which was at least permitted by the statute in force at the time said judgment was rendered. The conclusion follows that the judgment should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

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32 Cal. App. 805

MONO IRR. CO. v. STATE et al. (Civ. 1462.)

(District Court of Appeal, Third District, California. Dec. 23, 1916. Rehearing Denied Dec. 23, 1916. Denied by Supreme Court, Jan. 22, 1917.)

Appeal from Superior Court, Mona County; W. S. Wells, Judge.

Condemnation proceeding by the Mono Irrigation Company against the State of California, John Doe, and Richard Roe. Judgment for plaintiff, and defendants appeal. Judgment previously rendered in the Appellate District Court set aside, and judgment rendered in the superior court affirmed, and petition for rehearing denied.

U. S. Webb, Atty. Gen., and John T. Nourse, Deputy Atty. Gen., for appellants. Wm. O. Parker, of Bridgeport, and J. D. Murphy, of Berkeley, for respondent.

PER CURIAM. In the opinion rendered by this court November 24, 1916, the above-entitled cause and two others, Nos. 1460 and 1461, involving the same plaintiff and defendants, were considered and treated together.

It was mistakenly assumed that this case, like the other two, related to unsurveyed land. It appears, however, that the land for which condemnation was sought herein was surveyed prior to the creation of the said forest reserve. This case ought therefore to have been grouped with Pacific Power Co. (a Corporation), Plaintiff and Respondent v. State of California, John Doe, and Richard Roe, Defendants and Appellants, 162 Pac. 643, decided at the same time.

For the reasons stated in the said latter opinion, the judgment rendered herein is set aside, and the judgment rendered in the superior court is affirmed. The petition for rehearing is denied.

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32 Cal. App. 194

J. I. CASE THRESHING MACH. CO. v. COPREN BROS. et al. (Civ. 1449.)

(District Court of Appeal, Third District, California. Nov. 25, 1916. Rehearing Denied by Supreme Court Jan. 22, 1917.)

1. CHATTEL MORTGAGES 🔑258 — FORECLOSURE UNDER POWER OF SALE—AGENCY OF MORTGAGEE.

Where personal property was sold pursuant to the mortgagor's written consent and authorization in the mortgage, the mortgagee may be said to have been acting as the mortgagor's agent in making the sale.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 533; Dec. Dig. 🔑258.]

2. CHATTEL MORTGAGES 🔑255 — FORECLOSURE BY ACTION—STATUTE—"SECURED."

Under Code Civ. Proc. § 726, allowing but one action for a debt secured by a mortgage, where property had been sold by plaintiff under the written authorization in a chattel mortgage, it having ceased to be security for any part of the balance due on the secured notes, they were not "secured" at the time suit for the balance was brought; the word "secured" being considered as used in the present tense, and referring to a debt that at the time suit was brought was secured by a mortgage subject to exceptions in individual cases.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 517; Dec. Dig. 🔑255.]

3. SALES 🔑61 — VALIDITY OF CONTRACT — EXECUTION — ORDER SIGNED BY BUYER ONLY.

A contract for the purchase of an engine in the form of an order signed by the buyer only became an executed contract when it was accepted by the seller and the engine was delivered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 162–170; Dec. Dig. 🔑61.]

4. EVIDENCE 🔑441(9) — PAROL EVIDENCE VARYING WRITTEN AGREEMENT—STATUTE.

Under Code Civ. Proc. § 1856, providing that an agreement in writing is to be considered as containing all its terms, and that there can be, between the parties and successors in interest, no evidence of the terms other than the contents of the writing, where a contract for sale of machinery purported to contain all representations and agreements made, and that employés of seller were not authorized to bind the company, evidence of an alleged parol warranty was not admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1732; Dec. Dig. 🔑441(9).]

5. PLEADINGS 🔑236(3) — AMENDMENT — DISCRETION OF COURT.

In an action for the balance due on secured notes after foreclosure of mortgage on machinery, the refusal of the court to permit defendants to amend their answer to allege that they did not read the contract of purchase was not an abuse of the discretion in the court to allow amendments to the pleadings during the trial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. 🔑236(3).]

6. SALES 🔑261(1) — CONSTRUCTION OF CONTRACT—WARRANTY.

Where defendants ordered "one 30 horse power simple traction engine," on an order blank containing no warranties, except that machinery would be of good material, and equal or better than any other machine of equal size and proportions when properly handled, there was no warranty as to the horse power of the engine.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 727, 733, 734; Dec. Dig. 🔑261(1).]

7. SALES 🔑355(1)—ACTION FOR PRICE—EVIDENCE—ADMISSIBILITY.

In an action for balance due on notes secured by a mortgage on an engine, where the pleading did not allege a rescission or offer to rescind the contract for sale of the engine, which did not contain a warranty as to horse power, evidence as to the horse power the engine would develop was properly excluded.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1025, 1027–1035; Dec. Dig. 🔑355(1).]

8. CHATTEL MORTGAGES 🔑264 — FORECLOSURE SALE—ACTION FOR DEFICIENCY—BURDEN OF PROOF.

In an action for the balance due on secured notes after foreclosure and sale, where plaintiff did not sell at public sale pursuant to notice posted, the burden was on it to prove a sale at some other time.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 549; Dec. Dig. 🔑264.]

9. CHATTEL MORTGAGES 🔑255—DEFICIENCY AND PERSONAL LIABILITY — NECESSITY OF SALE.

Where a chattel mortgage authorized the mortgagee to take possession of and sell the property on default in payment of the secured notes, until the property is sold under the terms of the mortgage, he has no cause of action against the mortgagor for personal judgment, and cannot give mortgagor credit for some amount and then bring action.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 517; Dec. Dig. 🔑255.]

10. CHATTEL MORTGAGES 🔑264 — SALE UNDER POWER—QUESTION FOR JURY.

In an action to recover balance due on secured notes after foreclosure and sale of the mortgaged personal property, whether plaintiff sold property at public sale advertised *held* for the jury.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 549; Dec. Dig. 🔑264.]

11. APPEAL AND ERROR 🔑1170(9)—REVERSAL—ERROR NOT PREJUDICIAL.

In action for the balance due on notes secured by a chattel mortgage containing a power of sale, reversal for error in refusing to instruct that plaintiff cannot recover if he did not sell the property at public auction in accordance with notices posted is not violative of Const. art. 6, § 4½, providing that no judgment shall be set aside or new trial granted for error not prejudicial, since the section was not intended to abrogate or dispense with rules of procedure and evidence, and the error is not rendered harmless by the fact that defendants would not have bid at the sale if there had been one, as they were entitled to have the sale made as advertised to give other bidders an opportunity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4066, 4543; Dec. Dig. 🔑1170(9).]

Appeal from Superior Court, Sierra County; Stanley A. Smith, Judge.

Action by the J. I. Case Threshing Machine Company against William J. Copren and C. A. Copren, partners, doing business under the firm name and style of Copren Bros., and as individuals. Judgment for plaintiff, and defendants appeal. Reversed.

John V. Copren and W. I. Redding, of Downieville, for appellants. Dunn, White & Aiken, of Oakland, for respondent.

CHIPMAN, P. J. At the former hearing of this case the opinion was written by Judge John F. Ellison, sitting temporarily in this court. We now adopt it as correctly disposing of the questions raised by the appeal:

"Action to recover a judgment for money claimed to be due and unpaid upon three certain promissory notes. The complaint alleged that the notes were executed on July 5, 1912; that they were secured by a mortgage of even date on certain personal property; that the mortgage provided in the event of default in the payment of the notes the plaintiff could take possession of the mortgaged property and sell the same with or without notice, and, after deducting the expense of the sale, apply the balance on the notes secured by the mortgage; that the balance remaining unpaid on said notes after crediting the proceeds of such sale should at once become due and payable; that, acting under the terms and provisions of the mortgage, the plaintiff, upon default in the payment of the notes, and on June 22, 1914, took possession of and sold the mortgaged property for $500, and, after deducting $20, expenses, credited $480 on the notes; that there had been paid on one note before that time $74.45 which, with the credit of $480, left a balance of principal due of $684.30, and judgment was asked for this amount and interest as provided in the notes. The court, at the conclusion of the taking of the testimony, instructed the jury to find a verdict for the plaintiff for the amount sued for, and it did so. This appeal is from the judgment following such verdict. The defendants filed a general and special demurrer to the complaint, which was overruled.

[1, 2] "1. Their position on the general demurrer may be stated as follows: Section 726 of the Code of Civil Procedure provides that there can be but one action for the recovery of any debt secured by a mortgage; that, upon default in payment of the notes, plaintiff had only one of two remedies; it could bring a foreclosure suit or it could proceed under the terms of the mortgage and sell the property; that when it adopted the latter course it elected to look to the property only for satisfaction of its debt; that a suit for a deficiency can only be maintained after the property has been sold under a judgment in a foreclosure suit.

"We do not think counsel's position is tenable. For purposes of demurrer, deeming all the allegations of the complaint to be true, it must be held that when this action was begun the debt was not secured by a mortgage. The property that was security for it had been sold by the plaintiff, and the defendants given credit therefor. It had been sold pursuant to defendants' written consent and authorization contained in the mortgage. In making the sale the plaintiff may be said to have been acting as the defendants' agent. One object of the passage of section 726 of the Code of Civil Procedure was to compel one having a debt secured by a mortgage to exhaust his security and apply its value to the liquidation of the claim before proceeding to obtain a personal judgment as against his debtor. Many conditions may arise after a mortgage has been given rendering what was originally security for the debt valueless. In most cases, perhaps, it might be a correct statement of the law to say that the word 'secured,' as used in section 726, should be considered as used in the present tense, and that the section refers to a debt that at the time suit is brought is secured by a mortgage. The adoption of the above as a general rule of construction would be subject to exceptions in individual cases. Thus, perhaps, if one having a debt secured by a mortgage should cancel it of record, without the consent of the mortgagor, it might be held he could not bring a personal action. On the other hand, if such mortgage were canceled with the consent or at the request of the mortgagor, without any intention of canceling the indebtedness, or if the property, being personal, were all destroyed by fire, without fault of the mortgagee, in such cases the holder of the indebtedness would not be at all prevented by section 726 from bringing and maintaining a personal action for the amount due. So in this case, the property having been sold by the plaintiff acting under the written authorization of the defendants and having ceased to be security for any part of the balance due, the notes were not secured by a mortgage at the time the suit was brought, and section 726 has no application to the situation.

[3] "2. The defendants set up in their answer as a defense to the action certain oral representations alleged to have been made by the plaintiff before, at the time of, and after the notes were executed. The court excluded all evidence offered to sustain this defense and this ruling is assigned as error. To understand the ruling a somewhat fuller statement of the facts of the case is necessary.

"It appears that the plaintiff is engaged in the business of making and selling various kinds of machinery. On June 5, 1912, defendants signed one of the plaintiff's order blanks in and by which they ordered shipped to them at once 'one 30 horse power simple engine traction, wood burning, and fixtures' at the agreed price of $1,513.75 to be paid for $275 cash upon delivery, and the execution of three notes (being the notes in suit) secured by a mortgage on the property sold. The property was delivered to the defendants on July 5, 1912, the cash paid, and the notes and mortgages executed.

"The answer alleged that before and at the time of the purchase of the engine defendants informed plaintiff they desired to purchase an engine for the purpose of pulling four wagons, each loaded with four cords of green wood, along and over the 'Verdi and Dog Valley' grade in Sierra county, and thereupon plaintiff stated and expressly warranted that said 30 horse power engine had sufficient power to and would pull the four wagons loaded as above stated over said grade, and that said engine would develop 30 horse power; that, relying solely upon said representations and express warranties, defendants purchased the property and paid the money and gave the notes in question; that all of said statements, representations, and warranties were wholly untrue; that the engine never developed sufficient power to pull one loaded wagon over the grade, and failed to develop 30 horse power; that by reason of the above they were unable to use the engine for the purpose for which it was purchased, and it was of no use to them, and by reason of these facts the consideration of the notes wholly failed.

[4] "The contract for the purchase of the engine, while in the form of an order signed only by the defendants, became an executed contract when accepted by the plaintiff and the machinery delivered. It is complete in itself and expressly provides, over the signatures of the defendants, 'The undersigned hereby acknowledge that no promises, representations, or agreements have been made to or with me not herein contained,' and again, 'Salesmen, mechanics, and experts are not authorized to bind the company by any act, conduct, or statement.' The defendants, by the offered evidence, were attempting by parol to add a warranty to those contained in the written contract, and we think, in view of settled principles of law and the explicit language of the contract above quoted, the court correctly ruled that it could not be done.

"Section 1856 of the Code of Civil Procedure provides: 'When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing.' Certain exceptions are added to the section that are not applicable to this case.

"In Germain Fruit Co. v. Armsby, 153 Cal. 585, 96 Pac. 319, it is said: 'Where the written sale contains no warranty or expresses the warranty that is given by the vendor, parol evidence is inadmissible to prove the existence of the warranty in the former case or to extend it in the latter.'

"In Harrison v. McCormick, 89 Cal. 327, 330, 26 Pac. 830, 831 (23 Am. St. Rep. 469), it is said: 'The question whether a writing is upon its face a complete expression of the agreement of the parties is one of law for the court, and the rule which governs the court in its determination has been well stated as follows: "If it imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed."'

"In United Iron Works v. Outer Harbor Dock & Wharf Co., 168 Cal. 81, 141 Pac. 917, it is said: 'Appellant undertook by parol evidence of the "surrounding circumstances" to show that there was such a warranty given even if it were not expressly embodied in the written contract. The objections to the admission of this evidence were sustained, and this is the first one of the asserted errors; the contention being that under section 1647 of the Civil Code and section 1860 of the Code of Civil Procedure such evidence was clearly admissible. In this, however, appellant errs. "These sections but enact the common-law rule. It is never within their contemplation that a contract reduced to writing and executed by the parties shall have anything added to it or taken away from it by such evidence of 'surrounding circumstances.' This rule of evidence is invoked and employed only in cases where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they meant by what they said"'—citing cases.

[5] "3. Permitting parties to file amendments to their pleadings during the progress of the trial is largely in the discretion of the court, and its action will not be disturbed unless the discretion appears to have been wrongly exercised. The refusal of the court to permit defendants to amend their answer by alleging that before signing the instrument they did not read it was not an abuse of discretion.

[6] "4. The defendants alleged in their answer and offered to prove that the engine would not develop 30 horse power. All this offered evidence was excluded by the trial court, and this is assigned as error. Was there a warranty that the engine had this capacity and power?

"This is somewhat a close question, but in view of the particular wording of the contract it must be held that the ruling was correct. The only reference in the entire contract to 30 horse power is in the part of the contract above quoted wherein defendants ordered 'one 30 horse power simple engine traction.' It sufficiently appears from the printed order blank that plaintiff was selling and perhaps manufacturing many different kinds of machines, such as grain separators, hay stackers, etc. Those on the blank not ordered by a purchaser had written in the blank the word 'none' to show definitely it was not ordered. In front of the particular machine ordered was written some word to designate that it was ordered and how many. In this case, in front of the words '30 horse power simple engine' was written the word 'one' to designate that that engine had been bought and that one was bought. The court held that the words 'one 30 horse power simple engine' were used to designate the machine bought and did not carry a warranty of the power of the engine.

"Closely following the part of the order above referred to is the following: 'Said machinery is furnished upon and subject to the following mutual and interdependent conditions, and none other, namely: It is warranted to be made of good material, and durable with good care, and to be capable of doing more and better work than any other machine made of equal size and proportions, working under the same conditions on the same job, if properly operated by competent persons, with sufficient steam or horse power, and the printed rules and directions of the manufacturers intelligently followed.'

[7] "The above is the only warranty written in the order blank. It would seem to have been carefully drawn for the purpose of expressly excluding all other warranties. It contains no warranty as to the horse power of the engine. The pleading did not allege any rescission or offer to rescind the contract, and we conclude the court did not err in excluding evidence as to the horse power the engine would develop.

[8] "5. The defendants requested the court to give the jury the following instruction: 'The court instructs the jury that, if you believe from the evidence that the plaintiff elected to sell said engine at public auction at the time and place mentioned in the notices of sale posted by it, but did not so make said sale at public auction, then your verdict should be that the plaintiff is not entitled to recover in this action.' The court refused to give the instruction, and this is assigned as error.

"The record shows that, acting under the terms of the mortgage, the plaintiff took possession of the mortgaged property and gave notice, by posting and by mailing to the defendants, that it would sell it at public auction at Johnson's barn in Sierraville, Sierra county, on June 22, 1914, at 2 o'clock p. m. The witness Bloodworth testified that, acting for the plaintiff, he sold the property at public auction at the time and place stated in the notices to one Fred Cook for $500. 'I accepted the bid and declared the machinery sold to' the plaintiff. This was the only testimony offered by the plaintiff on this point, and the witness gave no testimony of any other sale either public or private having been made. He also testified that $500 was all the property was worth. One of the defendants gave testimony to the effect that witness Bloodworth did not go to the Johnson barn until 3 o'clock, and that witness went with him and remained there until 4 o'clock; that up to that time no sale of the property had been made and it had not been offered for sale. Another defendant testified that he was in the immediate vicinity of the barn from 1:30 to 3 p. m.; that Bloodworth was not there; that he left the barn about that time and went up town and saw Bloodworth sitting on the hotel porch.

"If the jury had accepted the testimony of the defendants, then it would have been their duty to find that no sale of the property had been made. The plaintiff's witness did not pretend that a sale was made at any other time than at 2 o'clock p. m., and if the jury concluded his statement that he made it then was untrue, they would have been justified in finding that no sale had been made. If the plaintiff made a sale at some other time (as after 4 o'clock), or if at some time he made a private sale, the burden was his to prove it. The suggestion that there might have been a private sale is foreign to the issue. No such sale was either alleged or proved, and the asked instruction was applicable to the only testimony there was in the case, and did not have to cover other contingencies concerning which there was no evidence.

"6. It was claimed by respondent at the trial, and is now claimed, that as the defendants would not have bid on the property, and there were no other bidders, the defendants were not injured by what was not done, in view of the fact that they got a credit of $500. Counsel states his position as follows: 'Under these circumstances, it was manifest, in view of the credit which they had received, that they were not prejudiced, no matter what character of sale was held.' And section 4½ of article 6 of the Constitution is also involved.

[9, 10] "We think the question of injury or no injury to the defendants is foreign to the discussion. The question of whether the property was sold or not cuts far deeper than error or injury. It goes to the foundation of the action and involves the question: Did the plaintiff at the time it brought this suit have any cause of action against the defendants for a personal judgment? It did if the property had been sold under the terms of the mortgage. If it had not been thus sold it did not, and this was a question for the jury to decide. Without first making a sale, the law would not permit plaintiff to give defendants credit for some amount, any amount it saw fit, and then bring suit for a personal judgment. Plaintiff realized that it was necessary to allege in its complaint a sale of the property in order to state a cause of action. It did so, and the allegation as to a sale was material to the statement of a cause of action and a finding on it favorable to plaintiff necessary to support a judgment. By refusing the offered instruction the court withdrew this vital issue from the jury."

[11] A rehearing was granted upon the earnest request of respondent that further consideration be given to certain facts from which it is claimed to conclusively appear that appellants were not prejudiced by the refusal of the court to give the instruction referred to in the foregoing opinion, and hence the judgment should not be reversed. These facts are that the mortgage under which the alleged sale was held provided that the mortgagee on default might take possession of the mortgaged chattels and sell the same at public or private sale, with or without notice at the mortgagees' option; that the mortgagees did not desire to bid; that they testified that the property was without value and that they would not have bid anything therefor; that, "had the property been offered for sale and the mortgagees had bid the same in, it would have been no more nor less than a private sale, no matter in what manner the transfer was effected"; and, finally, attention is called to an admission made by defendants' counsel at the trial in the discussion of the instruction that "there is no contention that the defendants were prejudiced by said sale." Upon this latter fact we quote from the record:

> "The Court: If there was any showing that there would have been other bidders and that the defendants were injured thereby—
>
> "Mr. Redding: There is no contention that the defendants were prejudiced by the said sale.
>
> "The Court: I can't see that it would make any difference, Mr. Redding. There is no injury to the defendants; of course, if the defendants wanted to bid, I could see where an injury might be suffered by them, but there is no contention of that character.
>
> "Mr. Redding: I wish to qualify that to the extent that there might have been other bidders.
>
> "The Court: Would it not devolve upon the defendants to show that the sale was unfair?"

Respondent cites several of the cases in which section 4½ of article 6 of the Constitution has been held to justify the reviewing court in disregarding the error because the court was not of the opinion that the error complained of had resulted in a miscarriage of justice. See, for cases, note to the section in Treadwell's Annotated Constitution (Ed. 1916) p. 313. The section forbids the setting aside of a judgment or granting a new trial—

> "in any case, on the ground of misdirection of the jury, or of the admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Speaking of this section, the Supreme Court said in Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 554, 147 Pac. 238, 243:

> "It is no longer the case that injury is presumed from error; the injury must appear affirmatively to the mind of the court after the examination required, or from the nature of the error itself."

The court also said:

> "Just what may be included in the phrase 'miscarriage of justice' must remain to be decided in each case as it is presented."

In People v. Tomsky, 20 Cal. App. 672, 683, 130 Pac. 184, 189, Mr. Justice Hart, speaking for the court, said:

> "The section is general in its language and terms, and, moreover, upon its face, very sweeping in its scope. It does not pretend to describe specifically the character of the errors coming within the purview of its language, or, by express language, to limit the right of the courts to determine and say that any error, whatever its nature, has not resulted in a miscarriage of justice. But it is, of course, very clear that the power vested in the courts by the section is not to be arbitrarily exercised either in the one direction or the other, but that the propriety or impropriety of the application of the provisions of the section must be determined, perhaps, in all cases, as much on the character of the record of the particular case as upon the character of the error itself."

Plaintiff's right of action, as was shown in the original opinion, depended, under the terms of the mortgage, upon there having been a sale either public or private. Plaintiff elected to proceed by a public sale and grounded its complaint on such sale. There was evidence tending to show that there was no public sale, and there was no evidence of a private sale. Had the court submitted the case to the jury, they would have been justified in finding that there was no sale at all; that the credit of $500 on the notes was arbitrarily made and in utter disregard of the terms of the mortgage. It is true that defendants would not have bid at the sale had there been a sale; it is true that in the opinion of plaintiff's agent the chattels were not worth more than $500; it is true that one of the defendants testified that the machine was worthless. Still defendants were entitled to have the sale made as advertised, since there may have been other bidders who would have given more than $500 for the property. Defendants' admissions must be considered in the light of their relations to the case. Their position was that, so far as they were concerned, the machine was a failure, and, for their uses, worthless. To have been bidders at the sale would have been inconsistent with the defense they were making. But, plaintiff having elected to enforce its rights by public sale, and having brought its action upon the assumption that there was such sale, there was an entire failure of proof. So also was there an entire failure of proof that any sale was made. We think it would be giving to section 4½ of article 6 unwarranted scope to permit its application to such a state of facts as we have here. To do so we must, in effect, say that it is not necessary to state facts sufficient to constitute a cause of action, or, having stated a cause of action, it need not be supported by sufficient evidence.

The section was not intended to abrogate or dispense with rules of procedure and evidence. It would, in our opinion, effect a miscarriage of justice to sustain the ruling of the trial court upon the record before us.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

(32 Cal. App. 250)

MILLER & LUX, Inc., v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (Civ. 1970.)

(District Court of Appeal, First District, California. Dec. 5, 1916.)

1. MASTER AND SERVANT 🔑362—WORKMEN'S COMPENSATION—"CASUAL EMPLOYMENT."

One employed as foreman over a number of other carpenters in the erection of a 14-room building, involving several months of regular and daily recurring labor, is not "casually" employed within the meaning of the Workmen's Compensation Act (St. 1913, p. 279).

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. 🔑362.]

2. MASTER AND SERVANT 🔑371—WORKMEN'S COMPENSATION ACT — "USUAL COURSE" OF TRADE, BUSINESS, ETC., OF AN EMPLOYER.

One employed as carpenter and foreman in charge of the construction of a cottage for employés upon one of the numerous properties of a large corporation, chartered, among other things, to construct buildings necessary to its business and whose business had for years included the construction, improvement, etc., of buildings on its properties, requiring the constant employment of carpenters thereon, was employed in the "usual course of the trade, business, profession, or occupation of his employer" within the Workmen's Compensation Act.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. 🔑371.

For other definitions, see Words and Phrases, First and Second Series, Usual Course of Business.]

3. MASTER AND SERVANT ⟹363—WORKMEN'S COMPENSATION ACT—"FARM LABOR."

Such employé did not come within the express exclusion of section 14 of the Workmen's Compensation Act, as one engaged in "farm labor," notwithstanding the building which he was engaged in constructing was upon a ranch property of his employer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⟹363.]

For other definitions, see Words and Phrases, First and Second Series, Farm Laborer.]

Petition for writ of review by Miller & Lux Incorporated, against the Industrial Accident Commission of the State of California and others to review an award under the Workmen's Compensation Act. Writ dismissed.

Edward F. Treadwell, of San Francisco, for petitioner. Chris M. Bradley, of San Francisco, for respondents.

PER CURIAM. This is a petition for a writ of review. The facts of the case are undisputed. They show that Sidney Eligh entered the employ of the petitioner early in the month of August, 1915, as a carpenter and as the foreman in charge of the construction of a 14-room cottage upon one of the numerous properties of the petitioner known as the Button Willow ranch, located in Kern county, Cal., and containing about 100,000 acres of land; said building when completed was to be occupied by other employés of the petitioner upon this ranch. After having continued in this employment for a period of 57 days Eligh suffered an injury to one of his eyes during the course of his duties in and about the building, which injury formed the basis of his claim for compensation presented to the Industrial Accident Commission. Upon the hearing before the commission the applicant received an award for his said injuries. The petitioner herein seeks to review such award upon the ground chiefly that the applicant's employment was casual and not in the usual course of the trade, business, profession, or occupation of his employer.

The record discloses that Miller & Lux, Incorporated, is an institution which, both by its articles of incorporation and by a long course of business conduct, has been and is engaged in many and divers occupations. The purposes of this corporation as set forth in its articles are very comprehensive, embracing among other things the power to "construct such buildings, structures, and improvements as may be necessary or desirable in order to carry on the business of a wholesale and retail butcher; also to purchase, lease, or otherwise acquire, hold, possess, use, improve, sell, mortgage, incumber, or otherwise dispose of every kind of property." The proofs before the commission showed that the petitioner herein was and for many years had been engaged in a considerable number of diversified lines of business permitted under the enumeration of its corporate purposes and powers, including the construction, improvement, and repair of buildings of various kinds upon its numerous properties, and requiring the constant employment of carpenters upon one or other of its ranches. In the particular work of which the injured applicant was engaged to be the foreman six or seven other carpenters were also employed, the work of construction having occupied nearly two months between the date of the applicant's employment and his injury. Upon proof of these facts the commission made its findings to the effect that the applicant's injury arose out of and happened in the course of his employment in the erection of a cottage for employés upon the premises of the employer, the business or occupation of whom being that of wholesale and retail butcher, wholesale and retail merchandizing, farming, and horticulture and real estate dealing, and that the erection and construction of cottages for its employés was in the usual course of its said business or occupation; that at the time of said injury applicant was not engaged in any of the occupations or employments excepted by section 14 of the Workmen's Compensation Act from the provisions of said act. These findings the petitioner herein assails as unsupported by any sufficient evidence, and upon several specific grounds.

[1, 2] The petitioner's first contention is that the applicant's employment was casual and not in the usual course of the trade, business, profession, or occupation of his employer. It is to be noted that in order to sustain this contention we must find the proofs entirely lacking in respect to both of its elements. The applicant's employment at the time of his injury must have been "casual," and must also have been not in the usual course of the trade, business, profession, or occupation of his employer. Without further reviewing or analyzing the proofs before the commission, we are satisfied that they sufficiently show that the applicant's employment was neither casual nor out of the usual course of the several extensive and diversified lines of business or occupation in which the petitioner at the time of applicant's injury was engaged. The cases collected with much industry and cited by counsel for the petitioner will, when analyzed, show that the rule depended in each case upon its particular state of facts; and that as to these facts they may each be easily differentiated from the case at bar. To hold that the applicant's employment to act as foreman over a number of other carpenters in the erection of a 14-room building, involving an engagement of several months of regular and daily recurring labor, to be "casual" would in our opinion restrict the operation of the statute beyond its reasonable and liberal interpretation; and also to hold that the applicant's employment as a carpenter to do work upon

one of the petitioner's extensive properties where, in order to the maintenance of its many and diversified activities, buildings were being constantly erected or improved, and where in direct connection with the particular property upon which the applicant was employed, other carpenters were kept constantly and regularly engaged, would not constitute an employment in the usual course of the trade, business, profession, or occupation of his employer, would be to do violence both to the record herein and to the spirit and purpose of the provisions of the Workmen's Compensation Act. We think, therefore, that the petitioner's contention in both of the above respects cannot be sustained.

[3] The petitioner makes the further contention that because it was, in the conduct of the ranch upon which the applicant received his injury, essentially a farmer, the applicant must be held to come within the express exclusion of section 14 of the Workmen's Compensation Act as being one engaged in farm labor. We are unable to follow the refinement of the petitioner's reasoning so far as to hold that because the operations of the petitioner are so diversified and extensive as to require regular employment of carpenters in the construction, improvement, and repair of buildings upon the ranch properties, that such artisans when so employed are to be regarded as engaged in farm labor. Such a construction would lead us entirely away from the evident objects of the Workmen's Compensation Act.

We are of the opinion that the writ should be dismissed, and it is so ordered.

(32 Cal. App. 279)

PEOPLE v. PEEPLES. (Cr. 654.)

(District Court of Appeal, First District, California. Dec. 7, 1916. Rehearing Denied Jan. 6, 1917. Denied by Supreme Court Feb. 5, 1917.)

1. Criminal Law 🔑722½ — Trial — Remark of Prosecuting Attorney.

For the prosecuting attorney, claiming, on a trial for stealing an automobile, that for parts of it parts of other automobiles had been substituted, to continually refer to the other automobiles as stolen, is improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1675; Dec. Dig. 🔑722½.]

2. Criminal Law 🔑713—Trial — Remark of Prosecuting Attorney.

For the prosecuting attorney in his closing argument to say that, if defendant is convicted, he will consent to his case being referred to the probation officer, is improper.

[Ed. Note.—For other cases, see Criminal Law, Cent.Dig. §§ 1663, 1678; Dec.Dig. 🔑713.]

3. Criminal Law 🔑729 — Trial — Remarks of Prosecuting Attorney—Admonition to Jury.

Statement of the prosecuting attorney to the jury, on his remark that, if defendant was convicted, he would consent to his case being referred to the probation officer, being excepted to as misconduct, that he withdrew the statement, and that the jury are under oath to be guided by the evidence and law, and that what was to be done with defendant, if convicted, was no concern of theirs, is equivalent to an admonition by the court to disregard the remark.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1692; Dec. Dig. 🔑729.]

4. Criminal Law 🔑1144(16) — Appeal — Harmless Error—Presumption.

The evidence abundantly supporting the conviction, and it being clear that defendant was guilty, it will be assumed that the jury followed the instructions to disregard improper remarks of the prosecuting attorney.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2768, 2901, 3034; Dec. Dig. 🔑1144(16).]

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

R. G. Peeples was convicted, and appeals. Affirmed.

William F. Herron and George Damon, both of San Francisco, and Allen C. Cunah, of Oakland, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. The defendant was charged by information with the crime of grand larceny; it being alleged that he stole an automobile of the value of $1,200. The appeal is from the judgment of conviction, and from an order denying his motion for a new trial.

[1] The only serious point in the case is as to certain conduct of the district attorney during the trial, claimed by the appellant to amount to serious misconduct, and to have gravely prejudiced him in the minds of the jury. In his opening statement the district attorney stated that he would prove that certain parts of the automobile in question had been changed, and that the parts substituted for them had been taken from another automobile, which also had been stolen. Repeatedly during the trial the district attorney, in questions propounded by him to witnesses, incorporated therein references to other stolen automobiles. If he desired to show—as doubtless he did—that parts and accessories of other automobiles had been substituted for parts of this automobile, for whatever material bearing such testimony would have on the case, he, of course, was warranted in doing so; but we can perceive no good reason —indeed, no excuse—for referring to the other automobiles as having been feloniously taken from their owners. Moreover, after the first reference to "other automobiles which were stolen," when the court, upon objection by counsel for the defendant, instructed the jury that such reference in the terms employed was improper, it was the plain duty of the district attorney to refrain from again offending in that regard. This he did not do.

[2, 3] In his closing address to the jury,

referring to a portion of the argument of defendant's counsel, wherein the latter dwelt at length upon the hardship of taking his client from the bosom of his family and sending him to the penitentiary, the district attorney made a remark to the effect:

> "I will make the same agreement that I did the other day. If the defendant is convicted, I will consent to his case being referred to the probation officer to look up his past record, and to see if he is entitled to probation."

This was a statement that the district attorney had no right to make. It is possible it was made, as claimed by the defendant, for the purpose of facilitating a conviction of the defendant, by reason of the jury supposing that leniency would be subsequently extended to him. However, it is a matter of general knowledge that a person convicted of crime is entitled to apply for probation, which it is in the court's discretion to grant, irrespective of the attitude of the district attorney in reference thereto. In this case the counsel for the defendant immediately assigned the remark quoted as misconduct, whereupon the district attorney withdrew it, and asked the jury to disregard it, saying in part:

> "I withdraw that statement. The district attorney desires at this time to withdraw anything he has said with reference to the probation officer. * * * Remember, gentlemen, that you are here under your solemn oaths as jurors to be guided by the evidence and the law, and the question of what it to be done with this defendant, if convicted, is matter of no concern of yours."

This statement by the prosecuting officer was equivalent to an admonition by the court to the jury to disregard the remark to which exception had been taken; and the court, moreover, in each of the instances referred to, when objection was made, instructed the jury to so disregard them.

[4] Complaints of misconduct on the part of prosecuting officers in the trial of causes are quite frequent. It is to be regretted that these officers in the heat of contest so often imperil judgments of conviction by their verbal excesses. In the present case, however, a careful examination of the record discloses that the evidence abundantly supports the verdict, and it is clear that the defendant was guilty of the offense charged. In view of the fact that the jury was admonished in each instance to disregard in their deliberations the statements of which complaint was made, we will assume that the instructions of the court were followed, and that no prejudice to the defendant resulted.

The court did not abuse its discretion in refusing to grant defendant's motion for a continuance of the trial of the case; and in our opinion the instructions of the court to the jury fully and fairly covered the law applicable to the facts of the case.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

(32 Cal. App. 264)

WEBSTER v. SAN JOAQUIN FRUIT & VEGETABLE GROWERS' PROTECTIVE ASS'N et al. (Civ. 1549.)

(District Court of Appeal, Third District, California. Dec. 6, 1916.)

ASSOCIATIONS 🔑19—LIABILITY OF MEMBERS.

While, as between the members of an unincorporated association, each is bound to pay only his numerical proportion of the indebtedness of the concern, as against creditors, each member of such an association is individually liable for the entire debt, provided that it is of such a nature and has been so contracted as to be binding on the association as a whole; such an association being in legal effect a mere partnership, so far as the liability of its members to third persons is concerned.

[Ed. Note.—For other cases, see Associations, Cent. Dig. § 29; Dec. Dig. 🔑19.]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by C. A. Webster against the San Joaquin Fruit & Vegetable Growers' Protective Association, a copartnership, and others. From a judgment for plaintiff, G. B. Gotello and Frank Lagomarsino, defendants against whom an individual judgment was rendered, appeal. Judgment affirmed.

Snyder & Snyder and H. Stanley Crane, all of Stockton, for appellants. George F. Buck and Gordon A. Stewart, both of Stockton, for respondent.

BURNETT, J. This action was brought to recover the sum of $1,798.05 for goods, wares, and merchandise purchased by the association for use in its business, and plaintiff had the judgment. The appeal is by G. B. Gotello and Frank Lagomarsino, who were members of the association and against whom an individual judgment was rendered. It is stated by appellants that:

> "There was no dispute as to the amount of the demand for plaintiff, and so the question involved on this appeal is simply whether the appellants can be held individually responsible for the claim of plaintiff."

The criticism of appellants is addressed to the consideration that the court found a partnership existed, whereas, so it is claimed, the evidence is insufficient to show such a relation among the parties composing the association. But appellants are in error as to such finding. It is true the association is designated a partnership, but the finding is:

> "That the following named persons at all times herein mentioned were associated in business and transacted such business under a common name, to wit, the name of San Joaquin Fruit and Vegetable Growers' Protective Association, and that said persons at all of said times were associates using such common name, and that said goods, wares, and merchandise referred to herein were purchased for the use of such business and were used in such business aforesaid."

Then follow the names of the nineteen persons, including appellants, composing the association.

There is no doubt the evidence amply supports said finding, and therefore the case is brought within the rule announced in volume 5, Corpus Juris, 1362, 1363, as follows:

> "While as between the members of an unincorporated association, each is bound to pay only his numerical proportion of the indebtedness of the concern, yet as against the creditors, each member is individually liable for the entire debt, provided, of course, the debt is of such a nature and has been so contracted as to be binding on the association as a whole. * * * An unincorporated association organized for business or profit is in legal effect a mere partnership so far as the liability of its members to third persons is concerned; and accordingly each member is individually liable as a partner for a debt contracted by the association."

It may be said also that, at least as far as appellants and some of the other members of the association are concerned, there is sufficient evidence that there existed a partnership within the contemplation of the Code definition. This is conclusively set forth in respondent's brief, but we deem it unnecessary to do more than to mention it.

The truth is this appeal is nearly, if not quite, frivolous. However, no damages are asked, and as what may seem to the court to be frivolous is often quite decorous in the eyes of counsel, we content ourselves with affirming the judgment; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

(32 Cal. App. 245)

FIGHIERA et al. v. DE WHIRST, Superior Court Judge. (Civ. 2187.)

(District Court of Appeal, Second District, California. Dec. 4, 1916. Rehearing Denied Jan. 3, 1917.)

1. EXCEPTIONS, BILL OF 🔑51 — DUTY OF TRIAL COURT.

Where the statement in proposed bill of exceptions does not conform to the record, but the trial judge can amend it, or cause it to be amended, so as to make a fair statement, without undue labor, he should do so, and it is not a proper exercise of his discretion to require a transcription of the full reporter's notes as a condition for settling the statement.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 74, 78; Dec. Dig. 🔑51.]

2. EXCEPTIONS, BILL OF 🔑53(7)—MANDAMUS TO COMPEL SETTLEMENT — OBJECTIONS NOT RULED ON IN TRIAL COURT.

In mandamus to compel a trial judge to settle bill of exceptions, although the trial judge, in refusing to settle the bill, did not rule upon appellee's objections that the bill was proposed too late, such objections will be considered in the mandamus proceedings, where they were insisted upon by appellee and not waived by him at any time.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 88; Dec. Dig. 🔑53(7).]

3. EXCEPTIONS, BILL OF 🔑39(1)—TIME FOR PRESENTATION.

Under Code Civ. Proc. § 650, limiting time for presenting proposed bill of exceptions, where motion for new trial is made, to ten days after notice of decision thereof, a party whose motion for new trial has been denied is entitled to have served upon him notice of such ruling, but such notice may be waived.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 54, 56; Dec. Dig. 🔑39(1).]

4. EXCEPTIONS, BILL OF 🔑39(1)—TIME FOR PRESENTATION—WAIVER OF NOTICE OF RULING.

In order to deprive an appellant of his right to written notice of decision on his motion for new trial in order to limit time for his presentation of bill of exceptions, there must be facts of record clearly indicating a waiver of such notice.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 54, 56; Dec. Dig. 🔑39(1).]

5. EXCEPTIONS, BILL OF 🔑39(1)—TIME FOR PRESENTATION — WAIVER OF WRITTEN NOTICE OF DENIAL OF NEW TRIAL.

After denial of appellants' motion for new trial, their application, pursuant to notice served and filed in the trial court, to set aside the order denying their motion for new trial, constituted a definite waiver of notice of entry of the order denying new trial, so that the ten days limited by Code Civ. Proc. § 650, for presenting bill of exceptions began to run from the time of entry of such order.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 54, 56; Dec. Dig. 🔑39(1).]

6. EXCEPTIONS, BILL OF 🔑53(5) — SETTLEMENT — COMPELLING PERFORMANCE OF USELESS ACT.

Petition for mandamus to require trial judge to settle bill of exceptions will be denied, where it would show on its face that it was not presented in time, so that it would be necessarily ignored on appeal, since to grant the writ would be to require the trial court to perform a useless act.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. 🔑53(5).]

Petition for writ of mandate by Louise N. Fighiera and another against Hon. H. T. De Whirst, Judge. Petition denied.

A. C. Vaughan, of Los Angeles, for petitioners. H. T. Dewhirst, of Redlands, in pro. per.

CONREY, P. J. This is a proceeding in mandamus to require the respondent as judge of the superior court in and for the county of San Bernardino to settle a bill of exceptions in an action wherein the petitioners were plaintiffs and one William F. Radis was defendant. After the entry of judgment in that action the plaintiffs in due time served and filed their notice of intention to move for a new trial, and later served and filed notice that said motion would be made on the 19th day of June, at 2 o'clock p. m. At that time, the attorney for plaintiffs not appearing and the attorney for defendant being present, the motion was denied. Thereafter, on July 27, 1916, the plaintiffs served on the defendant a proposed bill of exceptions. On August 2d the defendant served upon plaintiffs numerous amendments to the proposed bill of exceptions, specifying, however, together therewith his objections to the signing, settlement, and allowance of the bill, and insisting that his proposed amendments were to be considered only in the event that the court should have first overruled said prior objections. These objections set forth, in addition to the facts above noted, certain other facts, including the claimed fact that the plaintiffs had actual notice of the denial of their motion for a new trial on the date thereof, to wit: June 19, 1916. It is thus made to appear (said the defendant) that since no extension of time had been granted, the proposed bill of exceptions was served and filed after expiration of the time allowed by law.

[1] The proposed bill and amendments having been delivered to the clerk and by him to the judge, the court designated August 28, 1916, as the time for settling the bill of exceptions, and the attorneys for the respective parties were notified thereof. At the time appointed those attorneys appeared before the judge and the attorney for defendant presented his objections, including those above noted, to the settlement of any bill of exceptions. The record does not show any definite ruling by the court upon those objections, but the hearing on that day resulted in a minute order by the court in that case as follows:

> "This being the time heretofore continued to for further hearing on settlement of bill of exceptions, all parties present by and with their respective counsel. Argument is heard and the court at this time disallows the bill of exceptions for the reason that same does not conform to the record."

The petition for the writ in this proceeding and the respondent's answer thereto, as well as the briefs of counsel, indicate that a controversy arose between the plaintiffs' attorney and the judge respecting the correctness of the bill as proposed by plaintiffs' attorney, and that the judge was insisting that a better and more correct bill be proposed before he would make any order settling the same. Without entering into a discussion, which would necessarily be of considerable length, as to the merits of this controversy, it will be sufficient to say that the situation was not materially different from that shown in Vatcher v. Wilbur, 144 Cal. 536, 78 Pac. 14. The following statement made in that case is applicable here:

> "The respondent as judge of said court was not required to sign the proposed statement as it was presented. It was his duty merely to settle it, and this implied that he should amend it, or cause it to be amended, so as to make a fair statement, where it can be done with no more labor than was here required. We think, therefore, under the circumstances of this case, it was not a proper exercise of the discretion vested in the respondent judge to require a transcription of the full reporter's notes as a condition for settling said statement."

[2] Although at that time the judge perhaps did not rule favorably to the defendant upon his objections that the bill was proposed too late, those objections will nevertheless be considered at this time, since they were insisted upon by the defendant's attorney and were not waived by him at any time. And in respondent's answer to the petition in this proceeding he states that his present reasons for refusing to act upon the proposed bill of exceptions are not only because the petitioners have refused to amend the same as directed by him, but also because the proposed statement or a copy thereof was not drafted or served on said defendant within ten days after notice of respondent's decision denying the petitioners' motion for a new trial.

It is not claimed by the respondent that any formal notice of the order denying the motion for a new trial was served upon the plaintiffs or their attorney. The answer of respondent herein shows, and after hearing the argument we are assuming it to be admitted by plaintiffs, that on the 3d day of July, 1916, pursuant to notice theretofore served and filed by plaintiffs' attorney, the plaintiffs by their said attorney applied to the superior court to set aside the order of June 19th denying the motion for a new trial. The motion of July 3d seems to have been based upon excusable failure of plaintiffs' attorney to be present at the time set for presenting his motion for a new trial. For in connection with said motion of July 3d, plaintiffs' attorney served and filed an affidavit of the attorney, Mr. Vaughan, in which he set forth the accidental reasons which prevented his presence in the court at San Bernardino until 12 minutes after 2 o'clock on the 19th day of June. In that affidavit he stated that counsel for defendant had left the courtroom as affiant entered that room; "that the judge who tried the case was upon the bench, and upon entering the courtroom affiant was advised that the judge had denied the motion for a new trial because counsel for the plaintiffs herein was not present; upon receiving such information affiant explained to the court that he was delayed," etc. On July 3, 1916, said motion to set aside the order of June 19th was denied.

[3, 4] The Code of Civil Procedure, § 650, provides:

> "When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, * * * if proceedings on motion for a new trial be pending, within ten days after notice of decision denying said motion, or other determination thereof, or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare the draft of a bill, and serve the same, or a copy thereof, upon the adverse party. * * *"

Under the terms of the statute a party whose motion for a new trial has been denied by the court is entitled to have served upon him notice of such ruling of the court; but such notice may be waived.

> "The rule is that in order to deprive an appellant of his right to written notice of the entry of an order or judgment there must be facts of record clearly indicating a waiver of such notice." Hughes Mfg., etc., Co. v. Elliott, 167 Cal. 494, 140 Pac. 17.

Again it was said, referring to a case where written notice of decision was required by the Code:

> "The rule would therefore seem to be that written notice of filing of decision is in all cases required, unless waived by facts appearing in the records, files, or minutes of the court; and it follows that actual notice or knowledge, other than by written notice, is insufficient in any case unless it appears from facts thus evidenced, that written notice was waived." Mallory v. See, 129 Cal. 359, 61 Pac. 1123.

In the case last cited it was held that by the act evidenced upon the record of obtaining an order for stay of execution, appellant had waived written notice of decision.

[5, 6] In the case to which the present proceedings refer plaintiffs on July 3, 1916, applied to the superior court for affirmative relief with respect to the order of June 19th. At that time, if not before, their conduct constituted a definite waiver of notice of the entry of the order which they were asking the court to set aside. This being so, in the absence of any order extending the time for serving a proposed bill of exceptions, the time therefor expired at least two weeks prior to July 27th, when the proposed bill was actually served. Any bill of exceptions settled by the judge should include a showing of these facts in order to preserve the objections of the defendant to the settlement of the bill. Upon such a record, we are of opinion that such a bill of exceptions would necessarily be ignored in determining the merits of the appeal. This being so, to grant the writ demanded by petitioners herein would be to require the court to perform a useless act.

The petition for peremptory writ of mandate herein is denied.

We concur: JAMES, J.; SHAW, J.

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32 Cal. App. 235

BEALE et al. v. CITY OF SANTA BARBARA et al. (Civ. 1998.)

(District Court of Appeal, Second District, California. Dec. 1, 1916. Rehearing Denied by Supreme Court Jan. 29, 1917.)

1. MUNICIPAL CORPORATIONS 🔑290—STREET IMPROVEMENTS — RESOLUTION OF INTENTION — DESCRIPTION OF WORK — AMENDMENT OF STATUTE AFTER JUDICIAL CONSTRUCTION.

That after Street Improvement Act March 18, 1885 (St. 1885, p. 148) § 3, providing that before ordering the work the city council shall pass a resolution "describing the work," had been decided to be satisfied, in case of pavements, by brief description and reference in the resolution to plans and specifications on file, it was amended by St. 1913, p. 403, to provide that when the work consists of certain enumerated improvements (among which pavements are not included), a brief description thereof in the resolution, with reference to plans and specifications on file, shall be sufficient, does not change the law as judicially declared as to pavements.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 763, 764; Dec. Dig. 🔑290.]

2. MUNICIPAL CORPORATIONS 🔑293(1) — STREET IMPROVEMENTS—RESOLUTION OF INTENTION—ASSESSMENT DISTRICT.

Under Street Improvement Act March 18, 1885, § 3, as amended by St. 1913, p. 403, providing that, whenever the contemplated work in the opinion of the city council is of more than local or ordinary public benefit, the city council may make the expense chargeable on a district, which the council shall, in its resolution of intention, declare to be assessed, it is enough for the resolution to declare that said contemplated work is, in the council's opinion, of more than local or ordinary public benefit, without declaring that the lots and lands within the boundaries of the district fixed by it will be specially benefited.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 773; Dec. Dig. 🔑293(1).]

3. CONSTITUTIONAL LAW 🔑68(4)—LEGISLATIVE QUESTIONS — STREET IMPROVEMENTS — DETERMINATION OF BENEFITS.

The determination by the city council, to which Street Improvement Act, March 18, 1885, § 3, as amended by St. 1913, p. 403, intrusts the matter, that the property within an assessment district fixed by it will be specially benefited by the street improvement, is conclusive in the absence of fraud or its equivalent.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 125; Dec. Dig. 🔑68(4).]

4. MUNICIPAL CORPORATIONS 🔑323(3) — STREET IMPROVEMENT—ACTION TO ENJOIN—COMPLAINT—BENEFITS.

Allegation in a complaint to enjoin the making of contract for a street improvement that plaintiff's property within the assessment district fixed by the city council will not be benefited by the improvement is of no effect; as no evidence in support thereof would be admissible.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 846; Dec. Dig. 🔑323(3).]

5. CONSTITUTIONAL LAW 🔑290(3)—MUNICIPAL CORPORATIONS 🔑290—DUE PROCESS—LOCAL IMPROVEMENTS—NOTICE.

That Street Improvement Act March 18, 1885, § 3, as amended by St. 1913, p. 403, after providing for certain things to be done, as notice of passage of resolution of intention, which are ample as notice, then provides for certain other things to be done as notice, and immediately declares the latter things nonessentials, cannot be complained of as authorizing the taking of property without due process.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871, 872; Dec. Dig. 🔑290(3); Municipal Corporations, Cent. Dig. §§ 763, 764; Dec. Dig. 🔑290.]

6. MUNICIPAL CORPORATIONS 🔑450(4) — STREET IMPROVEMENTS — ASSESSMENT DISTRICT—MAP.

It is no ground for complaint that intersecting streets, some of which it is proposed to improve, are not delineated on the map showing the boundaries of the assessment district; the street improvement act not requiring it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1074; Dec. Dig. 🔑450(4).]

7. MUNICIPAL CORPORATIONS 🔑293(1) — STREET IMPROVEMENTS — NUMEROUS KINDS OF IMPROVEMENTS.

That a proposed improvement of streets embraces numerous kinds of improvement is no ground for complaint, being authorized by Street Improvement Act March 18, 1885, § 3, as amended by St. 1913, p. 403, and St. 1911, p. 632, § 7, subd. 13, as it cannot be assumed that the assessment board will apportion to any land within the assessment district any part of the cost of any improvements from which such land receives no benefit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 773; Dec. Dig. 🔑 293(1).]

8. MUNICIPAL CORPORATIONS 🔑293(4) — STREET IMPROVEMENTS—RESOLUTION OF INTENTION—QUALIFICATION OF COUNCILMAN.

A member of a city council is not disqualified to vote for adoption of a resolution of intention to improve streets because owning property within the assessment district.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 775; Dec. Dig. 🔑 293(4).]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Lillian Beale, executrix of John E. Beale, deceased, and others, against the City of Santa Barbara and others. From an adverse judgment, plaintiffs appeal. Affirmed.

B. F. Thomas, of Santa Barbara, for appellants. James B. Rickard and Arthur M. Ellis, both of Los Angeles, for respondents.

SHAW, J. In this action plaintiffs sought to have certain proceedings of the city council of Santa Barbara for doing the street work described in the resolution of intention adopted by said city council set aside and annulled, and to enjoin the superintendent of streets of said city from entering into a contract for the doing of the same. The cause of action is based upon the alleged insufficiency of the resolution of intention set out in the complaint, under which it is claimed the city council acquired no jurisdiction to do the work, and the alleged fact that plaintiffs' property would not be specially benefited by the improvements. A general demurrer to the complaint was sustained, without leave to amend and thereupon a judgment of dismissal of the action was entered, from which the plaintiffs appeal.

The resolution adopted, and which included the pavement of a number of streets and the construction of certain sewers, curbs, culverts, and gutters described therein, was pursuant to the provisions of "An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885 (St. 1885, p. 147) and acts supplementary thereto and amendatory thereof, and pursuant to "An act to provide a system of street improvement bonds to represent certain assessments for the cost of street work and improvement within municipalities, and also for the payment of such bonds," approved February 27, 1893 (St. 1893, p. 33), and acts amendatory thereof, and declared the intention of the city council—

"to order the following street work to be done in said city according to the plans and profiles therefor now on file in the office of the city engineer of said city, and being plans numbered A-33-1 and A-23-3 and specifications therefor now on file in the office of the city clerk of said city, and being entitled, 'Specifications for the Improvements of the Coast Highway, Salinas Street, Cacique Street, Milpas Street, and Haley Street,' which specifications were adopted by the council of said city on the 4th day of September, 1913, to which plan and specifications reference is hereby had, and they are made a part hereof, to wit: [Here followed a more complete description of the improvement.]"

The language used as to the Coast highway, with reference to the pavement thereof, which in substance is the same as that used in describing the pavement of each of said streets, is as follows:

"To construct a pavement (consisting of a one and one-half inch asphalt wearing surface and a cement concrete base) upon the central 24 feet of the roadway of the Coast highway from the termination of Salinas and Punta Gorda streets and being shown as station 0 plus 00 on plan A-33-1 to the westerly line of the pavement now existing at Booth's Point road and Hot Spring road, and being shown as station 39 plus 21 on said plan, together with certain pavement and certain wall opposite the termination of Ocean View avenue shown on said plan and slight modification of width near station 28 plus 04 as shown on said plan, and at the intersection of Booth's Point road and Hot Springs road, as shown on said plan, and in accordance with specifications No. 27; also to construct a shoulder one foot in width (consisting of asphalt wearing surface and cement concrete base) on both sides of said pavement; also to construct across or in such portion of the Coast highway as shown on said plan four reinforced concrete culverts or drains and one vitrified pipe drain, all of said work to be done in accordance with plan No. A-33-1 now on file in the office of the city engineer of said city, and also in accordance with the specifications therefor hereinabove referred to and now on file in the office of the city clerk of said city, to which plan and specifications reference is hereby made for further particulars."

As to some of the streets the resolution included the paving of intersecting streets between certain defined points, and in one instance described the work as "including certain pavements to be constructed opposite the termination of Rose avenue," all in accordance with plans and specifications referred to as part of the resolution.

As to the several sewers the construction of which the resolution contemplated, a description of one is sufficiently illustrative of all. The declared intention was—

"to construct a six-inch main sewer (consisting of a six-inch vitrified, salt-glazed sewer pipe) in Milpas street from the manhole now constructed in the intersection of Haley and Milpas streets to the lamphole to be constructed in Milpas street, said lamphole to be distant 394 feet southeasterly from said manhole together with the construction of said lamphole, all in accordance with specifications No. 28 and plan A-23-3."

The resolution further declared:

"That said contemplated work of improvement is in the opinion of said council of more than local or ordinary public benefit, and said council does hereby find, determine, and declare that an assessment district shall be formed to pay for the cost and expenses of said improvement; and the exterior boundaries of said district to be benefited by said improvement and to be assessed to pay the cost and expenses thereof, * * * is in general terms described as follows, to wit: [Followed by a general description by metes and bounds of the proposed district.]"

Reference is made to a plat prepared by the city engineer, approved by the city council, and on file in the office of the city engineer, the boundary line of which district is indicated by green tinting, showing the extent of the territory to be included in the assessment district, a copy of which map is attached to the complaint as part thereof. It was further provided that serial bonds should be issued to represent each assessment of $25 or over for the cost of said improvement, and a newspaper was designated wherein the city clerk was directed to publish the resolution as provided by law, and said clerk was also directed to mail, postage prepaid, to each property owner whose property was subject to assessment for the cost and expenses of said improvement, at his last known address, as shown by the tax rolls of said city, or to the general delivery where not so shown, a postal card containing a notice of the passage of the resolution of intention, all as required by law. The complaint further alleged that certain lots and lands within the boundaries of said proposed district were severally owned by plaintiffs, and that neither the construction of said street work nor said sewers would in any way or manner be of any benefit to the tracts of land so owned by them and each of them, for the alleged reasons that in some cases their lands were situated a long distance from the improvement contemplated in said resolution, and that other improved streets more accessible furnished them a means of egress and ingress thereto, together with other allegations as to the topography of their lands, the location and use thereof, which it is claimed show that their lands would not be benefited by the proposed improvement.

The foregoing references to the complaint are sufficient to illustrate all the points made by appellants which merit consideration.

[1] In our opinion, the resolution of intention upon which authority for all subsequent acts in proceedings for improving the streets must be based is not subject to any of the objections urged thereto by appellants. Section 3 of the act, the constitutionality of which has been repeatedly upheld, provides, among other things, that before ordering the work the city council shall pass a resolution "describing the work," and that whenever the construction of certain enumerated improvements (among which pavements are not included) constitutes the work mentioned in the resolution, a brief description thereof in the resolution, reference being had to plans and specifications on file, shall be sufficient. As to the work of paving the street mentioned in the resolution, it was described as the construction of "a pavement (consisting of a 1½-inch asphalt wearing surface and a cement concrete base)" to be constructed in accordance with plans and specifications on file, to which reference is made for further particulars, and which plans and specifications are made part of the resolution. The sufficiency of the plans and specifications and the fact that they were on file in the proper office is conceded. Appellants insist, however, that as to the work of paving, the resolution fails to describe the work, in that it does not specify the thickness of the concrete base, to which might be added the further objection that it likewise fails to specify the kind of sand, quality of cement, character of rock, and the proportions of the mixture, together with other details of construction, all of which, since not denied, presumably were embodied in elaborate plans and specifications. In the case of McQuiddy v. Worswick Street Paving Co., 160 Cal. 11, 116 Pac. 67, the resolution provided for the paving of a street "with asphaltic pavement on an asphalt concrete foundation, * * * all in accordance with the plans and specifications on file in the office of the city clerk," and in an attack made upon the sufficiency of the resolution it was upheld, the court holding that the language of the resolution, in connection with the specifications to which reference was made, constituted a sufficient compliance with the provisions of the statute. To the same effect is Richmond Construction Co. v. Growney, 29 Cal. App. 427, 155 Pac. 1008, where a part of the work contemplated in the resolution was the grading of the street. In the case of Chase v. Trout, 146 Cal. 350, 80 Pac. 81, the work provided for was that of grading, graveling, and guttering in accordance with plans, profiles, and specifications on file in the office of the city engineer, the contention there being, as here, that the resolution did not sufficiently describe the work; nevertheless, upon the maxim that "that is certain which can be made certain," it was held to constitute a substantial compliance with the provisions of the act. Appellants contend, however, that these decisions are not determinative of the question, for the reason that they were rendered prior to the amendment of section 3 (Stats. 1913, p. 403); the amendment constituting that portion of the section which enumerates certain kinds of improvements as to which it is provided a "brief description" of the same with a reference to the plans and specifications shall be sufficient. As we have seen, this amendment does not embrace pavements. Nevertheless, since the court had theretofore decided that the reference to specifications for details of the work, where it consisted of paving, might be made, the amendment is nothing more than a legislative declaration of that which had been judicially declared, as to work other than pavement, and since it does not purport to change the provisions of the act relating to pavements under which the court had held such description sufficient, it cannot be construed as changing the law

with reference thereto. Moreover, the proposed improvement, as expressed in the resolution, described it as the pavement of the street and specified the material to be used in the construction thereof. This was sufficient in characterizing the work as distinguished from other improvements. While the resolution might properly have stated the thickness of the concrete base, the failure of which alone constitutes appellants' objection thereto, its failure so to do does not affect the validity thereof. In connection with the plans and specifications to which reference is made, it constitutes a sufficient description of that part of the work described as pavement embraced in the resolution.

[2-4] It is next contended that the resolution is insufficient by reason of its failure to declare that the lots and lands within the exterior boundaries of the district will be specially benefited by the improvement. The provision of the act is that:

> "Whenever the contemplated work or improvement in the opinion of the city council is of more than local or ordinary public benefit, * * * the city council may make the expense of such work or improvement chargeable upon a district, which said council shall, in its resolution of intention, declare to be assessed to pay the costs and expenses thereof."

The declaration in the resolution is in strict accord with this provision, it being declared:

> "That said contemplated work of improvement is in the opinion of said council of more than local or ordinary public benefit, and said council does hereby find, determine and declare that an assessment district shall be formed to pay for the cost and expenses of said improvement; and the exterior boundaries of said district to be benefited by said improvement and to be assessed to pay the costs and expenses thereof" is as follows.

In the case of Haughawout v. Raymond, 148 Cal. 311, 83 Pac. 53, a like attack was made upon the resolution of intention, wherein the declaration was as follows:

> "The district to be benefited and to be assessed to pay the total cost of said work is hereby declared to be all those certain lots and parcels of land lying in the city of Los Angeles and particularly described as follows, to wit"

—and wherein it was held the contention did not merit any consideration. Not only is the finding sufficient as a basis for establishing the assessment district, but it is likewise sufficent as a determination by the city council, to whom a determination of the question is delegated by the Legislature, to show that the lots and lands within the exterior boundaries of the district will be specially benefited by the improvement. Whether the property will be specially benefited thereby is a question of fact to be determined by the legislative branch of the municipality, and in the absence of fraud, or arbitrarily and in total disregard of the exercise of judicial discretion vested in the assessment board, equivalent to fraud, as was the case in Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 148 Pac. 217, such determination must be deemed conclusive. Walston v. Nevin, 128 U. S. 582, 9 Sup. Ct. 192, 32 L. Ed. 544; Litchfield v. Vernon, 41 N. Y. 123; Duncan v. Ramish, 142 Cal. 691, 76 Pac. 661; Remillard v. Blake & B. Co., 169 Cal. 277, 146 Pac. 634, Ann. Cas. 1916D, 451. The position of counsel for appellants, as announced at the hearing, was to the effect that whenever a city council declares its intention to make street improvements, and likewise its intention to establish an assessment district upon which to apportion the cost of such improvement, any dissatisfied property owner therein, upon a claim that his property will not be benefited, may demand a hearing in court, and thus obstruct the proposed improvement until a determination of such question by the court. As stated in Paulson v. City of Portland, 16 Or. 450, 19 Pac. 450, 1 L. R. A. 673, such a course would hardly be practicable, and would result in substituting in place of the judgment of the common council, who are selected on account of their supposed fitness for that duty, the opinion of a multitude of witnesses, many of whom would be personally interested in the controversy. Says Hamilton on Special Assessments, § 515:

> "The determination of the assessing board as to what property is benefited and the extent of such benefit, when made in accordance with statutory requirements, is conclusive, in the absence of fraud or mistake."

Of course, the theory upon which the district is established, upon which the cost of the work shall be apportioned, is that it will derive special benefits from the improvement. But some one must determine that question, and, as stated, the Legislature has seen fit to delegate such power to the city council. From this conclusion it follows that the allegations of the complaint to the effect that plaintiffs' property will not be benefited by the proposed improvement cannot be considered in aid of the statement of a cause of action, since as to such question no evidence in support thereof would be admissible upon the trial. Cake v. City of Los Angeles, 164 Cal. 705, 130 Pac. 723; Duncan v. Ramish, supra.

[5] Section 3 of the act provides that the resolution of intention shall be posted conspicuously for two days on or near the chamber door of said council and published by two insertions in one or more daily, semiweekly, or weekly newspapers published and circulated in said city and designated by said council for that purpose. It also provides that the street superintendent shall post along the streets upon which the improvement is to be made, at not more than 300 feet apart, notices of the passage of said resolution, and requires street superintendents to cause a notice similar in substance to be published by two insertions in one or more daily newspapers, and likewise provides that the city clerk shall, upon the passage of the resolution of intention, mail, postage prepaid, to each property owner whose property is to be assessed for the cost of the improvement, a notice in the form prescribed. The act then provides

that the failure of the city clerk to mail said postal cards, or the failure of the superintendent of streets to post the notices of street work along the line of the improvement, shall in no wise affect the validity of the proceedings or prevent the city council from acquiring jurisdiction to order the work.

> "This," says counsel for appellants, in attacking the provision upon the ground that it authorizes the taking of property without due process of law, "is rank 'progress' towards injustice and anarchy. What lawyer, what judge, can lend his judgment to support such a law? We will do the lower court the justice to say we did not study or present all of the communistic phases of the act when the demurrer was argued."

Unfortunately this court, since the question is thus presented, cannot escape, as did the trial court, the animadversions of appellants' counsel. We are, nevertheless, constrained to "lend our judgment" in support of the fact that the publication of the resolution and the posting thereof by the city clerk, together with the publication of the notice of street work, even in the absence of the posting of notices along the line of the street and the sending out of the postal cards (which, however, is conceded to have been done), constitutes a sufficient notice, provided the affidavits of the posting of said notices and the mailing of said postal cards, as required, be filed showing the performance of such duty. The complaint contains no denial thereof. Clearly the publication and posting of the resolution, together with the publication of notice of street work, should be held sufficient notice of the proposed improvement of the streets by the city council. As determined by the Legislature, these acts were not only essential, but ample for the purpose intended; indeed, the requirement is in excess of that usual in cases of constructive notice. See: Reclamation District v. Hagar, 66 Cal. 55, 4 Pac. 945; Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 115, 17 Sup. Ct. 56, 41 L. Ed. 369. The posting of notices of street work by the superintendent of streets and the mailing of postal cards were nonessentials, and the requirement might have been omitted altogether without affecting the validity of the provision as to notice. This being true, the legislative enactment that a failure to comply with the provision so declared, and in fact a nonessential, constitutes no ground for complaint on the part of appellants. There is nothing in Brookes v. City of Oakland, 160 Cal. 423, 117 Pac. 433, sustaining appellants' contention.

[6, 7] Since not required by the act, no cause for complaint arises from the fact that the intersecting streets, some of which it was proposed to improve, were not delineated upon the map showing the boundaries of the district. Nor is there any merit in the contention that the proposed improvement embraces numerous kinds of improvements (section 2, Vrooman Act, Stats. 1913, p. 402; section 7, subd. 13, Stats. 1911, p. 632), some of which may not benefit plaintiffs' property. We cannot indulge in the presumption that the assessment board will apportion any part of the cost of constructing a sewer upon lands that receive no benefit therefrom. On the other hand, a benefit might result from other improvements described in the resolution for which the land so exempted from the cost of sewer construction should pay in proportion to the benefits received.

[8] Appellants' next point is that the court erred in refusing to permit them to amend their complaint by inserting an allegation to the effect that a member of the city council who voted in favor of the adoption of the resolution of intention and whose vote was necessary to constitute a majority in favor of the passage thereof was an owner of property within the proposed district. The denial of the motion to so amend the complaint was based upon the ground that the subject of the amendment was immaterial. The ruling of the court is supported by the cases of United Real Estate, etc., Co. v. Barnes, 159 Cal. 244, 113 Pac. 167, and Corliss v. Village of Highland Park, 132 Mich. 152, 93 N. W. 254, 610, 95 N. W. 416. There is no statutory provision, as in the case of Capron v. Hitchcock, 98 Cal. 428, 33 Pac. 431, cited by appellants, disqualifying a member of the city council from voting upon the adoption of a resolution of intention because of his ownership of lands in the district which will be subject to assessment for the cost of the improvement.

Page and Jones on Taxation by Special Assessment, § 269:

> "In the absence of specific statute, the fact that a member of a common council owns land which is subject to assessment does not disqualify him from acting."

We do not deem other points urged by appellants of sufficient importance to merit further discussion. Suffice it to say that we agree with the learned trial judge that the complaint fails to state a cause of action; and the judgment is therefore affirmed.

We concur: CONREY, P. J.; JAMES, J.

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32 Cal. App. 93

HELD v. BEACH-ROBINSON CO.

(Civ. 1851.)

(District Court of Appeal, First District, California. Nov. 16, 1916.)

1. ASSIGNMENTS 🔑50(1) — ASSIGNMENT OF AMOUNT DUE ON CONTRACT.

Where one advanced money to a subcontractor on promise of a main contractor that it would repay him from the amount payable to the subcontractor upon orders from the subcontractor, and, such orders from the subcontractor being procured, the main contractor also promised in writing to pay such sums out of the amount due as soon as received, and the orders and written promise were ambiguous as to whether such payments were to be made out of a particular portion of the fund payable to the subcontractor and testimony thereon was conflicting, the trial court was entitled to resolve the conflict in favor of the person advancing the money.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 99–105; Dec. Dig. 🔑50(1).]

2. ASSIGNMENTS 🔑55—CONSIDERATION.

The acceptance of the orders of the subcontractor by the main contractor was sufficient consideration for the latter's subsequent written promise to pay such sums, under Civ. Code, § 1606, as to effect as consideration of a legal or moral obligation.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 113–115; Dec. Dig. 🔑55.]

3. ASSIGNMENTS 🔑52—EQUITABLE ASSIGNMENTS—ORDER ON PARTICULAR FUND.

The orders and the written promise were to be read together, and, so read, could be construed as constituting an unqualified and equitable assignment of the aggregate amount called for out of an existing fund.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 107–111; Dec. Dig. 🔑52.]

Appeal from Superior Court, City and County of San Francisco; Adolphus E. Graupner and Bernard J. Flood, Judges.

Action by Ernest Held against the Beach-Robinson Company. From judgment for plaintiff and order denying new trial, defendant appeals. Affirmed.

Robinson & Sizer and Robinson, Gillis & Sizer, all of Oakland, for appellant. L. T. Jacks, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor and from an order denying the defendant's motion for a new trial.

The facts of the case are substantially these: The defendant in the month of September, 1913, had been awarded a contract to remodel Grace Cathedral Church, and in the month of November of that year sublet the portion of its contract having to do with inside cabinet work to the Bank Equipment Company for the sum of $4,400. The plaintiff for some years prior to this time had been engaged in the business of doing artistic woodwork, but had disposed of his business to a successor, which in turn transferred it to the Bank Equipment Company. Plaintiff was friendly to this latter institution, and evidently desired that it should succeed in the fulfillment of this particular subcontract, but a little more than a month after work upon it had begun plaintiff learned from the president of the Bank Equipment Company that it was being hard pressed for money and in danger of attachment for a bill of $150. The plaintiff went to Mr. Beach, of the Beach-Robinson Company, and explained the situation, whereupon the latter stated that, if the plaintiff would advance the money to the Bank Equipment Company to meet its immediate need, and if the said company would give the plaintiff an order for the amount, "he [meaning, of course, the defendant] would stay good for it." The plaintiff took this course, and procured an order for $150, to be paid "out of the money due us under our contract with you." This order the Beach-Robinson Company accepted; and not long after, and under a similar state of facts, accepted another order of the Bank Equipment Company in plaintiff's favor for the sum of $630, payable 35 days after the completion of the defendant's contract with the Grace Cathedral corporation. Within a day or two after the signing of this second order the plaintiff, apparently desiring a more formal writing covering both advances to the Bank Equipment Company, secured from the defendant the following paper:

> "San Francisco, 1914, January 19.
>
> "Ernest Held, Esq.—Dear Sir: We promise to pay you $630 and $150, equal to $780, out of the Grace Cathedral fund as soon as we receive it from the Grace Cathedral Association, which we expect will be about February 26, 1914. Respectfully yours, The Beach-Robinson Company, per R. E. Beach, Sec."

At the time of the execution of this writing Mr. Beach said to plaintiff: "Everything is all right. We will protect you." On the date of the acceptance of these orders and of the execution of the above writing there was, according to the undisputed evidence of the architect, and also according to the figures which Mr. Beach himself gave to the plaintiff, at that time approximately $1,300 in the Grace Cathedral fund belonging to the Bank Equipment Company, and then payable or thereafter to become due to it under its contract with the defendant. Within a day or two after the execution of the above paper the defendant informed the Bank Equipment Company in writing of the acceptance of these orders, and charged the Grace Cathedral fund on its books with the amount thereof. The defendant did not, however, inform either the Grace Cathedral corporation or the architect in charge of the work of the existence of the plaintiff's accepted orders or its written promise to him, but, on the contrary, the evidence shows that the above fund in existence at the time of the acceptance of said orders was thereafter depleted by payments made upon other orders of the defendant upon it, or by payments directly to the Bank Equipment Company, so that only the sum of $168 remained payable to the latter from the Grace Cathedral fund when the time for making the final payment upon the contract arrived. The evidence showed that some time after the acceptance of plaintiff's orders, and after its written promise to pay their aggregate sum to him, the defendant paid over to the Bank Equipment Company the sum of $216.70 upon its contract and out of the Cathedral fund, regardless of the existence of these outstanding obligations.

[1] The appellant makes two main contentions upon this appeal. The first is that the obligations assumed by it through its two accepted orders and its written promise were

to be satisfied out of the final payment upon the subcontract of the Bank Equipment Company due 35 days after the completion of the work, and that as to this balance it was depleted by lien claimants, whose rights to this particular portion of the fund were superior to that of the plaintiff. The trial court refused its assent to this construction of the writings in question; and we think it did not err in so doing. The writings themselves did not thus limit the defendant's obligations and promise; and if it can be said that they are uncertain in that regard, the testimony of the parties is conflicting as to the fund out of which the plaintiff was to be paid, and the trial court—as it was entitled to do—resolved that conflict in the plaintiff's favor.

The appellant's next contention is that the fund against which these orders were drawn was depleted without any fault on its part through the direct payment by the architect of other claims against the Bank Equipment Company of which the defendant had no knowledge. The record does not bear out this contention, but, on the contrary, shows not only that the architect paid none of such claims without the defendant's written order, but also that the defendant itself on a date subsequent to the dates of the plaintiff's orders paid to the Bank Equipment Company the sum of $216.70, regardless of the plaintiff's outstanding claim.

[2, 3] In respect to the appellant's final contention that the two orders accepted by the defendant did not amount to an equitable assignment of the sums they called for out of an existing fund, and that, as to its written promise of a day or two later, it was without consideration, we are of the opinion that the existence of the obligations assumed in the acceptance of these orders was a sufficient consideration for the defendant's written promise under section 1606 of the Civil Code, and that these several documents are to be read together, and, so read, are susceptible of the interpretation placed upon them by the trial court as constituting an unqualified and equitable assignment of the aggregate amount called for out of an existing fund. Pierce v. Robinson, 13 Cal. 121; Holder Lumber Co. v. Scarborough, 28 Cal. App. 152, 151 Pac. 674. The case of Lynip v. Alturas, 24 Cal. App. 426, 141 Pac. 835, relied upon by appellant, is clearly distinguishable from the case at bar, since in that case the liability of the defendant was necessarily contingent upon the completion and acceptance of the building, while the proofs showed that the building was abandoned by the contractor before the payments on which the order was drawn became due.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(32 Cal. App. 315)

MORRIS v. FIAT MOTOR SALES CO. OF CALIFORNIA et al. (Civ. 1808.)

(District Court of Appeal, First District, California. Dec. 12, 1916.)

1. Sales 🔑261(2) — "Warranty" — Requisites.

Any affirmation, made at the time of the sale or exchange of personal property, as to the character and condition of the thing sold, will be treated as a warranty, if it is so intended, and if the other party acquired the property on the faith of such affirmation, although the word "warranty," or any form of affirmative words of warranty, be not employed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 728; Dec. Dig. 🔑261(2).

For other definitions, see Words and Phrases, First and Second Series, Warranty.]

2. Sales 435(3) — Breach of Warranty — Pleading.

In an action for rescission of the sale of an automobile, an allegation that defendants falsely represented to the plaintiff as a fact that the automobile was then and there a 1912 model Pope-Hartford 50 horse power car, whereas in fact it was a 1911 model of that make, and that plaintiff wholly relied upon the representation, constituted an allegation of an express warranty as to the quality and character of the automobile.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1241–1243; Dec. Dig. 🔑435(3).]

3. Sales 🔑38(7)—Representations—Right to Rely Thereon.

Whenever, on a sale, a positive representation of a material fact is made, the party receiving it is entitled to rely and act upon it, and is not bound to verify it by an independent investigation, although he has an opportunity to do so.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 74, 75; Dec. Dig. 🔑38(7).]

4. Sales 🔑261(4) — Warranties — Requisites.

A positive representation, by the agent of the seller of an automobile, as of a material fact, for the purpose of inducing the buyer to make the purchase, that the car was a 1912 model, constituted, when acted upon, an express warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 730; Dec. Dig. 🔑261(4).]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by James Morris against the Fiat Motor Sales Company of California and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

R. W. McKnight, of San Francisco, for appellants. F. L. Berry, of San Francisco, for respondent.

KERRIGAN, J. From the evidence in this case it appears that in the month of March, 1913, the plaintiff purchased from the defendants a second-hand automobile, styled Pope-Hartford, through the efforts of one Shaw, who was employed by the defendants as a mechanic and demonstrator, but who, under the evidence in this case, must be regarded as the agent of the defendants in the sale of the car in question. During the negotiations for the same Shaw represented to the plaintiff, among other things, that the car was a "1912 model." Within a month after the purchase the plaintiff discovered that the car was not of the manufacturer's model of 1912, but of 1911, and was consequently of less value, whereupon he immediately offered to redeliver the car to the defendants, and demanded the return of the purchase price. This offer and demand being refused, he commenced this action for rescission of the contract. Judgment went for the plaintiff, and this appeal is by the defendants from that judgment and from an order denying their motion for a new trial.

[1] It is true, as claimed by defendants, that an express warranty, to be available, must be alleged in the complaint; but this does not mean that, in order to create an express warranty of an article of personal property, the word "warranty" should be employed, or any form of affirmative words of warranty. Any affirmation made at the time of the sale or exchange, as to the character or condition of the thing sold, will be treated as a warranty, if it is so intended, and if the other party acquired the property on the faith of such affirmation. Coats v. Hord, 29 Cal. App. 115, 154 Pac. 491; Luitweiler, etc., v. Ukiah, etc., Co., 16 Cal. App. 198, 207, 116 Pac. 707, 712; Pepper v. Vedova, 26 Cal. App. 406, 147 Pac. 105; 35 Cyc. 381.

[2] In the present case the complaint alleges that the defendants falsely represented to the plaintiff as a fact that the automobile was then and there a 1912 model Pope-Hartford 50 horse power car, whereas in truth and in fact it was a 1911 model of that make; that plaintiff wholly relied upon said representation in making the purchase. This, we think, constituted an allegation of an express warranty as to the quality and character of the automobile. Bergeler v. Michael, 84 Wis. 627, 54 N. W. 995; 35 Cyc. 448; Barry v. Danielson, 78 Wash. 453, 139 Pac. 223; 30 Am. & Eng. Ency. of Law, 136, 138.

[3] Neither do we agree with the defendants' contention that under the circumstances of the case, plaintiff having had an opportunity to investigate and learn whether or not the representation of the defendants was true, he had no right to place reliance upon their statements. Whenever a positive representation of a material fact is made, the party receiving it is in general entitled to rely and act upon it, and is not bound to verify it by an independent investigation. 30 Am. & Eng. Ency. of Law, 146; Maxon-Nowlin v. Norswing, 166 Cal. 509, 137 Pac. 240; Dow v. Swain, 125 Cal. 674, 58 Pac. 271; Pomeroy's Eq. Jur. § 895. "Where there is an express warranty, the buyer is under no obligation to inspect or examine the goods purchased, but may rely on the warranty." 35 Cyc. 378.

[4] In the case at bar the automobile company and its representative who conducted the sale were engaged in the business of selling automobiles; the plaintiff, it appears, knew little or nothing about such vehicles, but he was acquainted with the sales agent and had confidence in him. During the negotiations the agent made a positive representation of a material fact, and not of a mere matter of opinion or judgment, for the purpose—as the trial court with reason held—of inducing the plaintiff to make the purchase, and which representation was accepted and relied on by him. Such a representation constituted an express warranty. 35 Cyc. 381.

Defendants also assert that the plaintiff sustained no injury by reason of the misrepresentation. It was conceded at the trial that, other things being equal, a 1912 model Pope-Hartford 50 horse power automobile was worth at least $200 more than a 1911 model of the same make.

Two other points are discussed in the briefs, but they are wholly without merit, and require no detailed discussion.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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32 Cal. App. 253

TIDEWATER SOUTHERN RY. CO. v. HARNEY. (Civ. 1531.)

(District Court of Appeal, Third District, California. Dec. 5, 1916. On Petition for Rehearing, Jan. 4, 1917.)

1. Evidence 🔑419(15) — Parol Evidence Affecting Writing.

In an action on a note given in payment of a subscription to corporate stock, the company agreeing to buy back the stock at the end of 10 months at the price paid if defendant was not satisfied that such collateral agreement was the controlling consideration for the note could properly be shown by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1925, 1926; Dec. Dig. 🔑419 (15).]

2. Corporations 🔑82 — Subscription to Stock—Rescission.

Where defendant subscribed to corporate stock, giving a note for the price, the company to buy it back at the same price in 10 months if defendant was not satisfied, by exercising her privilege of rescission she terminated her conditional obligation on the note, it making no difference, since no third party was interested, that her promise to pay took the form of a note.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 285–295; Dec. Dig. 🔑82.]

3. Corporations 🔑82 — Subscription to Stock—Rescission — Intention — Lack of Form and Precision.

The court is not precluded from giving effect to the intention of the parties by reason of the fact that its expression is lacking somewhat in technical form or precision.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 285–295; Dec. Dig. 🔑82.]

4. Corporations 🔑399(7)—Representation by Agent — Subscription to Stock — Ostensible Authority.

A corporation's agent authorized to sell its stock and having the blank subscription book had ostensible authority to make an agreement with a subscriber that if she was not satisfied with the stock in 10 months, the company would buy it back at the price paid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1588, 1609; Dec. Dig. 🔑399(7).]

5. Principal and Agent 🔑123(1), 173(1)—Authority and Ratification—Evidence.

The authority of an agent and ratification of his acts by his principal may be shown by circumstances.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 420, 659; Dec. Dig. 🔑123(1), 173(1).]

6. Corporations 🔑432(12)—Acts of Agent—Ratification—Sufficiency of Evidence.

In a corporation's action on a note given for a subscription to stock, evidence *held* to show, either that the company's agent was authorized to contract on its behalf, that if defendant was not satisfied with her stock in 10 months the company would buy it back, or else that the company ratified the agent's act in making such contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1737, 1743, 1762; Dec. Dig. 🔑432(12).]

7. Corporations 🔑423—Fraud of Agent—Responsibility of Corporation.

A corporation was liable for the fraud of its agent in inducing parties to subscribe to stock and failing to indorse on the original subscription in the hands of the company the agreement that it would buy back the stock in 10 months if the subscriber was not satisfied, which he had indorsed on the subscriber's duplicate subscription, since it was manifestly the duty of the agent to file the original of the agreement of the parties with the corporation, while the rule that a principal is liable to third persons for the wrongful acts of his agent applies to acts of omission as well as to acts of commission.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1692–1695, 1903, 1906; Dec. Dig. 🔑423.]

8. Corporations 🔑82 — Fraud of Agent — Negligence of Plaintiff.

Where a company's agent to induce parties to subscribe to its stock agreed on behalf of the company that it would repurchase stock subscribed for in 10 months if the subscriber was not satisfied, the subscriber was not chargeable with negligence in failing to discover the agent's omission to indorse such agreement on the so-called "original" subscription in the hands of the company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 285–295; Dec. Dig. 🔑82.]

9. Bills and Notes 🔑353—Innocent Purchaser.

Where plaintiff corporation became the owner of a note by virtue of the consolidation of the holder corporation and plaintiff, the latter cannot be said to be an innocent purchaser or indorsee of the note for value.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 814, 898–903½, 906, 907; Dec. Dig. 🔑353.]

10. Bills and Notes 🔑497(5) — Innocent Holder—Burden of Proof.

Where fraud or illegality in the inception of a note is shown by the maker, the burden of proof is cast upon the indorsee to show that he is an innocent holder.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1683–1685, 1687; Dec. Dig. 🔑497(5).]

11. Corporations 🔑428(7)—Notice to Officer.

The knowledge of the president of a corporation of the infirmity of a note held by a company with which the first consolidated was sufficient to charge his corporation with notice.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1754; Dec. Dig. 🔑428(7).]

12. Corporations 🔑90(1)—Stock Subscription — Fraud as Defense — Independent Action.

In a company's action on a note given for a subscription to stock, defendant could set up that the contract she made with the company's agent was that it should repurchase her stock if she was not satisfied therewith in 10 months, thereby showing failure of consideration by reason of the company's refusal to keep the agreement which was the sole inducement for her promise, and it was not necessary that she resort to an independent action for damages to enforce her claim; since a party defrauded may obtain relief by cancellation or rescission, by action to recover a pecuniary compensation for injuries sustained, or by setting the fraud up to defeat an action brought to enforce an apparent obligation or liability, while she could not sue for failure to repurchase stock which she did not own and never had in possession.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 383, 385–388; Dec. Dig. 🔑90(1).]

On Petition for Rehearing.

13. Corporations 🔑82—Subscription Contract—Construction.

Where a corporation's agent soliciting subscriptions to its stock indorsed on the back of a subscriber's duplicate certificate the company's agreement that it would repurchase the stock in 10 months if the subscriber was not satisfied, the court could construe the agreement as one for the cancellation of the subscriber's liability on the note she gave for the stock, and to carry out the contract it was not requisite that the subscriber pay the company for the stock, receive it, then immediately return the shares and receive her money again.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 285–295; Dec. Dig. 🔑82.]

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by the Tidewater Southern Railway Company, a corporation, against Minnie S. Harney. From a judgment for defendant, plaintiff appeals. Judgment affirmed.

Meredith, Landis & Chester, of Sacramento, for appellant. A. H. Ashley, of Stockton, and G. M. Steele, of Lodi, for respondent.

BURNETT, J. On July 25, 1911, respondent subscribed in writing for 500 shares of the common stock of the Tidewater & Southern Railroad Company, for which she agreed to pay $500. At that time the railroad company was actively engaged in soliciting subscriptions for stock. The subscriptions were made out in triplicate. One marked "original" was retained by the company, one marked "duplicate" was given to the subscriber, and the other marked "triplicate" was retained by the agent. At the time of this subscription defendant executed her note for five hundred dollars for said stock. The duplicate subscription, retained by respondent, had written on the back thereof the following:

> "July 25–11. Ten months from date, if holder of contract wishes, we agree to take said stock off purchasers hands at the purchase price of $1.00 per share. Tidewater & Southern R. R. Co., by R. U. Morey, Sec. Dept."

This was not written upon the original subscription retained by the company.

On March 11, 1912, the Tidewater & Southern Railroad Company consolidated with the Tidewater & Southern Transit Company, and the plaintiff corporation was thereby organized succeeding to all the property rights of each. The action was brought upon said promissory note, and the defendant attacked the consideration for the note, claiming that the sale was conditional and that by the fraud of plaintiff's agent, the true consideration did not appear upon the "original" subscription. The defense is elaborately set out in the answer, and the findings and judgment were in accordance therewith.

The case in its main features is quite similar to Tidewater Southern Railway Company v. Vance, 23 Cal. App. Dec. 447 [also reported in 160 Pac. 1097], and is substantially covered by that decision. It is held therein, as stated in the syllabus:

> "An agreement, made by a fully organized corporation with a subscriber for certain shares of its capital stock, that the subscriber should have the right at any time within ten months to cancel his subscription and to recall his promissory note given therefor, is enforceable against the corporation, in the absence of any showing that any later subscriber had been defrauded by his reliance upon such subscription, or that any subsequent creditor had relied upon such subscription in dealing with the corporation."

The principles governing the transaction are set forth clearly and succinctly in said opinion written by Mr. Justice Richards, and it may be said that the Supreme Court denied the petition for a hearing by that court. The following statement in said opinion is applicable here:

> "The Tidewater & Southern Railroad Company had been fully organized before the respondent's subscription to its stock was made, and it does not appear that there was any later subscriber who could have been defrauded by his reliance upon the respondent's subscription; nor does it appear that there was any subsequent creditor of said corporation who could or did rely thereon in dealing with said corporation; nor is it shown that there was any secrecy contemplated or connived at by the respondent in the making of the collateral agreement by which he was permitted, within ten months thereafter, to cancel his subscription by recalling his note; nor that he had any knowledge of the fact that the authorized agent of the corporation failed to also indorse such agreement upon the original subscription which said agent retained on behalf of the corporation. Whatever secrecy there was in respect to this agreement was imparted entirely by the corporation itself through the act or neglect of its authorized agent; and, this being so, and no rights of subsequent subscribers or creditors being involved in the case, it would be a manifest fraud upon the defendant to permit the corporation to take advantage of its own wrong by repudiating its agreement while enforcing the defendant's note, which was evidently given only because of the reservation in said agreement permitting its recall."

[1] That this collateral agreement was the controlling consideration for the note could properly be shown by parol. Muir v. Hamilton, 152 Cal. 636, 93 Pac. 857. As to the fact itself, respondent was positive in her statements and she was corroborated by other evidence. She testified that:

> She signed the agreement at her home in the country. "On the day we signed up Mr. Morey and Mr. Avery came to see us in regard to the subscription agreement. Agents had been to see us on previous days. I don't remember just how many days, but I guess they came for more than one week in regard to this. My brother and sister were present when I signed. We didn't want to take the stock. He (Mr. Morey) said if we would take it he would give us this contract; that we could turn it back in ten months' time if we were not satisfied with it. He said he would give us our note back. I have never had experience whatever in the matter of purchasing stock. I resided on the ranch all my life up until last year. * * * I relied upon his statements. I would not have signed it if I didn't believe in it, * * * if he had not made this representation."

She testified, further, that the agent wrote the contract on the back of what she supposed was the original and gave her the duplicate, and said that the same contract would be on all of said applications, that the original would be turned in at the office, and that he would keep the "triplicate," and that she discovered for the first time when she came into court that there was no such writing on the back of the original.

[2, 3] Not only does she thus exhibit the true consideration for the note, but she displays the palpable effort of the agent to defraud her. By failing to indorse said agreement on the said "original" he thought to hold her to the absolute terms of the promise to pay the money. This feature of the case, though, might probably be eliminated from further attention as the rights of creditors or other subscribers are not involved. The decision, indeed, may rest upon the proposition that a vital element in the consideration for the note was this promise in effect to return the note and cancel the obligation within ten months if desired by respondent, and the failure of such consideration by reason of the refusal of appellant to comply with such agreement.

Or the transaction may be viewed as presenting this legal aspect: There was an agreement to deliver to respondent a certain number of shares of stock, provided the sum of $500 was paid in accordance with the terms of the note. Respondent had, however, the option to pay said sum or, within ten months, to cancel said agreement and be relieved from further liability. She exercised said privilege of rescission, and therefore her conditional obligation was terminated. The transaction must be considered, of course, in its entirety, and the effect is the same as though the contract were fully expressed in one instrument. It can make no difference, since no innocent third person is interested, that the promise to pay the money took the form of a promissory note. Nor are we precluded from giving effect to the intention of the parties by reason of the fact that its expression is lacking somewhat in technical form or precision. In fact, whatever deficiency may exist in that respect was caused by the agent of the corporation, who was moved by a sinister purpose to take any advantage of the confidence of respondent, and she should have the benefit of any intendment that may be reasonably indulged.

Two or three other questions raised by appellant are entitled to some consideration.

[4] We are satisfied that appellant should not be permitted to deny the authority of the agent to enter into such conditional contract. The agents were authorized to sell stock; they had the blank subscription book. In the sale of the stock they represented, therefore, the corporation. The purchaser was not warned nor put upon inquiry as to any limitation to the authority of the agent in receiving subscriptions. The purchaser had the right to assume that the salesman was authorized by the corporation to do those legal acts which the nature of his employment seemed to warrant. The agent, in other words, was ostensibly clothed with unlimited authority, and upon familiar principles appellant should not be heard to disavow and repudiate the contract made by him.

Again, it appears that before the expiration of the ten months, respondent, in company with her brother and sister, called upon Mr. Bearce, the president of the corporation, and demanded the cancellation of their subscriptions. Mr. Bearce's declarations and conduct at that time were indicative of his knowledge of the whole transaction and of his ratification on behalf of the corporation of the terms of the contract made by respondent. He asserted no claim that the corporation had no knowledge of the conditional agreement, or that the sales agent had no authority to sell stock on such terms. He did not disavow liability on behalf of the corporation, nor did he manifest any inclination to disregard or repudiate the actual agreement that was made. To the contrary, he declared that he intended to cancel the notes, including those of respondent's brother and sister which were given on similar conditions. In fact, an entry was made by the auditor in the bills receivable account of the corporation that respondent's note was canceled. This was undoubtedly at the direction of the president, as he said to respondent:

> "He thought the note had been canceled until the time that the Railroad Commission took hold of it. He said there had been an entry of cancellation made, and he called some one of the young ladies to find out when he had been there and he had canceled it, and she told him the date."

Mr. Bearce himself testified:

> "When they came in, oh, I told the defendant that we would cancel the subscription and as far as I was concerned that was my intention to do it. Then when they commenced to come in, we got the attorneys, Meredith, Landis & Chester, and they told us we could not cancel them."

And in answer to the question, "Why did you cancel them?" he said: "Because that agreement, as far as I knew, was a bona fide agreement."

[5, 6] The authority of the agent and the ratification of his acts by the principal may be shown, of course, by circumstances, and it is fair to assert that a review of the whole situation leads rationally to the conclusion that, in legal contemplation, the act of Morey in the premises was the act of appellant.

[7] Moreover, if we regard the fraudulent feature of the transaction, we reach the same conclusion. It was the duty of the agent to make the proper indorsement on the "original" subscription. If he had done so, the corporation would have had, through that channel, actual knowledge of the entire contract. But by the fraud of the agent the said indorsement was not made, and, as far as respondent is concerned, the case must be viewed then as though said indorsement had been made and acquiesced in by appellant; for the act of the agent under the circumstances is the act of the principal, and the latter must suffer the consequences of the agent's failure to do as he agreed. This particular phase of the case is discussed with great learning by Mr. Justice Lorigan in Otis Elevator Co. v. First National Bank, 163 Cal. 31, 124 Pac. 704, 41 L. R. A. (N. S.) 529, wherein is an elaborate exposition of the doctrine that:

> "A principal is liable to third parties, not only for the negligence of its agents in the transaction of the business of the agency, but likewise for the frauds, torts, or other wrongful acts committed by such agent in and as part of the transaction of such business."

The fraud perpetrated therein by the agent consisted in presenting a check for payment which had been raised to a much larger amount than it originally called for. He was the agent of a depositor, and for a period of several years had been intrusted by his principal with the duty of filling out in his own handwriting the body of checks payable to "cash" or "bearer," and after the same were signed he presented them to and had them cashed at the depository bank. It was held that he was acting within the scope of his employment when he presented the "raised" check. The principle applies, of course, to acts of omission as well as to acts of commission. It was manifestly the duty of the agent herein to file the original of the actual agreement of the parties with the corporation. He was acting directly within the scope of his authority when he secured the contract and filed it with the principal, and his fraudulent omission of a material part of the subscription must be regarded in the same light as would be a fraudulent addition of a material term. The result is that the status of the parties was fixed as though the agent had done his duty, and appellant is deemed to have ratified the conditional contract.

[8] Nor will it do to say that respondent is chargeable with negligence in failing to discover the omission and to insist that the agent make the proper indorsement. She had a right to rely upon his promise and representations. There may be some antiquated authorities requiring a person to assume that every one with whom he has a business transaction is a rogue and to act accordingly, but the more reasonable theory is that he can act upon the presumption that there exists no intention to cheat or defraud him. The modern generally accepted doctrine is:

> "That a man may act upon a positive representation of fact, notwithstanding the fact that the means of knowledge were specially open to him. If the representation were of a character to induce action, and did induce it, that is enough. It matters not that a person misled may be said, in some loose sense, to have been negligent. (In reality negligence is beside the case where the misrepresentation was calculated to mislead and did mislead); for it is not just that a man who has deceived another should be permitted to say to him, 'You ought not to have believed or trusted me,' or, 'You were yourself guilty of negligence.'" Bigelow on Fraud, vol. 1, 523–524.

And as to subscriptions the rule is stated in 10 Cyc. p. 424 (d) and (f), as follows:

> "There are common-law authorities to the effect that one who has been drawn by fraudulent representations into making a subscription for stock of a corporation cannot set up the fact that the fraud was practiced upon him and that it induced him to enter into the contract, by way of defense to an action for the subscription, unless he shows that he used due diligence before signing the contract to discover whether or not the representations were true; but the rule of equity is that where there has been a fraudulent misrepresentation or a willful concealment of facts by means of which a person has been induced to enter into a contract to subscribe, in the absence of circumstances tending to excite suspicion in the mind of a reasonable man, he may rightfully rely upon the statements to which the other party to the contract or the agent of such other party has deliberately pledged his faith."

Said rule applies here, as there were no circumstances that would excite the suspicion of a reasonable person. It cannot be claimed that plaintiff is in a better position as to the note than would be the original payee.

[9] As we have seen, plaintiff became the owner by virtue of the consolidation of the two corporations. It cannot be said to be an innocent purchaser or indorsee of the note for value.

[10] If it may be assumed that plaintiff can be placed in the category of indorsee before maturity, then the rule of the modern authorities will apply that:

> "Where fraud or illegality in the inception of the note is shown by the maker, the burden of proof is then cast upon the indorsee to show that he is an innocent holder." Jordan v. Grover, 99 Cal. 194, 33 Pac. 889; Union Collection Company v. Buckman, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609.

[11] There is no such evidence. The inference is rather that plaintiff had knowledge of the consideration for said note at the time it succeeded to its ownership. There is evidence that Mr. Bearce understood the situation when he became president of the new corporation at the time it was formed. His knowledge would be sufficient to charge the corporation with notice.

[12] Nor do we think there is any merit in the contention that respondent should have resorted to an independent action for damages to enforce her claims under the contract. As before indicated, the consideration for the note was involved, and of course that can be set up as a defense to an action on said note. Or if we view the element of fraud to which we have adverted, attention may be directed to the established and permissible procedure as set forth in Field v. Austin, 131 Cal. 382, 63 Pac. 692, and other cases, recognizing three methods by which a party defrauded may obtain relief as follows: (1) Cancellation or rescission, whereby the defrauded party procures an instrument to be set aside and himself to be restored to his original position; (2) affirmative relief by an action to recover a pecuniary compensation for the injury sustained by the fraud of the defendant where no cancellation is necessary as the basis of such recovery; and (3) defensive relief, whereby the fraud is set up by way of defense to defeat an action brought to enforce an apparent obligation or liability.

After an examination of the entire record and such consideration as we could give to the suggestions of counsel, we are persuaded that it would be wrong to interfere with the judgment of the lower court, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

On Petition for Rehearing.

BURNETT, J. [13] In view of appellant's petition for rehearing a few words may be added to the former opinion. We may concede the rule concerning parol testimony to be as stated by appellant. It is a mistake, however, to assume that we have added, or attempted to add, anything to the written agreement of the parties. We have simply held—what must be apparent—that under the circumstances of this case the agreement was in effect to cancel respondent's obligation if she exercised her option within ten months. As to this it may be declared that the contract was so treated and interpreted by respondent and by the president of appellant; it was so represented by the agent and so understood by Miss Harney at the time of its execution, and it cannot be doubted that a cancellation of respondent's obligation by appellant would have been essentially a compliance with the corporation's agreement

This necessarily follows from the fact that the contract was executory and respondent promised to pay the same amount for the same number of shares of stock as appellant. The stock was never delivered to respondent, and she made no payment therefor, but simply gave her promissory note. Suppose appellant had kept its promise, what would have occurred? It would have delivered to respondent the contract and promissory note and whatever was necessary to evidence a satisfaction or cancellation of respondent's obligation. But, according to appellant's theory, to carry out its contract this proceeding would be required: Respondent would pay appellant the sum of $500 and receive the 500 shares, and then she would immediately return the shares and receive the money again. Such circuity of action would not be required. Its equivalent would be indubitably the cancellation of respondent's obligation and the return of the note. So it seems perfectly plain that the court below, as well as the parties to the action, had a right to construe the agreement as one for the cancellation of respondent's liability. We have not varied nor added to the terms of the agreement, but have sought to give it effect according to its plain meaning and intent.

We think, also, that appellant is mistaken in the suggestion that the main contention of respondent is that "she was deprived of a most important consideration in that the collateral agreement was not embodied in the original, and hence she could not take advantage of its provisions." That was only one of the series of fraudulent acts perpetrated by the corporation through its agent. However, the fraud is not so important if we accord to respondent the full benefit of the contract that was actually entered into. And we can see no reason why, in an action brought by appellant to recover on the promise of respondent, she may not show a failure of consideration by reason of the refusal of the former to keep the covenant which was the sole inducement for the promise on the part of respondent. Appellant, having brought the suit, invited the very defense that was interposed, and made it proper to adjudicate the merits of the whole transaction. In this connection it may be said that the record shows that respondent did exercise her option, and that appellant failed to keep its agreement is not the subject of dispute.

It seems entirely plain that respondent could bring no such independent action for damages as is suggested by appellant. How could she sue for the failure to purchase from her stock which she did not own and never had in her possession? How could she tender the stock, as required, before bringing an action for the purchase price when she had no control of said stock?

But we need not go further than to say that in our judgment appellant has failed to appreciate the situation of the parties and the nature of their contract. It has been treated as though the stock had been delivered by respondent and the money paid for it and she were the moving party in the action. It may be that from a legal standpoint the defense might have been presented more artistically and accurately, but the cause was fairly tried and justly decided and the conclusion should not be disturbed. The petition is denied.

We concur: CHIPMAN, P. J.; HART, J.

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32 Cal. App. 214

BURNS v. HAMMEL, Sheriff. (Civ. 1650.)

(District Court of Appeal, Second District, California. Nov. 27, 1916.)

1. SHERIFFS AND CONSTABLES ⚷138(3)—EXECUTION SALE — CLAIM OF THIRD PARTY — TITLE OF JUDGMENT DEBTOR.

In suit against sheriff for damages for execution sale of automobile, evidence that the judgment debtor at all times assumed complete control of the automobile, and that the money used for its purchase was loaned to him and his wife in his wife's name on account of his ill health, *held* sufficient to sustain finding that the automobile belonged to the judgment debtor, or that it was community property, as to which no transfer with change of possession required by Civ. Code, § 3440, as to creditors, had ever been made.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 295, 296; Dec. Dig. ⚷138(3).]

2. SHERIFFS AND CONSTABLES ⚷138(3)—EXECUTION SALE—CLAIM OF THIRD PERSON—EVIDENCE—"TRUSTEE."

In such action the fact that the judgment debtor purchased the automobile under the designation of "trustee" was of no weight, for the reason that, even though his creditor had been given notice thereof, there was nothing in the form which the transaction took to indicate that any other person that the judgment debtor was the owner and real purchaser.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 295, 296; Dec. Dig. ⚷138(3).

For other definitions, see Words and Phrases, First and Second Series, Trustee.]

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by J. R. Burns against W. A. Hammel, Sheriff of Los Angeles County. From judgment for defendant, plaintiff appeals. Affirmed.

Shepard & Alm, of Los Angeles, for appellant. Kemp, Mitchell & Silberberg, of Los Angeles, for respondent.

JAMES, J. Plaintiff sued the defendant, who was at the time the sheriff of Los Angeles county, to recover as damages the sum of $1,950, alleged to have been the value of a certain automobile taken and sold by the sheriff under a writ of execution in a suit of one Garstang v. Guy Posson. The findings and judgment were in favor of the defendant and against the plaintiff, the latter being a third party claimant. The appeal is from the judgment, and is presented under the alternative method.

[1] From the findings of fact it appears that on the 1st day of October, 1912, Guy Posson became a debtor of Garstang, and in December of the same year suit was brought by Garstang and judgment recovered therein for the sum of $450, with costs against Posson; that execution was thereafter issued and a sale made of the automobile for the benefit of the judgment creditor, by which act the plaintiff here asserts a conversion was worked of his property. There is really but one question in the case for this court to determine, and that is as to whether under the evidence submitted the court was justified in the making of the finding that Posson was the owner of the automobile, and that the plaintiff, Burns, acquired no title as against the judgment creditor. On the part of the appellant it is contended that the evidence showed without contradiction that Posson never owned the automobile; that he purchased it for his wife with funds belonging to her; and that his use of the machine was not a use coupled with ownership, but in part was for the benefit of his wife and with her permission. It appears without any dispute whatsoever that Posson at all times, with an exception which will be immediately noted, had possession of the automobile and used it in his business, and that he had such possession at the time the execution herein was levied. There was a brief time when he loaned the machine to one Hedge, who was a close friend and to whom he was indebted for money loaned. Posson purchased the automobile under a contract in which he, as the vendee, was described as "Guy Posson, trustee." He gave checks in payment of the price of the machine signed with the same name and designation. He testified that he bought the machine for "another party." When asked who that party was, he said that it was his wife. When asked where he got the funds with which to pay for the automobile, he said:

> "I got it from Mrs. Posson and some funds that were in the bank that were to that name."

He later said that some of that money had been secured from an old friend named Lewis, who sent the money "to Mrs. Posson" from Portland. In explanation of the circumstances as to how this money happened to be sent, he said:

> "I had had a stroke of paralysis, and had been sick more or less for a year and a half, and Mr. Lewis was an old friend of the family who had been here. I had befriended him and loaned him a good many thousands of dollars many times. He was down here and saw our condition, and he advanced this money and Mr. Moore and Mrs. Posson, and it was put in the bank subject to her check and subject to my check as trustee, in order to work when I could work, do what I could. So, thinking we would be able to earn some money through the machine, letting her son drive it, we bought the machine, directed me to buy it."

He added in his further testimony that the money sent by Lewis was a loan to Mrs. Posson; that it amounted in all to about $2,500. It appeared by his testimony that he later borrowed $5,000 of Hedge and gave Hedge a bill of sale of the machine as security, signing the bill of sale, "Guy Posson, Trustee." The note, however, which he gave to Hedge was signed simply, "Guy Posson." Posson produced also what purported to be a bill of sale executed by himself as trustee to his wife, and another bill of sale executed by the wife to her daughter, covering the same machine. Prior to the 21st of November, 1913, the plaintiff here, who resided at Colton, in this state, loaned certain collateral to Guy Posson for the latter's use. This loan of securities was made purely as a matter of personal accommodation to Guy Posson, and was made without any security delivered at that time. Burns testified that he had no knowledge that any security was to be given him until some time in November —by other testimony it appeared at about the 21st of that month—when Guy Posson came to Colton and delivered to him an assignment of the bill of sale theretofore delivered to Hedge and covering the automobile in question. This act of Posson, according to undisputed testimony, was a voluntary one and without any further consideration extended by Burns to him. This, in brief, is the substance of the material testimony given at the trial, although there was other evidence as to circumstances surrounding the transactions of Posson with respect to the automobile and his handling of the machine, as well as testimony impeaching the character of Posson for truth and veracity. Posson did not produce at the trial his wife or daughter, and all of the testimony given with respect to the wife's ownership of the machine was that furnished by the husband alone. The fact that Posson purchased the machine under the designation of "trustee" is of no weight at all, for the reason that, even though his creditor had been given notice thereof, there was nothing in the form which the transaction took to indicate that any other person than Posson was the owner and real purchaser. See Thompson v. Toland, 48 Cal. 99.

[2] The court had the right to consider all of the circumstances of the case which on their face bore indications of fraud or concealment practiced by Posson. Posson's testimony as to the securing of money from Lewis did not negative a rather clear inference that Lewis, assuming that he loaned money to the Possons, loaned it to them for their community use. The direct suggestion is that the money was called a loan to Mrs. Posson because Posson was threatened with paralysis and preferred to have the money placed so that the control of it might be assumed by his wife in the event of his demise. He at all times assumed complete control of the automobile, not parting with the

possession of it, except, as has been noted, for the brief time when the machine was used by Hedge. We think that the evidence was amply sufficient to sustain the finding made by the trial judge that the property was in fact that of Guy Posson, or that it was community property, which would be the same thing for the purposes of this case. As it appears no change of the possession of the machine was had, but that Posson continued to manage and use it as he had at all times theretofore, such transfer as to his creditor Garstang would not be good. Civ. Code, § 3440.

The judgment appears to be sustained by the evidence, and it is therefore affirmed.

We concur: CONREY, P. J.; SHAW, J.

174 Cal. 222

KRUSE et al. v. PILLSBURY et al., State Industrial Acc. Commission.
(S. F. 7245.)

(Supreme Court of California. Jan. 19, 1917.)

1. MASTER AND SERVANT 🔑369—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—INJURY OUTSIDE STATE.

The Workmen's Compensation Act (St. 1913, p. 279) does not authorize an award for injuries received outside the state.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. 🔑369.]

2. MASTER AND SERVANT 🔑369—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—INJURIES ON VESSEL—FOREIGN PORT.

A vessel, owned and chartered within the state, but lying in the port of another state at the time a sailor thereon was killed, is subject to the laws of the other state, though while on the high seas she may be considered a part of the territory of the state by which she was owned, and therefore the State Industrial Accident Commission cannot make an award for the sailor's death under the Workmen's Compensation Act.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. 🔑369.]

In Bank. Proceedings under the Workmen's Compensation Act by Mary Sandberg, to recover compensation for the death of her husband, opposed by Emil T. Kruse and others, employers. An award of compensation was made by A. J. Pillsbury and others, the Industrial Accident Commission, and the employers apply for writ of certiorari. Award annulled.

McCutchen, Olney & Willard and Ira A. Campbell, all of San Francisco, for petitioners. F. R. Wall, of San Francisco, for applicant. Christopher M. Bradley, of San Francisco, for respondents.

MELVIN, J. A writ of certiorari was issued for a review by this court of the proceedings by which a majority of the members of the Industrial Accident Commission of this state made an award in favor of Mary Sandberg, the widow of a sailor who lost his life while in the service of the petitioners on board the steamer Doris in the state of Washington.

[1] The main question examined by the Commission was this: Does the statute authorize the making of an award for injuries received outside of the state? This has been answered in the negative by this court (North Alaska Salmon Company [a corporation] v. A. J. Pillsbury, Will J. French and Harris Weinstock, as Members of and Constituting the Industrial Accident Commission of the State of California, 162 Pac. 93, S. F. No. 7432 [opinion filed December 14, 1916]), and that case is decisive upon all questions save one raised by the petitioners herein.

[2] It is argued that the question of extraterritoriality is not involved at all, respondents' counsel taking the position that the schooner Doris, on which the accident occurred, was a part of the territory of the state of California and subject to the jurisdiction of the Industrial Accident Commission of this state.

The deceased, Louis Sandberg, at the time of the accident was second officer of the Doris. It was stipulated at the hearing before the Industrial Accident Commission that said accident occurred at Hoquiam, in the state of Washington; that at the time of the accident the deceased employé was performing service growing out of, incidental to, and in the course of, his employment; that the accident was not caused by the willful misconduct or intoxication of the deceased employé.

It thus appears that when the accident occurred the vessel and the officer who was killed were not only within the boundaries of the state of Washington, but were in a port subject to the shipping and other laws of that commonwealth. This fact is to be kept in mind in an analysis of the authorities cited by respondents. In support of the theory that the fiction of admiralty makes the steamer on which the accident occurred a part of the state of California several authorities are cited. The first of these (Crapo v. Kelly, 16 Wall. 610, 21 L. Ed. 430) involved the ownership of a vessel registered in Massachusetts. During a voyage to New York, while the vessel was on the high seas, the owner applied for the benefit of the insolvency laws of Massachusetts, and in the course of the proceedings the court made an order the result of which was to transfer all of the insolvent's property to the assignee. On the arrival of the vessel at the port of New York the sheriff of that county levied an attachment for a debt owed by the insolvent to a resident of the state of New York. It was held that the transfer of the title to the vessel by the court of Massachusetts was just as effective as if it had taken place while she was physically within the state of Massachusetts. The basis of the decision is that while at sea the vessel was constructively a part of the state of Massachusetts. In McDonald v. Mallory, 77 N. Y. 550, 33 Am. Rep. 664, in an opinion written by Judge Rapallo, the authority of Crapo v. Kelly, supra, was followed, and it was decided that the courts of New York had jurisdiction to try a case involving demanded damages for the death of a citizen of New York on a ship owned and registered in that state, the death having occurred while the said vessel was on the high seas. But the fact that both of these cases involve matters occurring on the high seas differentiates them from those cases in which the vessels were in foreign ports at the times when the jurisdiction of the courts of their home states was sought to be applied. In the case of Crapo v. Kelly it was conceded that if the vessel at the time of the execution of the court's assignment had been in the port of New York and had subsequently been seized there under attachment proceedings by a creditor in New York, the attachment would have held her as against the prior assignment. In McDonald v. Mallory, supra, the general rule on the subject was thus stated:

> "The liability of a person for his acts depends, in general, upon the laws of the place where the acts were committed, and although a civil right of action acquired, or liability incurred, in one state or country for a personal injury may be enforced in another to which the parties may remove or where they be found, yet the right or liability must exist under the laws of the place where the act was done. Actions for injuries to the person committed abroad are sustained without proof in the first instance of the lex loci, upon the presumption that the right to compensation for such injuries is recognized by the laws of all countries. But this presumption cannot apply where the wrong complained of is not one of those thus universally recognized as a ground of action, but is one for which redress is given only by statute."

Beyer v. Hamburg-American S. S. Co. (C. C.) 171 Fed. 582, also cited by respondents, was a case in which a German sailor sought to obtain damages in an American court. As the accident occurred upon the high seas upon a German vessel carrying the German flag, it was held that the law of Germany governed the case.

But respondents are of the opinion that the modern rule is not dependent upon the location of the ship at the time of the accident, and in this behalf they cite several authorities which we shall examine. The first of these is Thompson Towing & Wrecking Association v. McGregor, 207 Fed. 209, 124 C. C. A. 479. In that case the accident which was the basis of plaintiff's claim occurred by reason of an explosion upon an American vessel then on Mud Lake, an arm of Lake Huron. It was not certain on which side of the boundary line between the United States and Canada the vessel was floating at the time of the accident. The trial court found, however, that she was on Canadian waters. The circuit court, commenting on this finding, said that it was to be remembered that the vessel had been taken from the American side for a temporary purpose only, i. e., for assisting in floating a stranded ship, and that, without touching at any Canadian port, she was brought back to the nearest American harbor directly after the accident. This, we take it, is important as showing that probably no local statute was involved or could be held applicable to the accident on the steamer from Michigan. Mrs. Workman, the claimant, was a citizen of Michigan; the Stewart on which her husband's death occurred, was owned in Michigan, and the deceased was a citizen of that state up to the time of his death. Any right Mrs. Workman might have possessed under the statutes of Ontario was barred by the lapse of time, but concededly the suit was instituted within the time limited by the statute of Michigan. The court, in discussing this phase of the case, said, in part:

> "Can the right of action in terms preserved to the widow by that statute be enforced? If so, it is because at the time of the death the Stewart was, through ownership and registration, domiciled in Michigan and was, as respects the enforcement of such a right, part of the territory of Michigan. So far as this question is concerned, the ultimate basis of the decree was 'that the explosion of this boiler was a matter which did not directly involve the "peace, dignity, or tranquility" of the Canadian government but rather involved the "internal discipline and management" of the ship.' This was regarded as being in accordance with the ratio decidendi in United States v. Rodgers, 150 U. S. 249, 266, 14 Sup. Ct. 109, 113, 116, 37 L. Ed. 1071, in which it was held that the federal courts have jurisdiction, under section 5346 of the Revised Statutes (U. S. Comp. St. 1901, p. 3630), to try a person for a crime 'committed on a vessel belonging to a citizen of the United States when such vessel is in the Detroit river, out of the jurisdiction of any particular state, and within the territorial limits of the

> Dominion of Canada.' Thus the question confronting us is at last narrowed to the inquiry whether, since the act causing the death of Workman occurred on a vessel owned and territorially situated similarly to the vessel involved in the Rodgers Case, jurisdiction extends to the enforcement of a civil liability, like the one urged here. * * * So far as the question of jurisdiction is concerned, if the Canadian waters in question could be regarded the same as the waters of one of the open oceans, recovery in this case might be warranted by decisions like that of The Hamilton, 207 U. S. 398, 405, 28 Sup. Ct. 133, 134, 52 L. Ed. 264; but that case grew out of a collision at sea, without the territorial jurisdiction of any particular nation, and concerned lost members of the crew of the sunken vessel and claims made on account of their deaths against a fund derived from the Hamilton, under the limitation acts of Congress; Mr. Justice Holmes stating: 'The jurisdiction commonly expressed in the formula that a vessel at sea is regarded as part of the territory of the state was held, upon much consideration, to belong to Massachusetts,' etc. It is strongly contended that the Hamilton and the class of cases it represents are inapplicable because the Stewart was, at the time of the accident, lying in waters of another nation. The idea, of course, is that the local law of the place of injury and death must govern. No doubt this is the general rule; still, in determining the place of Workman's death, we must not overlook the question whether, in the circumstances of this case, the Stewart was constructively part of Michigan, so far as her 'internal management and discipline' were concerned. This cannot be solved by such cases as Smith v. Condry, 1 How. 28, 32, 11 L. Ed. 35, where, in passing upon the rights of two American vessels which had collided at the dock of the port of Liverpool, it was held that certain British statutes enacted for the regulation of pilots conducting ships were controlling."

Further, in the course of the opinion, the court said:

> "Since the right of action here has been preserved in Mrs. Workman by the Michigan statute, there is no perceivable reason why the right cannot, under the facts of this case, be enforced. If that statute were an act of Congress and limited in its operation to the waters of the Great Lakes, navigable rivers, etc., the instant case could not be rationally distinguished from the Rodgers Case. As Congress has chosen to remain silent, the subject-matter of the Michigan statute, both as to lands and navigable waters within its borders, was plainly within the legislative power of the state (Bigelow v. Nickerson, 70 Fed. 113, 117, et seq., 17 C. C. A. 1, 30 L. R. A. 336 [C. C. A. 7th Cir.]; Chicago Transit Co. v. Campbell, 110 Ill. App. 366, 370, 371); and there should be accorded to it the same operation and effect concerning the Stewart and her location as would be to an appropriate similar act of Congress. In speaking of the vessels passing through the Detroit river, Mr. Justice Field said in the Rodgers Case, 150 U. S. 260, 14 Sup. Ct. 113, 37 L. Ed. 1071: 'All of them, however, so far as transactions had on board are concerned, are deemed to be within the country of their owners. Constructively they constitute a part of the territory of the nation to which the owners belong. Whilst they are on the navigable waters of the river they are within the admiralty jurisdiction of that country. This jurisdiction is not changed by the fact that each of the neighboring nations may, in some cases, assert its own authority over persons on such vessels in relation to acts committed by them within its territorial limits. * * * The general rule is that the country to which the vessel belongs will exercise jurisdiction over all matters affecting the vessel or those belonging to her, without interference of the local government, unless they involve its peace, dignity, or tranquility, in which case it may assert its authority. Wildenhus' Case, 120 U. S. 1, 12, 7 Sup. Ct. 385, 30 L. Ed. 565; Halleck on International Law, c. 7, § 26, p. 172.'"

We have quoted thus liberally from the above-cited case because it seems to be the authority upon which respondents rely most confidently as supporting their position.

Another case which seems to lend some weight to the argument of respondents is De Valle Da Costa v. Southern Pacific Company (C. C.) 160 Fed. 216. That was an action by the administrator of a late resident of Massachusetts for damages on account of the death of his decedent by reason of the negligence of the defendant. There were three counts, one stating that the accident occurred in the harbor of Galveston within three miles of the shore of Texas, and that plaintiff had a cause of action by virtue of the law of Texas; the second alleged that defendant operated a line of steamers between New York and Galveston, and that by reason of the accident a cause of action arose under the New York Code; and the third, setting forth defendant's status as a corporation under the laws of Kentucky, pleaded a cause of action accruing to plaintiff by virtue of a statute of the last-named state. Judge Lowell decided on the authority of The Hamilton that a cause of action arose under the Kentucky statute. It developed in later stages of the case that death actually took place on the high seas ([C. C.] 167 Fed. 654; 176 Fed. 843, 100 C. C. A. 313; 190 Fed. 689, 111 C. C. A. 417), but the ruling that the Kentucky statute was applicable was made upon pleadings which located the accident at a place within the state of Texas.

In support of the doctrine that the fact of the vessel's presence in the port of a foreign sovereignty at the time of the accident does not deprive of jurisdiction the government of the state in which the vessel is owned and chartered, respondents quote an expression of Mr. Justice Holmes, made in the course of the opinion in the matter of The Hamilton, 207 U. S. 404, 28 Sup. Ct. 133, 52 L. Ed. 264, where, in discussing the principles announced in the opinion in American Steamboat Co. v. Chace, 16 Wall. 522, 21 L. Ed. 369, that learned justice said:

> "So far as the objection to the state law is founded on the admiralty clause in the Constitution, it would seem not to matter whether the accident happened near shore or in mid-ocean, notwithstanding some expressions of doubt."

In our opinion none of the cases above considered nor any other authority cited by respondents supports the conclusion that the dependent wife of a person who was killed within a port of another state upon a vessel owned in California, and under the circumstances attending the death of Sandberg, is entitled to relief under the Workmen's Compensation Law of this state. Thompson Towing Association v. McGregor, supra, in its last analysis held merely that, in the absence of congressional legislation on the subject, an accident occurring upon a ship sailing on the open waters of the Great Lakes was to be treated as one happening upon the high seas, even if the boat was then north of the boundary line between the United States and the British possessions. The dictum of Judge Lowell in Da Costa v. Southern Pacific Company, supra, involved a situation in which local laws would, in all probability, have no operative effect, and the quotation from the opinion of Mr. Justice Holmes is not applicable to the facts in the matter before us, because he was analyzing a state of facts involving an accident on the high seas.

On the other hand there are many authorities in support of the rule that when a merchant vessel of one country enters the port of another for the purposes of commerce, it subjects itself to the laws of the sovereignty governing such port, unless some different rule has been established by treaty or otherwise. This, in substance, was the ruling in Wildenhus' Case, supra, and in Crapo v. Kelly, supra, the court quoted with approval the words of Mr. Wheaton in his work on International Law (8th Ed. § 106) as follows:

> "Both the public and private vessels of every nation on the high seas, and out of the territorial limits of any other state, are subject to the jurisdiction of the state to which they belong."

All nations have equal authority upon the high seas, and therefore a ship upon the waters of the open ocean is subject to the laws of the home port, being for all purposes a part of the substance of the country from which she sails. But in the port of a foreign country the laws of that country are in full force, and must operate to the exclusion of the statutes of the sovereignty governing the ship's home port. Prof. Pomeroy in his work on International Law (section 145) uses the following language:

> "The ports and roadsteads are unquestionably a part of the territory, and subject to the exclusive dominion of the state to which they belong, to the same extent as the land itself. They are governed in all respects by the municipal law."

In The Scotland, 105 U. S. 24, 26 L. Ed. 1001, Mr. Justice Bradley, delivering the opinion of the court, said:

> "In administering justice between parties it is essential to know by what law, or code, or system of laws, their mutual rights are to be determined. When they arise in a particular country or state, they are generally to be determined by the laws of that state. Those laws pervade all transactions which take place where they prevail, and give them their color and legal effect."

In 1 Kent's Comm., pp. 29, 30, the learned author asserts that exclusive jurisdiction of a state over those portions of the sea embraced within its harbors, gulfs, bays, and estuaries is unquestionable.

In The Bee (D. C.) 216 Fed. 709, the action was based upon injuries received by a stevedore at a dock in Portland, Or., while assisting in the loading of a vessel owned in California. The suit was transferred to the District Court of the United States because of diversity of citizenship, but the learned judge of that court applied the law of Oregon, saying, in part:

> "Where the act of a ship occasions an actionable personal injury, not maritime, the law, I take it, is that the rights of the parties are to be determined by the law of the place where the injury occurred, and not that of the home port of the vessel. N. P. R. R. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958; Stewart v. B. & O. R. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537."

In Faras v. Lower California Development Co., 27 Cal. App. 688, 151 Pac. 35, the court was considering an appeal in an action for damages for personal injuries. Plaintiff was a citizen of Mexico, employed as a sailor upon a British ship. He was injured while the vessel was tied to a wharf in the harbor of San Diego. The court refused to apply the law of Great Britain as it defines the responsibility of the master to his servant. This refusal was sustained by the District Court of Appeal, and a petition to have the case transferred to this court was denied.

The text-writers state the rule that the laws of the parent state apply to a ship on the high seas, but they do not extend the rule to vessels lying in the ports of alien nations. See, in addition to the works previously cited, Wharton on Conflict of Laws, § 356, Wildman on International Law, p. 40, and Minor on Conflict of Laws, page 272; and to the same effect see Beyer v. Hamburg, etc., Co. (C. C.) 171 Fed. 583. Indeed we are cited to no authority holding that the laws of the home port control in a case of this sort in which the accident took place in the port of a foreign state or nation.

The award is annulled.

We concur:

ANGELLOTTI, C. J.; SLOSS, J.; LORIGAN, J.; SHAW, J.; HENSHAW, J.; LAWLOR, J.

174 Cal. 218

DOWLING v. SPRING VALLEY WATER CO. et al. (S. F. 7156.)

(Supreme Court of California. Jan. 15, 1917.)

1. PLEADING ⚷68 — COMPLAINT — INFORMATION AND BELIEF.

In action by purchaser of land at execution sale to set aside in part a decree quieting title to land under the McEnerney Act (St. 1906, p. 78), a complaint alleging only on information and belief that the execution debtor, in whose name the land stood when defendants' suit was commenced, was ignorant of such suit, and not disclosing the sources of information, was demurrable.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 140; Dec. Dig. ⚷68.]

2. PLEADING ⚷68—SETTING ASIDE JUDGMENT—ALLEGATIONS ON INFORMATION AND BELIEF.

The fraud that would avail to set aside the solemn judgment in rem of a court of record must be clearly pleaded and proved, and it is not sufficient to allege fraud or its elements upon its information and belief, unless the facts upon which the belief is founded are stated in the pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 140; Dec. Dig. 🔑68.]

3. PLEADING 🔑68—COMPLAINT—INFORMATION AND BELIEF.

In action to set aside in part a decree quieting title under the McEnerney Act, because of plaintiff's lack of notice of the pendency of the suit, a complaint was demurrable which alleged that the testimony of defendants' representatives in the former suit relative to the owners of the property were false, and which alleged upon information and belief that such representatives knew their falsity, but did not allege facts which showed positively or by reasonable inference that such knowledge was possessed by the representatives.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 140; Dec. Dig. 🔑68.]

4. RECORDS 🔑18(1)—LOST RECORDS—MCENERNEY ACT.

Since a suit under the McEnerney Act lies whenever the records of the county have been lost or destroyed "in whole or in any material part," the owner of land is not deprived of the benefit of the statute by the fact that the fire may have spared some parts of the record.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 36; Dec. Dig. 🔑18(1).]

5. JUDGMENT 🔑460(3)—SETTING ASIDE—MCENERNEY ACT.

A complaint in action to set aside in part a decree quieting title under the McEnerney Act, because of ignorance of plaintiff or his predecessor of pendency of such suit, was demurrable for failure to allege any reason why plaintiff or his predecessor was ignorant of the record evidence of the proceeding, such as the lis pendens, affidavit, summons, etc., since one seeking equity to set aside a solemn judgment on the ground of fraud must show affirmatively why he failed to avail himself of sources of information easily within his reach.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 882; Dec. Dig. 🔑460(3).]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Suit by J. J. Dowling against the Spring Valley Water Company and another. From judgment for defendants, plaintiff appeals. Affirmed.

H. M. Anthony, of San Francisco, for appellant. McCutchen, Olney & Willard and Heller, Powers & Ehrman, all of San Francisco, for respondents.

MELVIN, J. J. J. Dowling filed a bill in equity by which he sought to have the court set aside in part a decree quieting the title of the Spring Valley Water Company to certain land in San Francisco pursuant to a proceeding under the statute commonly known as the "McEnerney Act." A general demurrer to the second amended complaint was sustained, and judgment was entered for defendants. From said judgment, plaintiff appeals.

Among the allegations made by appellant in the second amended complaint are in substance the following ones: That from December 30, 1910, to July 14, 1911, and up to the time of a certain execution sale, one Alla J. Tyler was the owner in fee of the property in dispute; that by reason of certain street work performed by plaintiff as a contractor, after due authorization, he acquired a lien on said property amounting to $6.08; that on January 21, 1907, plaintiff began a suit against Alla J. Tyler to foreclose said lien, resulting in a judgment in his favor for $33.38 made a lien on the property; that execution issued; that plaintiff became the purchaser of the property at the sheriff's sale; that since October 9, 1911, the date of said sale, plaintiff has owned the land in fee and has been in peaceable possession thereof; that on December 30, 1910, the Spring Valley Water Company commenced its action under the "McEnerney Act" to quiet its title to certain land embracing the lot to which plaintiff here asserts title; that this complaint was verified, and alleged the peaceable possession by the Spring Valley Water Company and the ownership by that company of the land described in its pleading; and that a lis pendens was filed according to law. There were lengthy quotations in the second amended complaint herein from the affidavit accompanying the complaint in the "McEnerney" suit, which we need not reproduce here. It is sufficient to say that apparently this affidavit fulfilled the requirements of the statute. There is also an averment that pursuant to order of court summons was published, but that neither by the affidavit nor in the publication of summons did it appear that Alla J. Tyler claimed any interest in the property. Plaintiff also stated that he had no notice or knowledge of the pendency of the water company's action and upon information and belief he alleged similar lack of knowledge on the part of Alla J. Tyler and also upon information and belief that if she had possessed knowledge or notice thereof she would have appeared and established her ownership of the property. There were allegations that at the trial of the water company's suit an officer of that corporation swore that it was the owner of all of the property title to which was involved in the action and that said testimony was false because there were then of record in the city and county recorder's office instruments showing Alla J. Tyler to be the owner in fee of all the property claimed by plaintiff as her successor in interest. Certain allegations contained in the affidavit, complaint, and the testimony in the water company's suit were upon information and belief specified as false, and known to be untrue by that corporation. The Union Trust Company of San Francisco was made a party because of a lien of a general mortgage to said defendant by the water company. There were also averments that the assessment rolls from 1905 to the date of the action were not destroyed; that those records showed the assessment of this land to Alla J. Tyler for 1905, 1906, 1907, and 1908 and that for 1909, 1910, and 1911 it was assessed to "Alla J. Taylor." There was a further assertion that the Spring Valley Water Company had paid no taxes on this parcel of land from 1905 to 1911, inclusive. The prayer of plaintiff was to have the decree in the action to quiet title set aside or if that could not be done that the Spring Valley Water Company be adjudged a trustee for plaintiff and be compelled to convey to him, freed of the mortgage of the Union Trust Company, the land to which he asserts title.

[1-4] The demurrer was properly sustained. The complaint showed compliance by the Spring Villey Water Company with all of the requirements of the "McEnerney Act" except (as appellant maintains) personal service of summons upon Alla J. Tyler, appellant's predecessor in interest; but it is alleged only upon information and belief that Alla J. Tyler was ignorant of the proceeding. The source of the information is not set forth. It does not appear that the pleader obtained his information from Alla J. Tyler, or, if not from her, from what other source. Obviously she would be the best source of information and her successor, who did not seek knowledge from her, would be under the necessity of explaining in his complaint why he sought other means of enlightenment and what they were. The fraud that would avail to set aside the solemn judgment in rem of a court of record must be clearly pleaded and proven. And it is not sufficient to allege fraud or its elements upon information and belief unless the facts upon which the belief is founded are stated in the pleading. 9 Ency. Plead. & Prac. 694. In the complaint it is alleged that the statements of the representatives of the Spring Valley Water Company relative to the ownership of the property involved in the former proceeding were "wholly untrue and false in fact" but the averment that they were known by such representatives to be false is "upon information and belief." Obviously there must be cases in which the knowledge of the fraud by its perpetrator must be charged on information and belief; but in such cases there must be allegations of facts which show positively or by reasonable inference that such knowledge must have been possessed by the person accused of the fraud.

It seems to be the theory of appellant in this case that, having alleged the preservation of a part of the records of the city and county of San Francisco, and that these preserved volumes or documents seemed to indicate the assessment of the property to Alla J. Tyler, therefore the agents of the Spring Valley Water Company were guilty of fraud in failing to know of the contents of such records. But a suit under the "McEnerney Act" does not imply the destruction of all of the records which by any possibility may have reference to the property to which the plaintiff seeks to quiet title against all persons. Such an action lies whenever the records of the county have been lost or destroyed "in whole or in any material part." Stats. 1906, p. 78. That the fire may have spared some parts of the record does not deprive a landowner of the benefit of the statute. Therefore the mere allegation that the records described were in existence does not justify the allegation "on information and belief" that fraud was committed by the agents of the Spring Valley Water Company when they deposed that they knew of no adverse claimants to the property involved in the former action. The attempted pleading of extrinsic fraud was utterly insufficient.

[5] The existence of parts of the records did not absolve either plaintiff or Alla J. Tyler from the duty of availing themselves of the information available to them regarding the suit to quiet title. The action in rem was conducted with all the prescribed formalities. The lis pendens was filed, the necessary affidavit was prepared, and the summons was published and posted. We must presume that the recorder kept a plat book showing the lands against which such suits were filed. Plaintiff has failed to allege any reason why he or Alla J. Tyler were ignorant of this record evidence of the proceeding in rem. One seeking equity to set aside a solemn judgment on the ground of fraud must show affirmatively why he failed to avail himself of sources of information easily within his reach. Champion v. Woods, 79 Cal. 17, 21 Pac. 534, 12 Am. St. Rep. 126; Truett v. Onderdonk, 120 Cal. 581, 53 Pac. 26; Davis v. Hibernia Savings, etc., Society, 21 Cal. App. 444, 132 Pac. 462.

From the foregoing it follows that the judgment must be and it accordingly is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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174 Cal. 216

ATWELL v. HASKELL. (S. F. 7806.)

(Supreme Court of California. Jan. 15, 1917.)

WILLS ⟹584—ESTATES CREATED—CONSTRUCTION.

Where testator by a holographic will provided, "Should my wife survive me, I give to her a life interest in my property," describing it, "together with the use of the buildings and income to be derived from the same, and the control of the same during her natural life, subject to the leases that may be in effect," and, "having been advised that the law gives to my wife one-half of my property if she survives me, I consider she is amply provided for, and I therefore give the remaining one-half to be divided as follows," naming other beneficiaries, the limitation, "subject to the leases that may be in effect," was used as a reservation withholding from the life estate such leasehold interest as the husband himself had in the property which belonged to the community; the testator before his death having conveyed the fee to the wife and retained leasehold interests.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1273; Dec. Dig. ⚷584.]

Department 2. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Proceedings in the estate of Edmund Atwell, deceased, by Lois A. Atwell, against Albert Haskell, as executor of deceased. From a decree of final distribution, Lois A. Atwell appeals. Affirmed.

John Yule, Horatio Alling, and Cary Howard, all of Oakland, for appellant. Wm. C. Clark, of Oakland, for respondent.

HENSHAW, J. Lois A. Atwell, widow of Edmund Atwell, appeals from the decree of final distribution made and entered in the matter of the estate of said Edmund Atwell, deceased.

The estate of Edmund Atwell consisted entirely of community property as declared by his will. That instrument, which was holographic, contained the following provisions pertinent to the appeal now before us:

"Should my wife, Lois A. Atwell, survive me, I give to her a life interest in my property situated at and fronting on San Pablo avenue and known as lots Nos. 8 and 9 and fractional parts of lots Nos. 10, 11, 12 and 13 of the Kimball tract, together with the use of the buildings and income to be derived from the same and the control of the same during her natural life, subject to the leases that may be in effect. * * * Having been advised that the law gives to my wife one-half of the property I may own, if she survives me, I consider she is amply provided for: and having no natural or adopted child, I give, devise and bequeath the remaining one-half, which I am entitled to dispose of, to be divided as follows:" Here follows an enumeration of the other beneficiaries and the proportionate share of each.

Before his death, Atwell had conveyed the fee of the property to his wife and had retained certain leasehold interests in the property, which leasehold interests were admittedly a part of the community property. In its decree of final distribution the court recognized the ownership of the fee in the wife, and, treating Mr. Atwell's leasehold interests as community property, distributed them one half to the widow as of right; the other half to the named beneficiaries under Atwell's will. The widow appeals, contending that by the terms of the first quoted paragraph of the will she was entitled to have distributed to her all of these leasehold interests, herein invoking the familiar principle of construction that, where a testator does not own all that he attempts to devise or bequeath, so much as he does own will go to the beneficiary.

Therefore it is said that, as his attempt to convey a life estate failed for the indicated reason, it should be held that he did convey by this language whatever was in his power to convey, namely, the leasehold interests. But the terms of this particular devise do not warrant this construction. By those terms even the life estate which was conveyed was, and was to be, subject "to the leases that may be in effect." This quoted language, if held merely to indicate that the widow was to take the life interest subject to the rights of the lessees, would be meaningless, since necessarily she would have to take the property under those burdens. It seems to be quite apparent that the language was used as a reservation and as a withholding from the life estate devised of such leasehold interests as the husband himself had in the property, under the testator's view that those leasehold interests should continue to be a part of the community property. This was the view adopted by the trial court, under which view the decree of distribution here complained of was given.

For the indicated reasons, it was correctly given, and the judgment is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

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174 Cal. 211

In re McCOMBS' ESTATE. (L. A. 4857.)

(Supreme Court of California. Jan. 15, 1917. Rehearing Denied Feb. 12, 1917.)

1. Adoption ⚷17—Evidence—Sufficiency.

In a proceeding by an alleged adopted child and pretermitted heir to contest the distribution of an estate, evidence *held* insufficient to show that the contestant had been formally adopted pursuant to the statute of New York, c. 438, passed May 31, 1884, which gave orphan asylums and other charitable institutions authority to place children in their care with suitable persons by a written instrument of adoption executed under seal and signed on the corporate name of the corporation and by the person or persons with whom the child is so placed.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 5; Dec. Dig. ⚷17.]

2. Adoption ⚷17—Evidence—Sufficiency.

To establish a child's right to inherit from a person claimed as an adopting parent, there must be proof of the act of adoption done in strict accordance with the statute, as the power to adopt was unknown to the common law.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 5; Dec. Dig. ⚷17.]

3. Adoption ⚷17 — Evidence — Burden of Proof.

A contestant of distribution of an estate, who, seeking to establish her own status as an adopted daughter, as against legatees and devisees under a will, has the burden of proof upon her to establish her standing as such.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 5; Dec. Dig. ⚷17.]

Department 2. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Proceeding by Helen McCombs Fairchild and another to contest the distribution of the estate of Helen McCombs, deceased. From a decree distributing the estate in accordance with the provisions of the will, the contestants appeal. Affirmed.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

James B. Irsfeld and Harlan G. Palmer, both of Los Angeles, for appellant. Frank Dominguez, W. H. Dehm, and Earl Rogers, all of Los Angeles, for respondent.

MELVIN, J. Appellant Helen McCombs Fairchild opposed distribution of the estate of Helen McCombs, deceased, upon the theory that said appellant was the adopted daughter of Helen McCombs and a pretermitted heir. The court found that contestant was not the legally adopted daughter of Helen McCombs, and that the omission to provide for Mrs. Fairchild in decedent's will was intentional. She and her assignee, J. B. Irsfeld, have appealed from the decree distributing the estate in accordance with the provisions of the will of Helen McCombs.

The contestant introduced evidence tending to show that while she was an infant she was an inmate of and entered upon the books of the Jefferson County Orphan Asylum of Watertown, N. Y., as a child placed there by "charity"; that George W. McCombs and his wife, Helen McCombs, of Argenta, Ark., took her from that institution "on trial" on August 8, 1887; and that she went with them to their home and lived with them as their daughter until and for some time after her first marriage. It was shown that Mrs. Helen McCombs had issued cards of invitation to the marriage of "her daughter Helen" to Dell Ingram. There was also testimony to the effect that both Mr. and Mrs. McCombs had on different occasions exhibited documents or a document declared by them to be "Helen's adoption papers," but no person undertook to declare what were the contents of such papers. Contestant herself testified that after the death of George McCombs while she and her husband were living with his widow, Helen McCombs, the latter showed her some papers which were described by Mrs. McCombs as adoption papers. "She showed us the papers," declared witness, "and told me she was going to tear them up so I couldn't get anything when she died; she tore them up in our face." There was an entry in the records of the orphan asylum immediately following the words "Taken on trial by George W. McCombs August 8th, 1887," etc., as follows: "Adopted January, 1888." No court record of formal adoption or contract of adoption was proven to exist. The only proved writing by George W. McCombs was that by which he applied to the trustees of the asylum for the custody of the child "with the intention of adoption." It was also shown that the license issued while contestant was a minor, authorizing her marriage to Ingram, bore the notation "The mother consents." During all the years before her marriage contestant was called "daughter" by Mrs. McCombs, and she called the latter "mother" or "mamma." These are the principal facts established by the contestant.

Appellant is of the opinion that by the evidence offered she has established her status as an adopted child, but the question arises whether or not greater proof than she brought forward was necessary to fix the fact of adoption for the purposes of her contest. Under the law of 1884 in force in the state of New York at the time the child was taken from Watertown to Arkansas, any institution of the same kind as that from which she was procured by the McCombs was empowered to assume guardianship of the person of an indigent minor child. This could be accomplished by an instrument signed by the parents or the survivor of them, or in the case of an abandoned child by the mayor of the city or the county judge.

"Chapter 438. An act to revise and consolidate the statutes of the state relating to the custody and care of indigent and pauper children by orphan asylums and other charitable institutions. Passed May 31, 1884." By this act the institution was given authority to bind out the child by indenture or to place such child out on trial. The law authorized the charitable corporation to place the child by adoption with a suitable person or persons, "by a written instrument of adoption, which shall be executed under seal and signed in the corporate name of such corporation by such officer or officers as shall be authorized by the directors or trustees thereof to sign such corporate name to such instruments, and which shall also be signed by the person or persons with whom such child shall be so placed by adoption, and if either of the persons so taking such child by adoption shall then have a husband or wife from whom such person is not lawfully separated, such instrument of adoption shall also be signed by such husband or wife." There was a further provision that after such adoption the foster parent and the child should sustain toward each other the legal relation of parent and child with all the usual reciprocal rights and duties except the right of inheritance.

[1, 2] It is very clear that no formal adoption under the New York law was proven. Surely the entry in the register of the orphan asylum that the child had been "adopted" was not sufficient to constitute such proof. Nor were the proofs of mere declarations that certain papers were "adoption papers" enough to establish the existence of the solemnly executed contract contemplated by the statute. Nor was there any proof that the child was placed in the Jefferson County Orphan Asylum under such circumstances as gave the officers of that institution power to enter into a contract for her adoption. To establish the child's right to inherit from the person claimed as an adopting parent, there must be proof of an act of adoption done in strict accordance with the statute. Ex parte Clark, 87 Cal. 638-641, 25 Pac. 967. The power to adopt children is a creation of statute and was unknown to the common law. The mode is the measure of the power. Ex parte Chambers, 80 Cal. 216, 22 Pac. 138. Therefore proof of strict formal compliance with the requirements of the statute is necessary. Matter of Cozza, 163 Cal. 514, 126 Pac. 161, Ann. Cas. 1914A, 214.

[3] Appellant conceding the force of these and many other authorities to the same effect insists that there is a distinction between cases where the natural parents are seeking to set aside the supposed adoption and those in which adoptive parents or those standing in their place are making an attack upon such proceedings, and in that behalf Estate of McKeag, 141 Cal. 403, 74 Pac. 1039, 99 Am. St. Rep. 80, is cited. In that case the attack was made by an heir at law upon the status of the administrator of the estate of a deceased person appointed after nomination of his wife who was an adopted daughter of the intestate. The petitioner sought to show that certain alleged informalities in the adoption proceedings rendered them null and of no effect, and this department held that as against such collateral attack the adoption was sufficient. It was also held that the appellant was as effectually estopped as the decedent would have been in her lifetime from questioning the validity of the adoption proceedings. But the case at bar is quite different. Here is a contestant seeking to establish as against the legatees and devisees under a will her own status as an adopted daughter. The burden of proof is upon her to convince the court of her standing as an adopted child. Proof that she had lived with the McCombs and had been treated as a child was not sufficient. In re Romero, 75 Cal. 381, 17 Pac. 434; In re Huyck's Estate, 49 Misc. Rep. 391, 99 N. Y. Supp. 502; Coombs v. Cook, 35 Okl. 326, 129 Pac. 698; Tyler v. Reynolds, 53 Iowa, 147, 4 N. W. 902.

In Smith v. Allen, 161 N. Y. 478, 55 N. E. 1056, the appeal was from a judgment construing a will. By a residuary clause all property remaining after the death or marriage of the testator's widow was to go to those who would have been entitled to succeed in the event of his intestacy. One of the claimants asserted rights as an adopted child, and of her claim Mr. Justice Haight, writing the opinion of the court, used the following language:

> "Mrs. Greene claims to have been the adopted daughter of the testator, and as such to be his sole heir at law and next of kin and entitled to all of the residuary estate. It appears that Mrs. Greene was born in 1851; that she was placed in the Church Charity Foundation in 1856, and was subsequently taken therefrom by Mrs. Allen, the testator's wife. She continued thereafter to live with the testator in his family until her marriage and was treated in every respect as a daughter. The testator in both his will and codicil describes her as his adopted daughter, but it is not claimed that she was ever adopted by any instrument in writing, or that there is any written evidence of an adoption further than an entry in a book kept by the Church Charity Foundation, as follows: 'Sarah Frances was adopted by Captain and Mrs. Allen.' This, we think, is not sufficient to constitute an adoption under the statute of 1873, chapter 830, as amended by the Laws of 1887, chapter 703."

Appellant seeks to distinguish this case from the one at bar on the ground that the law of 1884, unlike that of 1873, gave the officers of eleemosynary institutions the right to place children by adoption. But the decision does not depend upon that distinction. It holds that a mere clerical entry of an adoption proves nothing—that there must be some proof of an instrument in accord with the necessary form of the law, executed with due formality by the proper parties. To be sure this case differs from that in that an attempt was made to show that some sort of a document characterized by the testatrix as "adoption papers" was in existence, but the evidence upon that point was not so strong as the reference in Mr. Allen's will to Mrs. Greene as his adopted daughter. The facts in this case were not so much in favor of the contestant as those appearing in the one just cited. Under that authority and the others which we have discussed and referred to we are constrained to affirm the decree of the probate court as it relates to the conclusion that Mrs. Fairchild was not the adopted child of Helen McCombs. And this makes it unnecessary to discuss the other part of the court's finding that testatrix had Mrs. Fairchild in mind when she omitted to provide for appellant, and that such omission was intentional.

The decree is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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32 Cal. App. 282

PORTOLA REALTY CO. v. CARLSTON et al.

(Civ. 1927.)

(District Court of Appeal, First District, California. Dec. 8, 1916. Rehearing Denied by Supreme Court Feb. 5, 1917.)

1. APPEAL AND ERROR 🔑1071(4)—TRIVIAL ERROR—FINDINGS.

Trivial and insubstantial variances between statements of the court in making findings and more detailed recital of the facts are insufficient to justify a reversal of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4237; Dec. Dig. 🔑1071(4).]

2. MORTGAGES 🔑356—SALE—NOTICE.

Where a trust deed authorized the trustees to sell the premises as a whole or in parcels, an original notice of sale published once a week for three weeks as required by the trust deed was sufficient to give the trustees jurisdiction to make a sale in parcels under a subsequent order of the court which was only published for five days.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1063–1067; Dec. Dig. 🔑356.]

3. PAYMENT 🔑25—SUFFICIENCY—ENTRY OF CREDIT.

Payment by the purchaser at a sale under a trust deed by transferring the amount of the purchase price to the trustees by a loan and credit upon the books of a bank which was at the time a creditor of the mortgagor and beneficiary of the trust deed satisfied the requirement of the trust deed that all bids and payments should be made in United States gold coin.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 30, 31; Dec. Dig. ⚷25.]

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Suit by the Portola Realty Company against J. F. Carlston and another, as trustees, etc., and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Asher, Meyerstein & McNutt, of San Francisco, for appellant. Robert B. Gaylord, of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants in an action in equity brought by the plaintiff seeking relief from a sale of real estate under a trust deed, of which the defendants Carlston and Harris were the trustees, and at which sale the defendant Winship was the purchaser of the property covered by said trust deed.

The facts of the case are undisputed, and are these: On July 6, 1912, the plaintiff and appellant herein executed a trust deed covering the real estate in question to secure its indebtedness evidenced by its promissory notes in the sum of $58,077.32 to E. Winship, the defendants Carlston and Harris being named as trustees in said deed. This deed of trust was in the usual form, and provided that in the event of the grantor's default and upon demand of the beneficiaries the trustees were required to sell the property at public auction as a whole, or, in their discretion, in such parcels or subdivisions as they in their judgment should deem reasonable, after publishing notice of time and place of sale once a week for three weeks, and also provided as one of the terms of such sale that all bids and payments should be made in United States gold coin. Shortly after the execution of the promissory notes and deed of trust Mr. Winship transferred the same to the Central National Bank of Oakland as collateral security for a certain indebtedness of the United Iron Works, of which he was president. At the time of such transfer and up to and after the sale under the trust deed the said Carlston, one of said trustees, was president of said bank, and Harris, the other of said trustees, was a stockholder therein. The promissory notes of the plaintiff fell due on or about June 6, 1913, and were unpaid. Five days thereafter the said Central National Bank served a written demand upon the trustees, reciting that default had been made in the payment of these notes, and demanding that the property be sold under the provisions of the trust deed. In response to this demand the trustees gave notice of their proposed sale of the premises in question to be held on July 8, 1913, the said notice being published once a week for three weeks prior to the fixed day of sale. In said notice it was provided and published that the premises would be sold in one parcel. On July 7, 1913, one day before the sale, the plaintiff herein commenced an action in the superior court of the county of Alameda, seeking to restrain such sale, and in such action obtained a temporary restraining order, requiring the trustees to show cause on July 11, 1913, why they should not be enjoined from selling the premises during the pendency of the action. On July 11, 1913, upon plaintiff's motion in said action, the court made a further order directing the trustees to postpone the sale to July 21, 1913, and on July 21, 1913, to offer the property for sale in three parcels as specified in the order, and further directed that the trustees should publish for a period of not less than five days prior to said July 21, 1913, notice that the property would be offered in parcels as provided in said order. Upon the institution of said action on July 7, 1913, the trustees postponed the sale, by a proper notice thereof as provided in the trust deed, until July 15, 1913, and again on that day to July 21, 1913, and said trustees also, and five days prior to the last-named date of sale published notice of the offer of said property for sale in parcels for the time and in the manner prescribed in the court's order. On July 21, 1913, the trustees offered the property for sale in parcels, and, there being no bidders, offered it as a whole, whereupon it was sold to Mr. Winship, the only bidder therefor, for the sum of $60,000. The purchaser, Winship, according to the findings of the court herein, did not physically deliver to the trustees in United States gold coin the sum of $60,000, the amount of his bid, or any portion thereof, but immediately after the sale to him borrowed from the said Central National Bank, the then holder of the promissory notes and the beneficiary under the trust deed, the said sum of $60,000, which sum was in said bank credited to said trustees on account of such sale, and a deed to the property was then executed by them to the purchaser. Thereupon the plaintiff brought the present action to set aside said sale.

The court, upon proof or stipulation as to the truth of the foregoing facts, made its findings and rendered its judgment in favor of the defendants, from which judgment the plaintiff prosecutes this appeal.

[1] The first assault which the appellant makes upon the judgment is directed against the findings of the court, which, according to its view, are in irreconcilable conflict, and hence insufficient to support the judgment. An examination of the findings of the trial court will show that they purport to give in detail the history of the acts and conduct of the trustees in the course of the execution of their trust; and while it may be true that some of the general statements of the court in making said findings may vary slightly from the language and effect of its more de-

tailed recital of the facts, these variances are on the whole trivial and insubstantial and wholly insufficient to justify a reversal of the case.

[2] The contention of the appellant that the sale by the trustees should be set aside for the reason that the notice of the sale of the premises in parcels was not published for the full period of three weeks prior to said sale, but only for the period of five days required by the court's order, we find to be without merit in view of the fact that the trustees were empowered by the express terms of the deed of trust to sell the premises as a whole or in parcels at their discretion; and hence their original notice of sale was sufficient in form and substance to give them jurisdiction to make the sale, which jurisdiction the subsequent order of the court requiring the offer of the property in parcels, might direct but could not destroy.

[3] The further contention of the appellant that the sale was invalid because the payment of the sum bid was not made in gold coin is sufficiently answered by the finding of the court, showing how the transfer of the amount of the purchase price from the purchaser to the trustees was accomplished, viz. by a loan and credit upon the books of the bank, which was at the time the creditor of the plaintiff and the beneficiary of the trust deed. Under such conditions no physical transfer of the actual gold coin from the purchaser to the trustees was necessary to satisfy the requirements of the trust deed.

The final contention of the appellant is that, since the trustees were also interested as officials or stockholders in the bank which had become by transfer from the original creditor the holder of the plaintiff's obligations and the beneficiary of the trust deed, they were held to the exercise of some degree of duty in safeguarding the interests of the plaintiff, to which they did not adhere in the sale of the plaintiff's property, might be meritorious if the record disclosed any such violation of their trust; but in that respect the appellant has not succeeded in bringing to our attention any such breach of duty on the part of these trustees as would have justified the intervention of a court of equity in the case at bar.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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32 Cal. App. 318

HERNAN v. OUR LADY'S HOME.

(Civ. 1913.)

(District Court of Appeal, First District, California. Dec. 13, 1916.)

1. CONTRACTS 🔑271—FOR SUPPORT—ELECTION TO RESCIND.

Where decedent directed his attorney to serve a notice of election to terminate contract with defendant to care for decedent, but before notice was served decedent became ill and stated that he did not wish his money back and was cared for by defendant until his death, such notice did not terminate the contract, and the money paid defendant could not be recovered.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1190, 1191; Dec. Dig. 🔑271.]

2. MONEY RECEIVED 🔑18(3)—RECOVERY—SUFFICIENCY OF EVIDENCE.

In an action to recover money paid to defendant by decedent pursuant to a contract to care for decedent, where plaintiff claimed contract had been terminated, evidence *held* to sustain finding for defendant.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 72; Dec. Dig. 🔑18(3).]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Lillie Hernan against Our Lady's Home, a corporation. Plaintiff appeals from judgment for defendant and from an order denying motion for new trial. Affirmed.

William A. Nunlist, of San Francisco, for appellant. James Gartlan, of San Francisco, for respondent.

PER CURIAM. On the 27th day of June, 1907, the defendant corporation entered into a written agreement with one Patrick Hayes, plaintiff's testator, whereby, in consideration of the sum of $1,900 paid to it by Patrick Hayes the defendant obligated itself to provide him with board, lodging, and medical attendance during the remainder of his life. The agreement also provided that if either of the parties thereto became dissatisfied one with the other it was optional with either to terminate it, and in the event of such termination the money paid was to be returned to Patrick Hayes, less $30 per month for the time he had remained with the defendant. After being in the home for a little more than a month, Hayes became dissatisfied with the life there, and requested his attorney to procure a return to him of his money. The attorney, thinking that his client's dissatisfaction was but temporary, deferred taking any action in the matter, but on September 3, 1907, finding him insistent he prepared a notice stating that Hayes elected to terminate the contract and to have refunded to him the amount thereupon due. This notice was not served upon the defendant until September 20th. In the meantime, on September 5th, after a short absence, Hayes returned to the institution conducted by the defendant very ill; and the defendant in order that better care and medical treatment might be furnished Hayes, had him removed to St. Mary's Hospital, where at defendant's expense he remained until his death on September 22d. At the time of the service of the notice of termination of the contract Patrick Hayes was unconscious, from which condition he did not recover until the following day in the afternoon, at which time he told one of the sisters in attendance upon him that he was not dissatisfied with the home, that he did not want his money back, and that if he should die it was his wish that the money paid by him to the defendant should be retained by it.

[1, 2] Plaintiff's contention to the contrary notwithstanding, we think the court did find that the decedent was not dissatisfied with Our Lady's Home, and we also think such finding is sustained by the evidence. In our opinion, the notice alone did not terminate the contract. The record shows that the decedent on the 3d day of September instructed his attorney to terminate the contract. On the 5th of September Patrick Hayes was taken seriously ill, and remained until his death under the care of the defendant. On September 20th, when perhaps it was discovered that the decedent's illness would probably prove fatal, the notice of termination was served. But, as just stated, the decedent continued all this time a member of the home, and on September 21st repudiated any steps that he theretofore had directed to be taken looking to a dissolution of his arrangement with the defendant. We think the court was correct in arriving at the conclusion it did.

The order denying the motion for a new trial is affirmed.

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32 Cal. App. 298

LEVI v. SOCKOLOV. (Civ. 1934.)

(District Court of Appeal, First District, California. Dec. 11, 1916. Rehearing Denied Jan. 10, 1917.)

1. Pleading 🔑11—Form of Allegations—Matters of Evidence.

In an action for an amount paid on the price of a lot on which there was a building in course of construction, which defendant agreed to complete in a workmanlike manner, plaintiff, averring that the defendant violated his contract by failing to construct and complete the building in a workmanlike manner, was not required to set forth all of the evidence in his complaint, but only to call attention to his chief objections to the work, so that the complaint, which set forth in detail a number of specific defects, was sufficiently specific, although it did not allege evidentiary facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 31; Dec. Dig. 🔑11.]

2. Pleading 🔑193(1)—Demurrer—Details of Expenditures—Bill of Particulars.

In an action for moneys expended for the use and benefit of another, the details of the alleged expenditures were obtainable by defendant through a demand for a bill of particulars, and could not be properly required by means of a special demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428, 430, 437, 443; Dec. Dig. 🔑193(1).]

3. Appeal and Error 🔑1011(1)—Review—Findings on Conflicting Evidence.

Where the evidence as to a matter of fact is clear and radically conflicting, the findings thereon will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. 🔑1011(1).]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Action by Ben Levi against Joseph Sockolov. From a judgment for plaintiff and an order denying defendant's motion for new trial, the latter appeals. Judgment and order affirmed.

G. Gunzendorfer, of San Francisco, for appellant. Wal J. Tuska, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor and from an order denying the defendant's motion for a new trial.

The action was brought to recover the sum of $1,563 alleged to have been paid by the plaintiff upon the purchase price of a lot upon which there was at the time a building in course of construction, the defendant agreeing to complete the construction of said building in a workmanlike manner, and to deliver the same to the plaintiff free and clear of incumbrances with the exception of an existing mortgage for $15,000, the plaintiff agreeing to take the premises when so completed and to pay the sum of $29,000 as the whole purchase price thereof. The plaintiff avers that the defendant violated this agreement by his failure to construct and complete the building in a workmanlike manner or in accordance with the contract, and he therefore prays to recover the sum paid on account of the purchase price. There is also a second count in the complaint wherein the plaintiff seeks to recover the sum of $407 alleged to have been laid out and expended for the defendant's use and benefit.

The first contention of the appellant is that the court should have sustained his demurrers to both counts of the complaint. As to the first alleged cause of action the appellant appears to concede that it might be sufficient as against the assault of his general demurrer, but urges that his special demurrer to that count should have been sustained. The complaint in that count set out the contract between the parties in hæc verba, and proceeded to allege that the defendant had breached the same by not completing the building in a workmanlike manner. He then proceeded to set forth in detail a number of specific defects in the work of construction.

[1] The defendant's objection seems to be that the plaintiff did not go further in evidentiary matter in support of his general averment that the structure was not completed in a workmanlike manner; but we think that the pleader was not required to set forth all of the evidence in his complaint, but only to call attention to his chief objections to the work, and hence that the complaint herein was sufficiently specific to inform the defendant as to the nature of the plaintiff's demand.

[2] As to the second count in the complaint, the latter appears to have been drawn in conformity with the common count for moneys expended for the use and benefit of another. The details of the alleged expenditures were obtainable by the defendant through a demand for a bill of particulars, but could not be properly required by means of a special demurrer. Counsel for appellant cites no authority in support of his contention, and the court finds no merit in it.

[3] The next contention of the defendant is that the evidence is insufficient to sustain the findings of the court in respect to the proper completion of the building; but in regard to the matters of construction in which the building was sought to be proven defective, we find that the evidence is so clearly and radically conflicting as to render it perfectly plain that the judgment cannot be disturbed upon that ground.

In addition to his objection to the sufficiency of the evidence the appellant's voluminous brief directs our attention to 68 or more specific exceptions taken by him to the rulings of the court in the admission or rejection of evidence. We have patiently examined them all, and do not find that any one of them was either vital or supported by authority. They will therefore be disregarded upon this appeal as not sufficiently important to justify a reversal on the case. The fact is that the whole gravamen of the appeal rests in the appellant's claim that the evidence does not support the findings in the case; and this in view of its radical conflicts we decline to review.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(32 Cal. App. 305)

UNION INV. CO. v. F. M. LANDON CO. et al. (Civ. 1583.)

(District Court of Appeal, Third District, California. Dec. 12, 1916. Rehearing Denied by Supreme Court Feb. 8, 1917.)

1. SALES 🔑426—BREACH OF WARRANTY AS DEFENSE.

Under a warranty that the seller, if a stallion proved unsatisfactory and was returned, would replace him with another, such redress is exclusive, and the buyer cannot defend a purchase price action upon ground that the stallion was unsatisfactory.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1209; Dec. Dig. 🔑426.]

2. SALES 🔑429—BREACH OF WARRANTY AS DEFENSE—CONDITION PRECEDENT.

Under a warranty that the seller, if a stallion proved unsatisfactory, and was returned, would replace him with another, return of the unsatisfactory stallion by the buyer is a condition precedent before a breach of warranty is available as a defense to a purchase price action.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1224–1229; Dec. Dig. 🔑429.]

3. SALES 🔑287(6) — WARRANTY — WAIVING FAILURE TO RETURN.

Under a warranty to replace a stallion if unsatisfactory and returned to the seller at one of several places, the seller does not waive the requirement that the original stallion be returned by giving the buyer the privilege of delivery at a nearer point.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 816; Dec. Dig. 🔑287(6).]

4. APPEAL AND ERROR 🔑1175(2)—REVIEW—DIRECTING JUDGMENT.

While the Supreme Court can set aside erroneous findings, it cannot direct judgment for appellant where this would necessitate the making of findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4574; Dec. Dig. 🔑1175(2).]

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Action by the Union Investment Company against the F. M. Landon Company, T. B. McMullen, J. R. Spann, Andrew Jessen, B. W. Owens, W. W. Treat, K. G. Moltzner, and V. W. Stevenson. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Gonsalves & Keller, of Oakland, for appellant. Braynard & Kimball, of Redding, for respondents.

HART, J. This action is on a promissory note, and is the culmination of a transaction whereby the defendants bought from the named payees of said note, McLaughlin Bros., a Percheron stallion, named Gluton, for the sum of $1,200.

The note was executed at Anderson, Shasta county, on the 20th day of August, 1910, and made payable on the 1st day of July, 1912. The complaint alleges the payment of the sum of $225 thereon, and that the balance, $975, with accrued interest, remains unpaid; that the defendants have refused and still refuse to pay said balance. The assignment of the note by the McLaughlin Bros. to the plaintiff before maturity for a valuable consideration is alleged, and judgment for the balance alleged to be due on the obligation with the accumulated interest is prayed for.

The answer admits that defendants executed and delivered to McLaughlin Bros. the note in suit as evidence of part of the purchase price of the stallion referred to in the complaint; but, in support of the defense of failure of consideration, alleges that the McLaughlin Bros. sold the stallion to the defendants under the following guaranty (technically a warranty), executed and delivered by the sellers to the defendants contemporaneously with the execution of the contract of sale and the note in controversy:

"*Guarantee*—If the above-named stallion does not get 60 per cent. of the producing mares with foal, with proper care and handling, we agree to replace him with another stallion of the same breed and price upon delivery to us at our stables in Kansas City, Mo., St. Paul, Minn., or Columbus, Ohio, of the above-named stallion in as sound condition as he is at present. Mares bred with the impregnator, properly used, the percentage is the same as with the stallion, i. e., the above contract holds the same."

The answer proceeds to allege that the stallion, after trial, did not, as a foal-getter, measure up to the terms of said warranty, viz.:

> "That said stallion, when properly handled, did not get 60 or any per cent. of the producing mares with foal or any producing or other mare with foal."

The answer further alleges that long prior to the commencement of this action, and upon the discovery that the said stallion was not as he was guaranteed to be, as aforesaid, said defendants offered to return said stallion to said McLaughlin Bros., and demanded of said McLaughlin Bros. that they replace him with another stallion of the same breed and price as specified in said written guaranty or return to defendants their said promissory note; "that said McLaughlin Bros. have failed, neglected, and refused and still fail, neglect, and refuse to either replace said stallion as aforesaid or to return to defendants their said promissory note."

The answer declares that the defendants still have in their possession the said stallion, and that the animal is in as sound a condition as he was on the 20th day of August, 1910, "and, at all times herein mentioned since the said discovery have been and now are ready and willing and hereby offer, upon the surrender and cancellation of their said promissory note, to deliver the said stallion to the said McLaughlin Bros. as specified in said written guaranty." The defendants, upon information and belief, further deny that the note in suit was, prior to the 1st day of July, 1912, the date of its maturity, assigned, transferred, and indorsed, for a valuable or any consideration, by the McLaughlin Bros. to the plaintiff.

The court's findings coincide with the allegations of the answer, and, accordingly, judgment passed for the defendants. From said judgment the plaintiff has taken this appeal, supporting the same by a bill of exceptions, upon which it pressed a motion for a new trial, which was denied.

The plaintiff assails certain of the vital findings as not being supported by the evidence. The findings attacked may briefly thus be stated: (1) That there was no consideration for the note in controversy; (2) that the note was indorsed after maturity, and that the plaintiff became and now is the holder of said note as the agent of McLaughlin Bros. for the purpose only of collecting the same; (3) that the McLaughlin Bros. violated the terms of the guaranty—the latter finding, in effect, involving the first above stated, viz.: That there was no consideration for the note, or, in other words, a failure of consideration. It is further contended that the findings of fact are inconsistent with and do not sustain the conclusions of law or the judgment. It is hence argued that the court erred in denying the plaintiff's motion for a judgment in its favor on the findings. Exceptions are also urged to certain rulings whereby the court below excluded certain testimony from the record and permitted other testimony to be received, all against the objections of the plaintiff.

It is not disputed that McLaughlin Bros., upon effecting a sale of the stallion in question and contemporaneously therewith, executed and delivered to the defendants a bill of sale, of which the guaranty hereinabove set forth constituted a part. Nor did the plaintiff offer any testimony the purpose or tendency of which was to contradict or overcome the effect of that of the defendants that the stallion, for breeding purposes, wholly failed to measure up to the terms of the guaranty. Upon this point the testimony is that the first breeding season of the stallion, after the defendants bought the animal, was in the year 1911, the season covering a period from the 15th day of March until and including the 1st day of July of that year; that during said season the horse was bred to 104 mares, and out of that number produced but 7 colts; that the mares to which he was bred were known to be and were producing animals; and that the stallion was in all respects properly handled for breeding purposes. The horse made the season of 1912 and 1913 with no better results, the proportion of foals from the stands of those seasons to the number of mares served being far below the percentage guaranteed by the vendors as specified in their written guaranty. Upon this question, then, as well as upon the question whether the note in suit was indorsed, assigned, and transferred to the plaintiff prior to the date of its maturity, upon which proposition the evidence is in sharp and pronounced conflict, it may safely be put down that the findings of the court are sufficiently supported.

[1-3] But as to the finding that the defendants "have received no consideration for their said promissory note," or as to any implied finding, if any there be, that there was a failure of such consideration, we are of a different mind. By the contract the parties fixed their own remedy in case of a breach, and it is the exclusive remedy. They had the right to do this, and, having bound themselves to the remedy so fixed, their rights must be measured thereby.

The sale of the horse to the defendants obviously constituted the consideration for the note in suit, and, of course, a sufficient consideration so long as the animal remained true to the foal-getting test prescribed by the warranty; and there could be a failure of consideration only in case the stallion failed to come up to the percentage for foal-getting provided by the warranty and the refusal or failure of the vendors to replace the stallion with another of the same breed and value. As seen, the stallion did not produce the percentage of foals guaranteed by the vendors, and, this being true, the obligation rested upon the latter, not to cancel and surrender up the note, but to replace said stallion with one answering the stipulations of the guaranty in that regard.

But, under the contract of guaranty, before the vendors could be compelled to do this, the obligation rested upon the defendants to return the stallion in as sound condition as when delivered to them to the possession of the McLaughlin Bros., or, which amounts to the same thing, to a place designated by them in the contract. This stipulation or covenant of the contract of guaranty constituted a condition precedent, the performance of which by the defendants was requisite to entitle them to the substitution and delivery to them of another stallion for the one which had been sold and delivered to them by the plaintiff, unless said condition had been waived by the vendors.

The rule generally applicable to contracts of the sort under present consideration is well stated by the Kansas Supreme Court, in the case of Hickman v. Richardson, 92 Kan. 716, 722, 142 Pac. 964, 966, as follows:

> "It was competent for the parties to agree how the purchaser should take advantage of any breach of warranty and what the rights of the parties should be in case the horse proved unsatisfactory. It seems to be well settled that such an agreement on the part of the purchaser is binding and that he cannot ignore the part of the contract which obligates him to return the property if it prove unsatisfactory after the stipulated test. Birch v. Kavanaugh Knitting Co., 165 N. Y. 617, 59 N. E. 1119; Nichols-Shepard Co. v. Rhoadman, 112 Mo. App. 299, 87 S. W. 62. Cases will be found where the purchaser is given the privilege of returning the property within a certain time if it prove unsatisfactory, but where he makes no agreement that he will pursue that remedy. In such cases it is held that the privilege to return the property is but a cumulative remedy. Am. Dig. (Dec. Ed.) tit. Sales, § 426, and cases cited. In the present case the warranty was in respect to a matter the absolute truth of which it might not have been possible for the seller to know, and the contract seems to have been made upon the theory that only subsequent developments would determine absolutely whether or not the horse would be satisfactory, so the agreement gave certain rights to both seller and purchaser; and the seller had the right to insist upon the provision requiring the horse to be returned within a specified time and another horse taken in its place. * * * By failing to return the horse in accordance with the provisions of the contract, the defendants are precluded from relying upon the breach of warranty of the breeding qualities of the horse."

Again in Crouch & Son v. Leake, 108 Ark. 322, 157 S. W. 390, 50 L. R. A. (N. S.) 774, where a contract of warranty precisely similar to the one before us was under consideration, it said:

> "The written contract expressed the terms of the warranty and provided the remedy that should accrue from a breach of it which was exclusive of any other mode of compensation and afforded the only relief to which they were entitled. Not having complied with the said condition on their part, nor shown a waiver thereof on the part of appellants, they will be held to have accepted the stallion as in all respects complying with the warranty and bound to the payment of the balance due on the note for the purchase money." Highsmith v. Hammonds, 99 Ark. 400, 138 S. W. 635, and other cases.

See, also, Brown v. Russell & Co., 105 Ind. 46, 52, 4 N. E. 428, 431; Bomberger, Wright & Co. v. Griener, 18 Iowa, 477, 480; Oltmanns Bros. v. Poland (Tex. Civ. App.) 142 S. W. 653; Holbert v. Sanzenbacher (Tex. Civ. App.) 159 S. W. 1054; Beckett v. Gridley, 67 Minn. 37, 69 N. W. 622; cases cited in footnotes under Crouch & Son v. Leake et al., 50 L. R. A. (N. S.) p. 774 et seq.

We now come to an examination of the evidence. But it may first be well to observe that there is no evidence showing or tending to show that the McLaughlin Bros. waived the condition imposed by the guaranty upon the defendants that they would, if the stallion, Gluton, failed to measure up to the terms of said contract as a foal-getter, return the animal to the said vendors. The McLaughlin Bros., however, did modify the guaranty to the extent of giving the defendants the privilege of delivering the horse to them at Emeryville, Cal., instead of making the delivery at one of the several places in the east mentioned in the agreement. But this modification did not, obviously, involve a waiver by the vendors of the condition or obligation imposed by the warranty upon the defendants.

The defendant Landon, who appears to have been the most active of the several parties to the agreement (the defendants) in an effort to secure from the McLaughlins another stallion in the place of the one sold and delivered to them, testified that, after it was discovered that the stallion, Gluton, was incapable of making the percentage of foals guaranteed by McLaughlin Bros., he, in the month of May, 1912, addressed a letter to the McLaughlins apprising them of the fact that the horse, for breeding purposes, had failed to meet the terms of the guaranty, and asking them to replace the animal with another stallion, as agreed. The witness admitted, however, that neither he nor any of the other defendants ever at any time offered to ship the stallion to the stables of McLaughlin Bros. at Kansas City, Mo., or at St. Paul, Minn., or at Columbus, Ohio; but he stated that McLaughlin Bros., in reply to the letter written to them by the witness in May, 1912, above referred to, ordered the shipment of the horse to Emeryville, Cal., where, so the McLaughlins stated, they had a stallion which they would deliver to the defendants in the place of the stallion Gluton. The defendants did not ship the stallion to Emeryville, nor did they (so Landon testified) notify the McLaughlins that they "held the stallion subject to their order. * * * I told them I wanted a change," continued Landon. "Q. Did you ship the stallion to them at Emeryville? A. I did not. I wrote to them for a description of the horse that they had there, and I never could get a letter from them afterwards. Q. After that you never received any further communications? A. No. Q. Did you afterwards write to them, asking them for a change? A. I did." The witness proceeded to say, as all the defendants that testified at the trial declared their willingness to do, that he "would be willing to give up the stallion if the four promissory notes that were given for the stallion were surrendered and canceled."

So far as anything to the contrary appears in this record, the stallion is still in the possession of the defendants. In fact, as above shown, the answer so declares.

Thus it is plainly manifest that the defendants not only wholly failed to discharge the obligation or condition to which they subscribed and bound themselves, but that they purposely refused to perform the condition. They probably stood upon the theory that the failure of the stallion to measure up as a foal-getter to the guaranteed percentage afforded ground for a rescission of the contract of sale. But, as we have above shown, this is an erroneous theory. The case here, stated in its simplest form, is: The contract constituted a completed sale, to which, however, were annexed conditions involving the reciprocal rights of the parties, to wit: As to the vendees, that the property sold should as to quality measure up to a specified standard, and in case it did not, that they would then be entitled, not to a rescission of the contract of sale, but to have it replaced by the vendors with property of like kind and value which would meet the terms of the warranty. As to the vendors, that, if the property did not meet the test prescribed by the warranty, the same should be returned to them by the vendees in as good condition as when delivered before other property of like kind and value should be delivered to the latter. A failure on the part of the vendees to return the property, as agreed, would constitute the breach of the agreement by them and so absolve the vendors from the obligation of replacing the same with other property of like kind and value. A failure of the vendors to replace the property as stipulated, after the return of the same to them in as good condition as when delivered, would constitute the breach of the agreement by them, and in that case only would the vendees be clothed with the right to a rescission and a return of the consideration moving from them to the vendors. But, to repeat, until such breach on the part of the vendors has occurred after the defendants have pursued the exclusive remedy to which by their agreement they had committed themselves, the vendees would have no right of action at all against the former. So, the vendees, having themselves first violated the agreement, or failed or refused to comply with the condition the performance of which was essential to support their right to be provided by the vendors with other property in the place of that originally sold to them, are obviously in no position to claim a rescission or to invoke the defense of no consideration or of failure of consideration for the purchase price in an action upon a promissory note made and delivered by them in consideration of the purchase price of the property sold. Of course, if, after a reasonable trial and the vendees have pursued the remedy fixed in their agreement, the vendors find themselves unable to furnish the vendees with a stallion whose procreative power is such as to enable him to produce the guaranteed percentage of foals, or substantially such percentage, then the vendees would be entitled to rescind the contract of sale and to the return of money paid thereon or the surrender or cancellation of any promissory note or notes delivered to the vendors by them for the purchase price of the stallion.

Counsel for the defendants have undertaken to point out a distinction between this case and the cases cited by the plaintiff and above referred to; but we can perceive no substantial distinction. It is true that some of the cases mentioned above use language which would indicate that a mere offer to return the property without actually returning it would fulfill the requirements of the rule applicable to cases of this character. It is by no means inconceivable that cases may arise (if some have not arisen) where, under a contract of sale, with warranty as to quality, that a mere offer to return the property sold would be sufficient to entitle the vendee to be provided by the vendors with other property in the place of that sold, the latter not having come up to the terms of the warranty. The proposition depends upon the wording of the contract, and perhaps to some extent upon the nature of the property sold. The agreement here, however, expressly and without qualification or reservation calls for a return of the property to the vendors before the latter become obligated to replace it with other property. Not only is this so, but the performance of the condition is itself one of vital importance to the vendors for a reason additional to those suggested in the cases above cited, viz.: That before replacing the stallion with another, the sellers might be afforded an opportunity to see and examine the horse for the purpose of determining whether his condition is the same as when sold, or whether, from negligent or other handling and treatment by the purchasers, the animal is not in the "sound" or healthy condition he was in when delivered into the possession of the vendees, a consideration which was probably in the minds of both parties when the sale was effected.

[4] Counsel for the plaintiff claim to be entitled to an order by this court directing judgment to be entered upon the findings in favor of the plaintiff. We cannot do this. The claim is based upon the theory that the findings support neither the conclusions of law nor the judgment, and this theory follows from the proposition that the court found that the defendants "have received no

consideration for their said promissory note," whereas, in its conclusions of law, the court declares "that there was an entire failure of consideration for which the said promissory note was given," etc., implying, of course, that there had been a consideration for the note. Conceding that the asserted inconsistency really exists, the plaintiff is not entitled to a judgment upon the findings as made. The objection, if tenable, could, under the state of the findings, as found and adopted by the court, have no other effect than to vitiate the judgment in favor of the defendants. This may sometimes mean, but it does not always mean, and surely has no such meaning in this case, that where the findings do not support the judgment in favor of one party, they would support a judgment in favor of the other. While an appellate court may set aside findings for want of evidence to support them, it very obviously cannot make findings, and this is what we would be compelled to do if we were to direct judgment for the plaintiff.

Under our view of this appeal as above set forth, there is no necessity for a consideration herein of the assignments involving objections to certain rulings of the court admitting and rejecting certain testimony.

For the reasons herein given, we are constrained to the conclusion that the judgment appealed from cannot stand, and the same is accordingly reversed, and the cause remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

(32 Cal. App. 325)

LOS ANGELES COUNTY v. SULLIVAN et al. (Civ. 2185.)

(District Court of Appeal, Second District, California. Dec. 13, 1916. Rehearing Denied by Supreme Court Feb. 8, 1917.)

1. EMINENT DOMAIN 🔑93 — COMPENSATION FOR INJURIES TO PROPERTY NOT TAKEN — FLOOD DANGER.

Under Code Civ. Proc. § 1248, allowing condemnation damages resulting from the construction of the proposed improvement to the portion of the property not taken, and section 1249, providing that the right to such damages accrues at date of the summons, a landowner may recover for the probable future flooding by a canal of land not actually taken.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 237-238; Dec. Dig. 🔑93.]

2. EMINENT DOMAIN 🔑203(2) — EVIDENCE REGARDING DAMAGES—ADMISSIBILITY.

In condemnation proceedings, testimony regarding the impairment in value of land from its probable future flooding by a canal, and which tended to establish the facts upon which such opinions were based, is admissible.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 542; Dec. Dig. 🔑203(2).]

3. EMINENT DOMAIN 🔑262(5) — HARMLESS ERROR—EVIDENCE REGARDING DAMAGES.

Although Code Civ. Proc. § 1249, provides the right to condemnation damages accrues at date of summons, admitting testimony regarding flooding of defendant's land after the proceedings were instituted was not prejudicial error, where he testified that such flooding could reasonably have been anticipated at date of summons, and the trial court attached no weight to the evidence.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 686; Dec. Dig. 🔑262(5).]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Condemnation proceedings by the County of Los Angeles against P. T. Sullivan and the Los Angeles Trust & Savings Bank. Judgment assessing compensation, and plaintiff appeals. Affirmed.

A. J. Hill, County Counsel, and Charles E. Haas, Deputy County Counsel, both of Los Angeles, for appellant. John H. Foley and George H. P. Shaw, both of Los Angeles, for respondents.

SHAW, J. This is an action brought by the county of Los Angeles to condemn a strip of land through a larger tract owned by defendant Sullivan, over which the county proposed to construct a storm drain or canal in the manner described in the complaint, for the purpose of carrying flood waters which in times of heavy rains accumulated upon the watershed contiguous to defendant's said tract of land. The summons was issued on August 13, 1913, and the action was tried by the court without a jury in February, 1914. Pursuant to stipulation of the parties, the court found that Sullivan was entitled to compensation for the strip of land sought to be condemned in the sum of $2,216; and upon evidence adduced by the respective parties, it found that the damage accruing to the remainder of the tract by reason of its severance from the strip condemned and the construction thereon of the storm drainage canal in the manner proposed by the plaintiff was the sum of $11,900. Judgment followed, from which this appeal is prosecuted.

That the evidence adduced is ample to justify the finding made as to the damage, admits of no question; indeed, no attack is made thereon by appellant, its chief contention being that the court erred in admitting testimony of witnesses who, in part, based their opinion as to the amount of damage sustained upon the alleged fact that the proposed storm drain and canal would constitute a constant menace and danger, in that, during times of heavy rainstorms, when a large volume of water would gather and flow down through the drainage canal, it might flood the land, and that the effect of this threatened flooding, due to the construction of the canal for the purpose intended, was to greatly depreciate its market value.

[1, 2] The point made may be best illustrated by quoting the view expressed by the learned trial judge, who, with reference to the rule that should obtain in the trial of the case, said:

> "You should assess as compensation for damages which, in your opinion, would accrue to the land [not] taken by reason of the severance produced by that particular kind of improvement. Now, if the particular kind of improvement proposed is one that might have a tendency to *flood the land* some time in the future, that possibility should be taken into consideration. It might be a very remote possibility; if so, it would have very little effect on the damages. Any probable contingency might have a considerable effect on the amount of damages."

To which appellant's counsel replied:

> "If your honor please, isn't it the rule that he must take it at the market value as it stands because of severance?"
>
> The Court: "Precisely; he must take into consideration the character of the instrumentality that caused the severance"

—the damage being fixed as of the time of the issuance of the summons.

The rule thus adopted was in accordance with the provisions of sections 1248 and 1249, Code of Civil Procedure—the *first* of which provides that there must be assessed "the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and *the construction of the improvement in the manner proposed by the plaintiff";* and the *second* providing that the right to such damages shall be deemed to have accrued at the date of the summons. Pursuant to the rule thus adopted by the court in the trial of the case, witnesses were asked the following question:

> "At that time, to wit, August, 13, 1913, what damage accrued to Mr. Sullivan's property by reason of the severance of the land by virtue of the proposed construction, taking into consideration the possibilities of the construction itself bringing more or less water as the case might be upon Mr. Sullivan's property?"

The question in issue was the amount of damage suffered; that is, the difference in the market value of the land immediately preceding the issuance of the summons on August 13, 1913, and its market value with the canal constructed in the manner proposed for the purpose intended. Necessarily the issue must be determined from the opinions of witnesses qualified to testify upon the subject. As to be expected in such cases, the opinions as to the impairment in value differed greatly, ranging from $750 by one who could not foresee any reasonable probability of damage from flooding, to upwards of $18,000 by those who claimed the improvement must inevitably result in flooding and cutting some 75 acres of land, worth before the improvement upwards of $600 per acre. Conceding appellant's contention that "the opinions of witnesses should not be speculative, but based upon facts and conditions proved or admitted," and that "opinions based upon conjecture and remote possibilities are of little value" (Lewis on Eminent Domain [3d Ed.] § 654), nevertheless the objection goes to the value which should be given the testimony, rather than to its competency. Sullivan, as owner of the land, was entitled to compensation for any and all depreciation in the value thereof which could be attributed to the construction of the proposed improvement for the purpose contemplated; and since the testimony *clearly tended to establish the facts* upon which such opinions were based, it was for the trial court to determine the value thereof as evidence. It is held in many jurisdictions that when a railroad is laid out through a parcel of land the danger of fire necessarily arising from the operation of the road to the buildings upon the remaining land should be considered as an element of damage, so far as it affects the value of the land. Cape Girardeau, etc., R. Co. v. Blechle, 234 Mo. 471, 137 S. W. 974, Ann. Cas. 1912D, 246; Adden v. White Mountains Railroad, 55 N. H. 413, 20 Am. Rep. 220; Beckman v. Lincoln, etc., R. Co., 85 Neb. 228, 122 N. W. 994, 133 Am. St. Rep. 655.

As to whether such danger would be remote would depend upon the proximity of the buildings to the line of the railway, and hence no rule of general application can be laid down governing such question. Whatever tends directly and substantially to diminish the value of the tract of land left to the owner who has been compelled to part with possession of a portion thereof for public good, should be weighed and considered in awarding him damages. Applying this rule, the court was amply justified in admitting evidence tending to show that the construction of the drainage canal in the manner proposed would subject the lands of defendant to danger from flooding, the effect of which would be to materially impair its market value, for which he was entitled to compensation. 15 Cyc. 691, 692; Chicago v. Taylor, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638.

[3] It appears that after the date of the issuance of the summons and before the trial of the case two heavy rainstorms occurred, as a result of which defendant's land was flooded to its great damage. Sullivan, the defendant, testified that at the time of the issuance of the summons not only he, but any one familiar with the storm-water conditions in Southern California and the topography of the land contiguous to that owned by him, from which the storm waters were gathered and conducted into the canal, could at the time, to wit, August 13, 1913, have foreseen what the result to his land would be from the construction of the proposed improvement, and, further, that the result which he then foresaw and expected was just what occurred in the two storms referred to. Thereupon questions were asked whereby it was sought to elicit evidence as to the effect which the flooding from these two storms had upon the land, to which objection was made. The objection was overruled, the court saying:

> "Now, Mr. Sullivan has testified that the effect of that improvement would be to produce the very conditions which were produced. * * * It is now proper to show exactly what did ensue, what did happen, he having testified that those things could have been foreseen. Upon

that theory the evidence of the present conditions may be admissible."

Thereupon defendant was permitted to show the condition of the land which was washed and channeled and upon which sand and silt were deposited as a result of the flooding. Under the peculiar circumstances of the case, we cannot say this was prejudicial error. Sullivan's testimony as to damage was limited to the time when the summons was issued. His estimate was based upon what he at that time conceived to be the condition which would probably result from the construction of the proposed improvement. The testimony of the witness that in August he foresaw and expected just what occurred—even to the cutting of channels through and the deposit of silt and sand upon his land in February—may appear improbable, thus rendering his evidence of little weight. Indeed, it is apparent that the trial judge attached no weight to the evidence; hence, if error, no prejudice resulted.

There was no error in the ruling of the court upon the admission of evidence, which is ample to sustain the finding that the construction of the proposed canal for the purpose intended endangered the land from annual storm-water floods, as the result of which its market value was impaired, as found by the court.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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32 Cal. App. 372

ARBOGAST v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al.

(Civ. 1607.)

(District Court of Appeal, Third District, California. Dec. 19, 1916.)

1. Justices of the Peace 🔑54(1)—Setting Aside Default—Loss of Jurisdiction.

Where a justice of the peace made an order setting aside a default judgment without payment of costs as required by Code Civ. Proc. § 859, he did not thereby lose jurisdiction, and his subsequent judgment entered in a trial upon the merits was valid.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 190, 198; Dec. Dig. 🔑54(1).]

2. Justices of the Peace 🔑122(5)—Setting Aside Default — Time of Application — Statutes.

The time for filing application to set aside default judgment in justice court under Code Civ. Proc. § 859, begins to run from the service of written notice of judgment entry as required by section 893, as amended in 1915 (St. 1915, p. 1441).

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 387, 388; Dec. Dig. 🔑122(5).]

3. Justices of the Peace 🔑122(5)—Notice of Judgment Entry—Statute.

Personal service of a justice court summons will not be deemed notice of the time of judgment entry as required by Code Civ. Proc. § 893, amended in 1915 (St. 1915, p. 1441); such statute making no distinction between personal and constructive service of summons, and not recognizing constructive notice of time of judgment entry.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 387, 388; Dec. Dig. 🔑122(5).]

4. Justices of the Peace 🔑122(5)—Setting Aside Default—Statute.

Code Civ. Proc. § 473, relating to procedure in the superior court, will not aid in construction of section 859, relating to the filing of application to set aside default judgment in justice court, where the Code sections relating to the two courts are entirely separate.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 387, 388; Dec. Dig. 🔑122(5).]

Application by J. L. Arbogast for a writ of prohibition against the Superior Court of the State of California in and for the County of Sacramento and Honorable Malcolm C. Glenn, Judge. Demurrer to application sustained, and alternative writ discharged.

Herbert N. De Wolf and H. N. Mitchell, both of Sacramento, for petitioner. Downey, Pullen & Downey, of Sacramento, for respondents.

BURNETT, J. An action was brought by petitioner in the justice's court of Sacramento township to recover for medical services performed for defendant therein. The complaint and summons in the action were personally served in said township, and, the defendant failing to appear, the default and judgment against her for the amount claimed were regularly entered by the justice. Twenty-six days after the date of the entry of said default judgment the defendant appeared by attorney and moved to set aside the judgment and for leave to file an answer, setting out in her affidavit in support of the motion that she was served with notice of said judgment less than ten days prior thereto. After consideration the justice granted the motion. The record shows that he did not require the defendant to pay plaintiff's costs as a prerequisite to setting aside said judgment, although the amount thereof appeared in his docket, nor does the record show that said costs were paid. The case proceeded to trial on the merits, and judgment was rendered for the plaintiff in the sum of $20; the default judgment having been for $35. The plaintiff appealed to the superior court on questions of both law and fact. In the superior court the plaintiff-appellant interposed a motion to quash the judgment appealed from and for judgment of the superior court affirming said default judgment rendered in the justice's court. Said motion was denied, and thereupon said plaintiff petitioned this court for a writ of prohibition to restrain said superior court from proceeding to the trial of said action and to require it "to make and enter judgment in said action quashing the judgment of the justice of the peace therein appealed from and confirming the judgment of default theretofore and upon March 14, 1916, entered in said cause by said justice of the peace, upon the ground that said defendants have no jurisdiction to proceed to the trial of said action or to take any other or further action therein except to enter said judgment."

An alternative writ was issued by this court, and on the return thereof a general demurrer and an answer were filed by respondents. The latter, however, becomes immaterial in view of our consideration of the demurrer. At a glance it must appear that the proceeding is somewhat peculiar, in that the party who appealed to the superior court on questions of law and fact, and thus invited its jurisdiction, is seeking to prevent said court from doing the very thing that he apparently sought. However, we may pass by the form of procedure and certain preliminary questions discussed by counsel, and come immediately to the two cardinal points to which the argument is mainly addressed. If the conclusion as to each of these should be in favor of respondents, it is manifest and admitted that petitioner must fail herein. They may be stated in the language of petitioner as follows:

> "We respectfully submit that the justice of the peace was without jurisdiction to set aside his default judgment without requiring as a condition that the defendant first pay plaintiff's costs in the action accrued to the date of such order.
>
> "We further contend that, where a defendant in a justice court is personally served with a summons and complaint and fails to appear, and judgment by default is entered against him, the time within which he may move to set aside said default judgment starts to run from the date of the entry of the judgment; in other words, that where a defendant is personally served with summons and complaint, such service amounts to notice of the entry of judgment."

These propositions are ably argued by petitioner with the citation of numerous cases bearing more or less upon the questions herein involved, but in this state they have both been authoritatively decided against him.

[1] As to the first, in Townsend v. Parker, 21 Cal. App. 323, 131 Pac. 766, it is said:

> "The appellant further insists that the justice of the peace had no jurisdiction to set aside said judgment without making said order conditional upon the payment of plaintiff's costs. The question is not jurisdictional, and no case cited by counsel supports his contention. The refusal of the justice to impose costs as a condition of making the order vacating the judgment was an error of law, for the correction of which the writ of certiorari may not be properly invoked."

The Supreme Court impliedly indorsed that view by denying a petition for hearing therein. Petitioner claims that the doctrine of said decision is in conflict with other cases of the appellate and Supreme Courts of this state. We do not agree with petitioner. It has been held several times that such failure to impose costs is a serious error for which the case should be reversed, but our courts have not gone to the extent of deciding that thereby is the justice's court divested of jurisdiction to proceed further with the cause.

In his closing brief petitioner renews his attack upon Townsend v. Parker, stating that it "is a void decision, and for that reason is an authority for no purpose." He also declares:

> "What we have herein said concerning Townsend v. Parker, will also apply to the case of Fast v. Young, 19 Cal. App. 577, 126 Pac. 854, also cited by defendants."

We may remark, however, that it is a little more difficult than the able counsel would seem to appreciate, to negative, nullify, and obliterate a serious and deliberate adjudication of an appellate tribunal. He is of the opinion that in the former case:

> "The court most certainly were not aware of the holding of the Supreme Court in the case of Heermanr v. Sawyer, 48 Cal. 562."

We apprehend, however, that said case did not escape either attention or examination. Petitioner seems to misunderstand the bearing of that decision upon the position herein. Therein the court did say that:

> "It has always been held here that the imposition of costs upon the moving party was indispensable to the validity of the order opening the default."

But what actual disposition was made of the appeal by the Supreme Court? The order setting aside the default was reversed, and the court directed that:

> "On the return of the case the court below can, of course, rehear the application upon the moving papers, and upon such other and further showing as it may permit to be made."

The foregoing is entirely in conflict with petitioner's contention. According to his view, the Supreme Court should simply have reversed the order upon the ground that the lower court had no jurisdiction to make it. And if any direction had been given by the Supreme Court, it ought to have been to the effect that the judgment as originally given should operate and be enforced as the judgment of the court. In other words, petitioner would have us believe that, since the court had no jurisdiction to make the particular order in question, it has no authority subsequently to make an order that is permitted by the statute. The making of an invalid order does not exhaust the jurisdiction of the court in the matter. When the invalid order is set aside, the court has the same power as it had originally to make the order that the statute contemplates. It may be admitted that the justice court had no jurisdiction to set aside the default without imposing the costs, but it did have jurisdiction to relieve the party upon said condition. And the same jurisdiction will exist when the invalid order is reversed. In other words, the error—it may be called jurisdictional—affects the order only, and it does not extend to the prior proceedings nor to a valid order that may hereafter be made. The prerequisite conditions for a valid order still exist, and we may presume that in the further prosecution of the litigation, they will not be ignored.

Nor is the point controlled by Johnson v. Superior Court, 28 Cal. App. 618, 153 Pac. 404. That case involved the construction of section 981 of the Code of Civil Procedure as to the payment of costs on appeal. The section provides that, unless the costs are paid at the time the notice of appeal is filed, the appeal from the judgment shall not be effectual for any purpose. The language of the section is such that no other conclusion consistent with the declared intention of the Legislature could be reached than the one announced by this court.

In the Townsend Case, as stated by respondent, the briefs contained a full discussion of the matter, and the cases cited herein by petitioner were cited therein in the District Court of Appeal and in the Supreme Court, and both courts were apparently satisfied with the decision, and so are we satisfied.

[2] As to the said second proposition, it is governed by the decision of this court in Peterson v. Superior Court, 30 Cal. App. 466, 158 Pac. 547. Therein the cases are reviewed, and the conclusion is reached and unequivocally declared that:

> "The time to file an application under section 859 of the Code of Civil Procedure to be relieved from a judgment entered by default in a justice's court, on the ground that such judgment had been taken by mistake, inadvertence, surprise, and excusable neglect, begins to run from service of written notice of entry of the judgment as required by section 893 of the Code of Civil Procedure, as amended in 1915."

Here, again, we may say that, in view of the plain and simple language of those two sections, any other conclusion would do violence to the expressed will of the Legislature.

[3] Nor can we perceive any force in the suggestion that, where personal service of the summons is had, the defendant is deemed to have notice of the time of the entry of the judgment, and that actual notice is required only where there has been constructive service of summons. The statute makes no such distinction, and for us to recognize it would be to add something that the Legislature has not provided. The statute is too plain and exacting to be frittered away in that manner. It does not recognize constructive notice. There must be actual knowledge brought home to defendant that the judgment has been entered. It is not sufficient that he be notified that judgment will be entered some time in the future if he fails to appear. It is true that in one or two other jurisdictions such distinction as to actual and constructive service of the summons has been made, but we are satisfied said sections of our statute contemplate no such distinction. It is the party who is in default that may move in the matter within ten days after he has received written notice of the entry of the judgment. We cannot perceive how anything can be added to the force of the provision by suggestion or analysis.

[4] Nor can we be aided by the consideration of section 473 of the Code of Civil Procedure, which applies to the superior court. If that part of the Code which expressly deals with proceedings in the justices' courts prescribes the powers of those courts in relation to a general subject, about which the powers of courts of record are expressly prescribed in another part, then the powers of the justices' courts with respect to that subject are to be looked for in the former, and not in the latter provision. Weimmer v. Sutherland, 74 Cal. 341, 15 Pac. 849. Section 859 is in the title dealing with proceedings in justices' courts, and provides for the vacating by justices' courts of judgments entered in said courts, while 473 is in that part of the Code dealing with proceedings in superior courts and provides for vacating judgments with certain conditions. Hubbard v. Superior Court, 9 Cal. App. 166, 98 Pac. 394.

We think petitioner has failed to state sufficient facts to justify the writ, and the demurrer is therefore sustained, and the alternative writ is discharged.

We concur: CHIPMAN, P. J.; HART, J.

(32 Cal. App. 229)

OTT HARDWARE CO. v. HOLMBERG.

(Civ. 2051.)

(District Court of Appeal, Second District, California. Dec. 1, 1916. Rehearing Denied by Supreme Court Jan. 29, 1917.)

1. Municipal Corporations 🔑886, 887—Indebtedness—General and Particular Funds.

Though when a municipal corporation by authority of law creates a particular fund with reference to which it contracts, any indebtedness arising upon such contract is payable only therefrom if the so-called fund is created by the city for its own convenience and not by direction of law, the indebtedness is not payable from such specific fund, but is a general liability, payable out of the city's general fund.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1868, 1869; Dec. Dig. 🔑886, 887.]

2. Garnishment 🔑228—Municipal Corporations—Impounding Money—Effect of Judgment.

In proceedings under Code Civ. Proc. § 710, providing for filing transcript of judgment with the auditor of any city from which money is owing to the judgment creditor's debtor, the effect of a judgment which by its terms was made payable "out of the amount due from said defendant city" to said debtor was to impound the amount of money due from the city and to subrogate the judgment creditor to the rights of the principal defendant, and not to determine the fund from which payment might be made or to prevent payment from the general fund.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 433, 434; Dec. Dig. 🔑228.]

3. Municipal Corporations 🔑371—Fiscal Management—General Funds.

Though the Santa Barbara City Charter (St. 1899, p. 468), § 76, provides that "the council shall, before fixing the rate of the annual city tax, established by ordinance separate funds representing the funded obligations of the city, if any, and the several departments requiring municipal expenditure, including the general fund, and the percentage of said levy shall be made for each fund, and the whole amount of taxes and revenue of the city apportioned accordingly," where the city contracted for tunnel construction and there was no showing that a separate fund to pay therefor had been established, the court will presume that the cost was payable from the general funds of the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 904; Dec. Dig. 🔑 371.]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Mandamus by the Ott Hardware Company against Miss A. C. Holmberg (substituted for Alfred Davis), as city clerk and city auditor of the city of Santa Barbara. Judgment for plaintiff, and from the judgment and from an order denying defendant's motion to vacate it and render a different judgment upon the findings, defendant appeals. Judgment and order affirmed.

Canfield & Starbuck, of Santa Barbara, for appellant. B. F. Thomas, of Santa Barbara, for respondent.

SHAW, J. These appeals, one from the judgment and the other from an order of court denying defendant's motion to vacate the judgment entered and render a different judgment upon the findings, were taken by Alfred Davis as the then city clerk and auditor of the city of Santa Barbara, for whom, upon suggestion of his death, A. C. Holmberg, his successor in office, has, by orders made pursuant to rule 16 [119 Pac. xii] of the Supreme Court, been substituted as appellant.

The facts upon which this proceeding for the issuance of a writ of mandate to be directed to the city clerk and auditor of the city of Santa Barbara is based, are set forth in an opinion of the Supreme Court filed in the case of Ott Hardware Co. v. Davis, 165 Cal. 795, 134 Pac. 973, wherein on a former appeal prosecuted by plaintiff the court reversed a judgment entered in favor of defendant. This appeal is from the judgment claimed by respondent to have been entered in accordance with the opinion of the Supreme Court upon the going down of the remittitur, whereas appellant, as grounds for a reversal, insists that, as rendered, it is contrary to the views contained in said opinion, and not supported by the findings.

It appears from the findings that on May 25, 1908, plaintiff recovered judgment against one Warren W. Clark; that on December 7, 1909, said Warren W. Clark recovered judgment against one Robert Beyrle in the sum of $705.26, by the provisions of which said judgment the city of Santa Barbara, made a defendant in said action, was adjudged to pay the amount thereof to said Warren W. Clark, or to Canfield & Starbuck, his attorneys, "out of the amount due from said defendant city of Santa Barbara to said defendant Robert Beyrle for the construction in part of the section numbered 16 of the tunnel now or lately in course of construction for said defendant city of Santa Barbara through the Santa Ynez range of mountains"; that after the entry of said last-mentioned judgment in favor of Clark against Robert Beyrle, to be paid out of the moneys due from the city of Santa Barbara to the defendant in said action, and before any satisfaction thereof or compliance therewith by said city of Santa Barbara, to wit, on December 8, 1909, the plaintiff herein, Ott Hardware Company, served upon and filed with the city clerk and city auditor of Santa Barbara a duly authenticated transcript of said judgment so obtained by plaintiff against said Clark, wherein it was stated that said plaintiff desired to avail itself of the provisions of section 710 of the Code of Civil Procedure, and demanded from said city clerk and city auditor a warrant on the city treasurer for said sum of $705.26, pursuant to the provisions of said section 710, the delivery of which was refused; that after said action on the part of plaintiff and refusal by said city clerk and auditor to deliver the warrant to plaintiff as demanded, Canfield & Starbuck presented to the council of said city the demand in writing of Warren W. Clark for payment of said judgment so obtained against Beyrle and to be paid out of any indebtedness due from said city of Santa Barbara to said Beyrle, which said demand was approved by said city council and delivered to the city clerk and auditor, who thereupon drew his warrant for said sum upon the city treasurer of said city, payable to Canfield & Starbuck, "out of the waterworks extension fund of the city," the amount of which said warrant was duly paid by said city treasurer, upon whom it was drawn, to said Canfield & Starbuck by whom, pursuant to an agreement with Clark, it was applied in liquidation of indebtedness due from Clark to his said attorneys.

The prayer of the complaint was that the auditor be commanded "to draw his warrant, properly signed and made out, in favor of or to pay into the superior court of the county of Santa Barbara, state of California, for the sum and in the sum of $705.26, * * * to be paid on and credited on said judgment in favor of the plaintiff herein and against said Warren W. Clark, * * * in the cause designated in said transcript of judgment filed with defendant on the 8th day of December, 1909, by plaintiff herein." The judgment from which this appeal is prosecuted, following the prayer of the complaint, ordered, adjudged, and decreed that defendant as city clerk and city auditor "draw his warrant as such city clerk and city auditor of said city, properly signed and made out, in favor of the superior court of the state of

California in and for the county of Santa Barbara, state of California, for the sum of $705.26."

While counsel for appellant concede the findings considered with the law of the case as established by the decision of the Supreme Court in Ott Hardware Co. v. Davis, supra, entitle plaintiff to the issuance of a warrant for the amount in controversy, they attack the judgment upon the ground that the effect of filing with the city auditor the transcript of the judgment obtained by plaintiff against Clark was to impound money due from the city to Clark out of a separate or particular fund, to wit, "out of the amount due from said defendant city of Santa Barbara to said defendant Robert Beyrle for the construction in part of the section numbered 16 of the tunnel," instead of which, however, the judgment orders a warrant payable, not from the amount due Beyrle for the construction of said tunnel, but from the general funds of the city. This particular point received little or no consideration in the case of Ott Hardware Co. v. Davis, supra, and we do not regard anything there said as determinative of the question.

[1] It is no doubt quite true that when a municipal corporation by authority of law creates a particular fund with reference to which it contracts, any indebtedness arising upon such contract is payable therefrom only. Section 860, Dillon on Municipal Corp.; Lake v. Trustees of Williamsburgh, 4 Denio (N. Y.) 520. Where, however, the so-called fund is one created by the city for its own convenience and not by direction of law, it is not payable from such specified fund, but is a general liability, payable out of the general funds of the city, chargeable, perhaps, to a specified account. As said in Carter v. Tilghman, 119 Cal. 104, 51 Pac. 34:

> "As a matter of bookkeeping, the board may keep as many accounts or funds as deemed necessary or convenient, but such a system of bookkeeping in no way affects the rights of creditors."

In Higgins v. City of San Diego, 131 Cal. 294, 63 Pac. 470, it is said (quoting from the syllabus):

> "The creditors of a city have the right to contract with reference to its entire revenue, except in so far as the charter expressly otherwise provides in the case of special funds, such as the school or library fund."

[2] Section 76 of the charter of the city of Santa Barbara (Stats. 1899, p. 468), provides that:

> "The council shall, before fixing the rate of the annual city tax, establish by ordinance separate funds representing the funded obligations of the city, if any, and the several departments requiring municipal expenditure, including a general fund, and the percentage of said levy shall be named for each fund, and the whole amount of taxes and revenue of the city apportioned accordingly."

[3] As disclosed by the findings, there is nothing showing, or tending to show, the establishment of a separate fund consisting of indebtedness due from the city to Beyrle for the construction of the tunnel. The effect of the judgment obtained by Clark against Beyrle for the sum of $705.26, which by its terms was made payable "out of the amount due from said defendant city of Santa Barbara to said defendant Robert Beyrle," was to impound the amount of money due from the city to Beyrle to the rights of whom as to such fund Clark was subrogated, and in turn plaintiff subrogated to the rights of Clark. As shown by the findings, the city, prior to the rendition of the Clark judgment, was indebted to Beyrle, which indebtedness we must presume, since there is nothing to the contrary disclosed, was payable, not from any special fund created pursuant to the charter provision, but from the general funds of the city. By the judgment obtained by Clark against Beyrle and the city, the amount adjudged therein to be due from him to Beyrle was ordered to be paid to him by the city out of indebtedness due from it to Beyrle. The effect of such adjudication was not to create a special fund. On the former appeal respondent argued that the issuance of the writ would be unavailing for the reason that, as shown by the findings, the fund out of which petitioner was entitled to be paid was entirely exhausted, in response to which it was there said:

> "This is not a consideration affecting the rights of the parties in the proceeding before us."

There is nothing in the opinion determinative of the question as to whether or not the indebtedness due from the city to Beyrle constituted a separate fund created under authority of law, as distinguished from a mere matter of bookkeeping. The foregoing is not only determinative of the appeal from the judgment, but likewise determines the appeal from the order of court denying appellant's motion to have another and different judgment entered upon the findings.

The judgment and order are affirmed.

I concur: CONREY, P. J.

JAMES, J. I concur in the judgment. I do this reluctantly, and only because our Supreme Court in Ott Hardware Co. v. Davis, 165 Cal. 795, 134 Pac. 973, has established the law to govern the case. I am still of the opinion that under the facts shown no liability was created against the city of Santa Barbara. The reasons are expressed in the dissenting opinion of the Supreme Court as filed in the case cited.

32 Cal. App. 347

VALLEJO & N. R. CO. v. REED ORCHARD CO. et al. (Civ. 1553.)

(District Court of Appeal, Third District, California. Dec. 15, 1916. Rehearing Denied by Supreme Court Feb. 12, 1917.)

1. EMINENT DOMAIN ⚷243(3) — AWARD — DAMAGES INCLUDED—GROWING CROPS.

Where a tenant of orchard lands, under a lease which provided that it should terminate in the event that any of the property was condemned for public use, was made a defendant in condemnation proceedings, but did not appear therein, nor make any claim for damages on account of the taking of his right to remove the crops then growing on the lands, which right was personal property, and there was no evidence introduced as to the value of the crops, and they probably had no value at the time of the hearing, such value was not included in the award, though such award stands in place of the land and is subject to all claims and interests in the land, especially where there was no showing that the railroad company took possession of the condemned property before the crop was harvested.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 628, 629, 700; Dec. Dig. ⚷243(3).]

2. EMINENT DOMAIN ⚷155 — AWARD — DISTRIBUTION—CONTRACT.

Where a tenant of orchard land, whose lease was to expire on condemnation of any of the land, entered into an agreement with plaintiff in condemnation proceedings and with others whereby he was entitled to retain possession of the land and harvest the crop therefrom, the proceeds to be deposited in a bank to be paid to the person or persons finally determined to be entitled thereto, and a suit was pending in the federal court to determine the rights to such proceeds, the tenant cannot recover the value of that crop as against his landlord from the award for condemnation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 421–424; Dec. Dig. ⚷155.]

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Condemnation proceedings by the Vallejo & Northern Railroad Company against the Reed Orchard Company, S. Komano, and others. From an order of the lower court denying defendant Komano's application to share in the award of damages, that defendant appeals. Affirmed.

White, Miller, Needham & Harber, of Sacramento, for appellant. C. E. McLaughlin, of Sacramento, and Arthur C. Huston, of Woodland, for respondents Reed Orchard Co. and others. Garret McEnerney and Walter Rothchild, both of San Francisco, for respondent Vallejo & N. R. Co.

BURNETT, J. The question involved respects the claim of appellant to share in the damages awarded for condemnation in the above-entitled action. Komano was a tenant in possession of the Reed orchard property under a five-year lease expiring November 1, 1912. The fee was in the said Reed Orchard Company. The condemnation proceedings were commenced in 1910 and tried in 1912, the preliminary order of condemnation being entered April 18, and the final decree of condemnation April 29, 1912. Komano was named as one of the defendants, and he was personally served, but he did not appear in the action. As to him the court found:

> "That the said defendant S. Komano is in the possession of the property herein condemned and also the larger tract or parcel of which the same is a part, as the tenant of the said defendant Reed Orchard Company, a corporation, but that the tenancy and possession of the said S. Komano is by virtue of a certain indenture of lease, * * * but that under and by virtue of the terms of the said lease it was by and between the said Reed Orchard Company and the said S. Komano understood and agreed that the said lease should be terminated in the event that the said land herein condemned, and the said larger parcel, or any part thereof, should be condemned by any judgment of condemnation, and that the estate, right, title, and interest of the said S. Komano therein is of no value."

The rental under the lease was $7.500 per year, payable $3,750 January 1st and $3,750 July 1st of each year. On January 1, 1912, Komano made the semiannual payment, and there is no dispute that he proceeded as required by the lease to cultivate, prune, spray, and otherwise care for and protect the orchard and fruit crops growing on the premises. An appeal was taken from the decree of condemnation, and pending the appeal, to wit, on July 1, 1912, Komano and the plaintiff and others entered into an agreement whereby the crops of 1912 were harvested and the proceeds applied to the payment of the July rental, to the expenses of harvesting and selling the crops, and to certain other items, and the balance of the money was deposited in bank, to be paid to the persons entitled thereto. This balance amounts to $4,688.03, and represents the net value of the fruit on the trees on the 104.1 acres when the decree of condemnation was entered. After the decree had become final, a demand was made of the county clerk and county treasurer by the said Reed Orchard Company and by its assignee of a portion of the fund, for the payment of the whole of said fund of $104,100 awarded as damages as aforesaid. A similar demand was made by appellant for the payment to him out of said fund of the value of said crop. The court denied appellant's application, and hence this appeal.

Certain legal propositions advanced by appellant may well be conceded for the purposes of the case.

1. Where a tenancy is of uncertain duration and is terminated while the crops are growing through no act or fault of the tenant, he has the right to harvest and remove the crops (8 R. C. L. p. 364; Civ. Code, §§ 819, 820; and the rule applies to fruit growing on trees, Vulicevich v. Skinner, 77 Cal. 239, 19 Pac. 424; Purner v. Piercy, 40 Md. 212, 17 Am. Rep. 591).

2. Komano was the owner of this crop of

fruit, which is recognized as fructus industriales and "regarded as personal chattels, independent and distinct from the land capable of a sale without regard to whether growing or matured." Swafford v. Spratt, 93 Mo. App. 634, 67 S. W. 702; Lynch v. Sprague Roller Mills, 51 Wash. 535, 99 Pac. 580.

3. The default of Komano would not affect his right to any compensation to which he was entitled. If the defendants make default, the plaintiff must still have a valuation made and tender the amount to the defendants as a consideration for the property acquired through the proceeding. Aliso Water Co. v. Baker, 95 Cal. 268, 30 Pac. 537.

4. Where land is taken for public use, the damages awarded are personal property into which the real property taken has been converted by operation of law. The award represents the aggregate value of all the estates and interests in the real property acquired, and any person interested may obtain a judicial allotment of his proportionate share and recover the amount thereof. Utter v. Richmond, 112 N. Y. 610, 20 N. E. 554; Murphy v. Hirschman, 168 App. Div. 153, 153 N. Y. Supp. 849.

It is declared, though, by appellant that:

> His interest "was not an interest in real property. He had no unexpired term to be valued. His tenancy terminated in the entry of the decree. Because the land was farming land, he thereupon became entitled to entry upon the lands to remove his crop."

Again he states:

> "Necessarily at the time of the trial Komano had received all the benefits which he was entitled to under the lease up to the crop then growing, and this crop, as we have seen, was personal property, and Komano's right, to enter and remove the same was the right which the law gave him on the termination of his leasehold. It was not an interest in real property."

If it was personal property, and not an interest in real property, it is difficult to see how he can obtain in this proceeding any comfort from the doctrine of the cases cited by him that the award represents the aggregate value of all the estates and interests in the real property acquired. The authorities, indeed, seem to contemplate that the condemnation of land reaches only the real property and improvements thereon which are a part of the realty. Our statute (Code Civ. Proc. § 1248), provides that in such cases there must be ascertained and assessed "the value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein." If personal property is to be included in the decree of condemnation, it should at least be specified in the decree. If these emblements were merely personal property, as claimed by appellant, it is at least doubtful whether it was proper to include them in said decree or to award their value, and it would seem that their owner could remove them after said decree of condemnation as well as before. In this connection it may be said that none of the cases cited by appellant involved a similar contention as that made here by appellant in reference to said verdict awarding damages.

In Big Lost River Irr. Co. v. Davidson, 21 Idaho, 160, 121 Pac. 92, no consideration was suggested as to who would share in the award. There was an objection, however, that the verdict should have been segregated as to the several parcels of land which were condemned, but the court held that the objection had been waived by failure to take advantage of it at the proper time.

In Metropolitan West Side Elevated Ry. Co. v. Eschner et al., 232 Ill. 210, 83 N. E. 809, it was decided that it was the duty of the court in awarding the damages assessed by the jury to determine who had title to the land condemned and make the award accordingly, and the court declared:

> "In determining such questions the court will not be restricted to mere legal titles, but will ascertain the rights of the respective owners in the property appropriated, whether such rights are legal or equitable in their nature."

The conflicting claims of title to the land appropriated are obviously what the court had in view.

In Lafferty v. Schuylkill River East Side R. Co., 124 Pa. 297, 16 Atl. 869, 3 L. R. A. 124, 10 Am. St. Rep. 587, the Supreme Court of Pennsylvania held that:

> "Crops planted by the owner of land after the location of a railroad, but before the damages had been paid or secured or notice given of an intent to enter, are proper subjects for compensation when the land is taken."

In that case, however, the action was brought by the tenant against the railroad company for damages after it had taken possession of the land. There was no suit for condemnation, as the company appropriated said land under an agreement between it and the owner of the fee.

In Buchanan v. Kansas City, 208 Mo. 674, 106 S. W. 531, 15 L. R. A. (N. S.) 834, the decision was in favor of one having a lien on the land which was condemned, and it was held by the court that:

> "When the money was paid into court, it represented, and stood in place of, the land condemned, and the claimants had the same right to and interest in the money that they had in the land."

In Van Loan v. City of New York, 105 App. Div. 572, 94 N. Y. Supp. 221, it was held, as stated in the syllabus, that:

> "An award, made for the taking of real property in condemnation proceedings, takes the place of the land, and remains subject to mortgage or judgment liens to which the land was subject, and is payable to a receiver appointed in supplementary proceedings on a judgment against the owner of the land."

The point involved therein is really foreign to any issue here. The vital consideration involved in United States v. Dunnington, 146 U. S. 340, 13 Sup. Ct. 79, 36 L. Ed. 996, was that, where lands are condemned for the use of the government, the United States discharges its whole duty to the owners by paying the amount awarded by the commissioners into court pursuant to its order, and that, if there was any error in the distribution of the same, it should not be charged against the government. The court took occasion, however, to point out who were entitled to share in said award and how they could enforce their claims. Therein the court followed Crane v. Elizabeth, 36 N. J. Eq. 339, in declaring it will be the duty of the court to decide the question of title of the various defendants in ordering judgment to the respective defendants, and that the court would not be restricted to mere legal titles, but "will ascertain the rights of the respective owners in the property appropriated, whether such rights are legal or equitable in their nature."

In McAllister v. Reel, 53 Mo. App. 81, both the owner and a lessee were made defendants in condemnation proceedings. There was only one assessment for damages, and it was in favor of the owner and was paid to him. Thereupon the lessee sued the owner to recover his share of the award as money had and received for his benefit. The court said:

> "We are satisfied that the plaintiff's cause of action is well founded. * * * The defendant admits that the plaintiff was his lessee; that the lease had several years to run; and that the larger portion of the house was condemned and removed. He also admits that he received the entire award. The report of the commissioners conclusively shows that the entire damages to the property were assessed. Certainly, under this evidence, the defendant has money in his hands which equitably and fairly belongs to the plaintiff, and which the defendant must pay."

Of course, therein the lessee unquestionably had an interest in the land, and that interest was covered by the award of damages.

North Coast Ry. Co. v. Hess, 56 Wash. 335, 105 Pac. 853, involved the question of the right of lienors of the land condemned to participate in the award of damages, and it was held that these various lienors had the same claim upon this fund for the satisfaction of their claims as they had against the land itself, notwithstanding the fact that their claim of record was only against the land.

Other cases to the same effect are cited, but they exhibit no special feature.

[1] The precise situation here involved was not presented in any of the cases which we have examined, but we do not mean to hold, however, that it would not have been proper to include in the award the value of the fruit crop to which appellant claims he was entitled. But did the award actually include such allowance? We can find in the record no warrant for so holding. Appellant himself did not contemplate that the verdict of the jury would include his claim. If he had anticipated or suspected such contingency, he would undoubtedly have appeared in the action and urged his right and presented some evidence in its support. And it may be said that this case emphasizes the importance of such appearance as a moment's reflection must indicate.

Moreover, when plaintiff made application to the court for an order authorizing it to take possession of and use the property described in the judgment of condemnation, appellant joined with the People's Savings Bank in a written opposition to said application in which they declared not only that said judgment was void in that it did not determine the names of the owners of the various interests and the value of their respective interests, but that the court was without jurisdiction to determine how much of said sum of $104,100 either of the defendants was entitled to, that the value of the interest of either of said defendants had not been paid into court for them, and, furthermore, that the "plaintiff should be prevented from in any manner injuring, taking possession of or interfering with the crop of fruit growing on said premises and now being harvested therefrom for the reason that the plaintiff herein is not entitled to such crop or any part thereof."

Of course, appellant is not estopped by the averments of said opposition, but it is worth mentioning as illustrating his attitude at the time of the trial. He was undoubtedly mistaken in certain respects in his position. He was probably right, though, in the contention that plaintiff was not "entitled" to said crop or any part thereof. At least, we cannot say that it was included in the judgment of condemnation or in the award of damages.

Our attention has not been called to any evidence in the record of the trial bearing upon the value of said crop. How can it be said that the verdict includes said value in the absence of any showing upon the subject? How can it be determined how much the jury concluded should be awarded for the emblements when they were not apprized of any such claim? If an interest in the real property was involved, then, as we have seen, it could be assumed that this was a part of the award and the court might apportion it as the interest of the parties demanded. But the case here concerns personal property according to appellant's claim. Besides, if it could be said that it was contemplated by the verdict, it would be its value not later than the time the verdict was rendered. But there is no evidence that it had any value then. Its potential or prospective value would not control even if there had been evidence of it.

It is quite apparent that, if the court should attempt to carve out of the total award what might be supposed the jury intended for the crop, it would be simply groping in the dark.

Again, there seems to be no evidence in the record that appellant was prevented from harvesting the crop. He claims himself that he had the right to enter upon the lands to remove his crop, but there is nothing to show that he made an effort to do so. He states also that:

> "He suffered no injury of any kind until the entry of the order of possession. Then his right to the emblements ceased, and his equitable right arose to resort to the money in place of resorting to the crop. If the possession had not been taken until after the crop was harvested, Komano would have had no claim upon the money."

It is difficult to understand how that circumstance could affect the question of whether the value of the crop was included in the verdict. But aside from that, there seems to be no evidence in the record that possession of the land was taken by plaintiff until after the crop was harvested. It is true that notice was given of an application for such possession to be heard on Monday, the 27th day of May, 1912, but the motion was not heard until November 11, 1912, and on that date the order was made authorizing "said plaintiff to take possession of and use the property taken and condemned." This was long after the crop had been harvested, as the parties agree. Therefore, it would seem, according to appellant's theory, that he has no claim against the fund constituting the verdict.

[2] Moreover, on July 1, 1912, appellant entered into a written agreement with plaintiff and two fruit companies, electing and agreeing to pursue a certain remedy for the enforcement of his declared claim and he ought to abide by it. That agreement recites that the said judgment of condemnation had been entered, and that the value of said 104.1 acres was fixed at $104,100; that appellant is now, and ever since the 1st day of November, 1907, has been, in possession of said orchard under the aforesaid lease; that "there is now on said orchard a large crop of pears, plums and apples now being harvested, and the harvesting of which will continue during July, 1912, and the greater part of August, 1912"; that said judgment "did not award any specific sum separately to said S. Komano"; that certain appeals were taken in said cause; that the plaintiff claims that it is entitled to take possession of said land and harvest said crops as its own, and appellant claims that the judgment of condemnation is void, and that he is entitled to possession of the premises and the proceeds of said crops; that it is "the desire of the parties hereto that said crops be properly cared for, picked, packed, and sold, and the net proceeds be deposited and safely kept and eventually paid to the party who shall eventually be finally adjudged to be entitled thereto." It was therefore stipulated that said Komano "continue in charge of the care, picking, harvesting, and packing said fruit and preparing the same for market under the terms and conditions of the shipping contract hereto attached and made a part of this agreement, and that the said party of the second part will use and exercise proper care, skill, and diligence in so doing, according to the best practice and customs of handling like crops." Then follow directions as to how the crops shall be sold and distribution of the proceeds, including the payment to appellant of the reasonable value of his services and the amounts paid out by him from March 22 to July 1, 1912, to wit, the sum of $3,020.64, and the further sum of $396 per month until the harvesting is completed; that the sum of $3,750, which would be due as rent on July 1st, be deposited in the National Bank of D. O. Mills & Co. until the final determination of the rights under said lease and that it be finally paid to the party entitled thereto; "that the residue shall then be deposited in the said Bank of California, at such rate of interest as may be obtainable to be paid to the persons or person who shall have established its or their right thereto." It is further provided that "the object of this agreement is to provide for the care, harvesting, and sale of the said crops so that the net proceeds thereof shall be eventually received by the party entitled thereto after paying the costs, charges, and expenses hereinbefore set forth, and the parties hereto may proceed with the present or any other litigation which they may deem proper to take in order to establish their right to the said funds."

It is not disputed that an action is now pending in the United States district court to determine who is entitled to this money.

Assuredly appellant could not thus voluntarily waive and surrender his claim to the possession of the property for the purpose of harvesting the crop, and then, for the reason that he was not in possession at the time of harvesting, maintain an action for a portion of the verdict of damages awarded by the jury. Independent of his possession at the time of harvest, his claim was either included or not included in the verdict. No one can say it was so included, as there was neither averment nor proof to indicate it. It was no part of the realty; his interest in said realty having terminated by agreement at the time of condemnation. His claim relates to personal property that became valuable after said verdict was found. If, therefore, said property had been or was appropriated by any one subsequent to said judgment of condemnation, or appellant's right to the possession of said personal property had been or was defeated, appellant's redress would be against said party so appropriating the said property or so defeating said right to the possession thereof. It would seem that he has no claim against the Reed Orchard Company. If any cause of action exists in his favor, he should reap the fruits of it in the said action pending in the federal court.

We see no reason to disturb the order of the lower court, and it is, therefore, affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(32 Cal. App. 300)

WOLF v. BRAKEBILL et al.

THOMPSON et al. v. W. H. WOLF, CASTLE BROS., WOLF & SON et al.

(Civ. 2012.)

(District Court of Appeal, Second District, California. Dec. 12, 1916.)

1. Bills and Notes 🔑520—Fraud—Sufficiency of Evidence.

In an action on notes given for the purchase price of a wholesale cigar house, the defense being fraud, evidence, in connection with the circumstances of the transaction, *held* sufficient to support findings made for plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1813, 1832, 1836, 1837; Dec. Dig. 🔑520.]

2. Bills and Notes 🔑122 — Signing for Accommodation.

As to the payee of notes, parties who signed them for the accommodation of the maker were joint makers.

[Ed. Note.—For other cases, see Bills and Notes, Cent.Dig. §§ 255, 259; Dec.Dig. 🔑122.]

3. Cancellation of Instruments 🔑24(1)—Notes—Suit by Joint Makers.

While the buyer of a business, who gave notes for the price, retained the property and the benefits of the transaction, joint makers of the notes, who signed them for her accommodation, could not have cancellation of the instruments to release them from their obligation merely because the maker made an injudicious purchase; in the absence of conspiracy existing between the payee and the purchaser and her husband to secure the accommodation signatures by means of fraud, a rescission of the contract and return of the property was a condition prerequisite to maintaining the action to cancel the notes.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 33; Dec. Dig. 🔑24(1).]

4. Bills and Notes 🔑519—Evidence—Showing that Maker was Surety.

If a party, apparently the maker of a note, may show that the payee consented to and did deal with him in the capacity of surety, the supporting evidence must be clear and unequivocal.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1802; Dec. Dig. 🔑519.]

5. Bills and Notes 🔑487—Amendment after Trial.

In action on notes, the court did not abuse its discretion in refusing to allow the defendants to amend their answer, after trial, by alleging that plaintiff consented to and did deal with them as sureties and not as principals, where there was no evidence tending to show any agreement or understanding on plaintiff's part, nor on the part of defendants, that the capacity in which they signed the notes, and that in which their signatures were accepted, was other than that of joint makers.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1575–1583; Dec. Dig. 🔑487; Pleading, Cent. Dig. § 703.]

Appeals from Superior Court, Los Angeles County; E. P. Unangst, Judge.

Actions by W. H. Wolf against Mrs. B. Brakebill, B. Brakebill, Chas. Thompson, and C. B. Williams, and by Chas. Thompson and C. B. Williams against W. H. Wolf, Castle Bros., Wolf & Son, a corporation, Mrs. B. Brakebill and B. Brakebill. From a judgment for plaintiff in the first case, and that plaintiffs in the second action take nothing thereby, and an order of the court denying their motion for new trial, plaintiffs in the second action appeal. Judgment and order affirmed.

Manning, Thompson & Hoover, of Los Angeles, for appellants. Denis & Loewenthal, of Los Angeles, for respondents.

SHAW, J. The first of these actions was brought by plaintiff to recover a balance upon two promissory notes made to him by defendants. In the second action plaintiffs Chas. Thompson and C. B. Williams (made defendants in the first) sought a decree to have the notes constituting the subject of the first action canceled and annulled. In both actions defendants B. Brakebill and Mrs. B. Brakebill suffered default. The grounds of defense pleaded by Thompson and Williams to the recovery sought upon the notes are substantially the same as those set forth in their complaint to have the notes canceled and annulled. By stipulation of the parties the two actions were consolidated for trial, as a result of which trial it was adjudged and decreed that plaintiff in the first action have judgment for amount of the notes sued upon, and that Thompson and Williams, plaintiffs in the second action, take nothing thereby. From the judgment so entered, and an order of court denying their motion for a new trial, Thompson and Williams appeal.

The complaint upon the notes was in the usual form, setting forth copies thereof, signed, "Mrs. B. Brakebill, B. Brakebill, Chas. Thompson, C. B. Williams," as makers thereof. As a defense to recovery thereon, and also as grounds for the decree asked canceling and annulling the same, Thompson and Williams alleged that their signatures to the notes, as accommodation makers and sureties, were procured by fraud and misrepresentation of Wolf, Castle Bros., Wolf & Son.

It appears that W. H. Wolf was president of Castle Bros., Wolf & Son, a corporation which owned a wholesale cigar house in Los Angeles, of which business B. Brakebill had for about a year prior to August, 1911, been in charge as manager thereof, and as such was under bond in the sum of $1,000 for a faithful discharge of his duties. About August 8, 1911, Mr. Wolf came to Los Angeles from San Francisco, where the main business of the corporation was conducted, and found among the outstanding accounts for goods sold by Brakebill one appearing against a Mr. Inman for $1,394.18, which the latter claimed he had paid, and exhibited what purported to be receipted bills showing payment of some $600 on said account. Wolf told Brakebill the result of his interview with Inman, and expressed a desire for immediate settlement. Thereupon Brakebill proposed to buy the stock of goods and business, stating that he could secure parties to join him in giving a note for the purchase price. Upon Wolf indicating his willingness to effect a sale upon such conditions, negotiations followed, as a result of which the fixtures, stock in trade, business, and good will of the House of Manila were sold, and by bill of sale transferred to Mrs. B. Brakebill for the sum of $5,485.74, which was the value of the goods agreed upon between the vendor and purchaser. At the same time Wolf sold and assigned to Mrs. B. Brakebill the Inman account of an agreed price of $1,394.18. In consideration of such transfer the promissory notes constituting the subject of this action were delivered to Wolf, who received them in full payment of the purchase price of the property sold to Mrs. B. Brakebill.

The alleged fraud constituting the defense and upon which appellant prayed for a cancellation and annullment of the notes, was: First, that the stock was represented to be good and salable, whereas it was musty, mildewed, worm-eaten, and worthless; second, that one-half the goods represented to be in stock, as per an inventory prepared, were not actually in stock; third, that the alleged account represented to exist against Inman and for which the note of $1,394.18 was given, did not exist; fourth, that Wolf, Castle Bros., Wolf & Son agreed to supply stock to Mrs. Brakebill for future sale upon the guaranty of Thompson and Williams, with which agreement they thereafter refused to comply; and fifth, that Wolf, Castle Bros., Wolf & Son fraudulently conspired with the Brakebills to secure the signatures of Thompson and Williams to said notes as accommodation makers thereof. As to all of these contentions the court found in favor of Wolf.

[1] In our opinion, the testimony as to which there is some conflict, taken in connection with the circumstances surrounding the transaction, is ample to support the findings made. That a part of the stock was mildewed and worm-eaten is conceded. This fact, however, was well known to the purchaser. On this account, in some instances reductions were conceded to the extent of 60 per cent. of the invoice price. It must be borne in mind that Wolf was not selling the goods nor the account to Thompson and Williams, but selling them to one who, with her husband, as shown by the evidence, had been in charge and management thereof for nearly a year, and hence fully acquainted with both the quantity of stock on hand and the condition thereof. What is said with reference to this proposition is likewise applicable to the second, namely, that one-half of the goods as shown by the invoice were not in stock. This claim is based upon the evidence of one Dignum, who testified that six days prior to the sale he made an inventory of the stock in the House of Manila from data given him by B. Brakebill, which on that date showed a less number of cigars on hand than on the date of the sale. This is not inconsistent with the alleged statement of Wolf that the inventory constituted a true and correct list of the goods on hand; nor with that of Mrs. Brakebill, the buyer, who, in response to Thompson's inquiry in reference to the inventory, said: "I know that is correct."

That Inman had paid something on his account, which payment was not shown by the books, may be conceded. The purpose of buying the account, as stated to Thompson and Williams by the Brakebills, was to give them money with which to conduct the business until collections from their own sales should come in, and whether part of it had been paid and then in possession of the Brakebills, or whether paid thereafter, was immaterial. In either event, as stated by Brakebill to Thompson, since the contrary is not shown, "it was as good as wheat." The purpose of Thompson and Williams in signing the note was to obtain for Mrs. Brakebill the use of this money, which purpose, so far as disclosed by the record, was accomplished. There is no evidence that Mrs. Brakebill, the buyer, did not receive the full benefit of the amount represented to be due from Inman, and it is clear that the House of Manila released to her all claim thereto.

Moreover, the evidence as a whole touching the subject shows that Thompson and Williams were both attorneys at law; that the former was the legal adviser of the Brakebills; that no confidential relation existed between Wolf and any of the parties, his dealings with the Brakebills being at arm's length; that Thompson and Williams had every opportunity to examine the stock before signing the notes; that before signing they consulted Mrs. Brakebill and her husband, the former stating that there was 60 to 70 per cent. profit to be derived from the business, as to which there is no evidence to the contrary, nor anything to show that Mrs. Brakebill, who retains the property and the proceeds of the sales thereof, is insolvent or unable to meet the payment of the notes for which as to her the other makers are sureties.

[2] As to Wolf, however, they were joint makers of the notes, having signed them for the accommodation of Mrs. Brakebill, in consideration of which Wolf conveyed to her the property referred to. So far as shown, Mrs. Brakebill obtained just what she contracted for; hence she was not defrauded and makes no complaint.

[3] While she retains the property and the benefits of the transaction, Thompson and Williams asked to have the notes given for the purchase price thereof canceled and to be released from their obligation, because the party for whose accommodation they signed the notes made an injudicious purchase. To our minds, a statement of the case is a sufficient answer to the contention of appellants. See Stockton, etc., Society v. Giddings, 96 Cal. 84, 30 Pac. 1016, 21 L. R. A. 406, 31 Am. St. Rep. 181.

We find no evidence whatever to support the contention as to the alleged conspiracy existing between Wolf and the Brakebills to secure the signatures of Thompson and Williams to the notes by means of fraud. In the absence of such conspiracy, a rescission of the contract and return of the property is a prerequisite condition of maintaining the action to cancel the notes. Gifford v. Carvill, 29 Cal. 589; Canal Co. v. Roach, 78 Cal. 552, 21 Pac. 304.

It is next claimed that the court abused its discretion in refusing to allow Thompson and Williams to amend their answer after the trial by alleging that Wolf consented to and did deal with the said defendants Thompson and Williams as sureties and not as principals.

[4] The language of the notes imports an unconditional promise to pay on the part of the makers thereof, and, conceding, as claimed, that notwithstanding the fact that where one appears as the maker of a note he may show that the payee consented to and did deal with him in the capacity of surety, the evidence in support thereof must be clear and unequivocal. Oppenheimer v. Clunie, 142 Cal. 313, 75 Pac. 899; Colton v. Stanford, 82 Cal. 398, 23 Pac. 16, 16 Am. St. Rep. 137.

[5] In the case at bar, while it appears that Brakebill stated to Wolf that he could obtain parties to "join him" in giving notes for the purchase price of the property, and that Wolf in the negotiations used the words "security" and "surety," there is no evidence that tends to show any agreement or understanding on his part, nor in fact upon the part of Thompson and Williams, that the capacity in which they signed the notes and that in which their signatures were accepted was other than that of joint makers thereof, in the promise to pay unconditionally. Damon v. Pardow, 34 Cal. 278. There was no abuse of discretion exercised in denying the motion.

We have examined a number of alleged errors predicated upon the rulings of the court in the admission and rejection of evidence, nearly all of which, under the view of the case hereinbefore expressed, were upon immaterial matters, and, where material, they are not of a character which could be deemed prejudicial to the substantial rights of appellants.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

32 Cal. App. 329

LOCOMOBILE CO. OF AMERICA v. BELABCO. (Civ. 1802.)

(District Court of Appeal, First District, California. Dec. 14, 1916. Rehearing Denied Jan. 13, 1917.)

1. Evidence ⚷441(1) — Parol — Affecting Written Contract.

Evidence of an oral contemporaneous agreement conflicting with the plain terms of a written contract is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1756; Dec. Dig. ⚷441(1).]

2. Fraud ⚷50—Burden of Proof.

The burden of proving fraud is always upon the party who relies upon it, and it cannot be presumed.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47; Dec. Dig. ⚷50.]

3. Sales ⚷52(7)—Fraud—Sufficiency of Evidence.

In replevin to recover automobile sold to defendant, evidence *held* insufficient to sustain finding that plaintiff deceived and defrauded defendant in inducing him to make the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 140–144; Dec. Dig. ⚷52(7).]

4. Evidence ⚷434(11) — Parol Evidence —"Fraud."

The failure to perform a parol agreement made in good faith does not constitute "fraud" which will render admissible proof of such contract to vary the terms of a written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2013, 2014; Dec. Dig. ⚷434(11).

For other definitions, see Words and Phrases, First and Second Series, Fraud.]

5. Fraud ⚷3 — Elements of — "Actual Fraud"—Statute.

Under Civ. Code, § 1572, "actual fraud" may consist of a promise made without any intention of performing it.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 1; Dec. Dig. ⚷3.

For other definitions, see Words and Phrases, First and Second Series, Actual Fraud.]

Appeal from Superior Court, City and County of San Francisco; Edward P. Shortall, Judge.

Action by the Locomobile Company of America against Fred Belabco. Judgment for defendant, and plaintiff appeals. Reversed.

Elliott McAllister and H. S. Young, both of San Francisco, for appellant. R. W. McKnight, of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment in favor of the defendant. The action is one in replevin for the return of an automobile sold by the plaintiff to the defendant; the plaintiff's right to replevin the same being based upon the theory that at the time of the commencement of the action the defendant was in default in the payment of the sum of $350 due under the terms of a leasenote or conditional sale agreement evidencing the transaction, and which agreement provided that in the event of default the plaintiff might retake possession of the car. Defendant contends, on the other hand, that there was only the sum of $150 due, which he also claims to have tendered to the plaintiff prior to the institution of the action.

The court found for the defendant, awarded him possession of the car, and in addition gave him, upon his cross-complaint, $425 damages consequent upon the replevin of the car.

The agreement in express terms provided that the price of the automobile was $2,650, but that the defendant should be allowed thereon the sum of $1,250, the value of a car turned in by the defendant, and should also be credited with such further sum over and above the $1,250 as might be realized by the plaintiff from a resale of the latter car. It is the claim of the defendant, however, supported by an abundance of evidence and sanctioned by the finding of the trial court, that the defendant signed the contract of purchase with a distinct oral agreement that he was to have a credit on account of the turned-in car of $1,450. He testified, as did others in his behalf, including the salesman who conducted the sale, that the defendant refused to sign the contract unless allowed a credit of at least $1,450 on account of the old car, he having purchased the latter from the plaintiff three months before and having paid therefor $1,750. These witnesses, or some of them, also testified that the defendant signed the contract upon the representation of the salesman that the parent organization of the plaintiff (of which it was but a subsidiary) insisted that cars of the type of the one in question should be sold for not less than the schedule price of $2,650, and that cars of the model of the one turned in in part payment should be considered as of a value of no more than $1,250. There was also testimony that the manager of the plaintiff approved the oral understanding had with the defendant. It is admitted that the old car was sold by the plaintiff for $1,250 several weeks after the transaction here involved by a salesman of the plaintiff other than the one with whom defendant dealt. The latter testified, as a witness for the plaintiff, that when he made the promise to the defendant to allow $1,450 on the old car he was positive he could effect a sale of it for that sum; that he knew persons who he was sure were willing to pay that price for such a car.

The question is: Was the court justified in finding that the defendant was entitled to a credit of $1,450, and not $1,250?

[1] The evidence of the oral contemporaneous agreement, conflicting, as it does with the plain terms of the written contract, was inadmissible (Peterson v. Chaix, 5 Cal. App. 525, 90 Pac. 948; Standard Box Co. v. Mutual Biscuit Co., 10 Cal. App. 746, 103 Pac. 938; Balfour v. Fresno, 109 Cal. 221, 41 Pac. 876; Code Civ. Proc. § 1856; Civ. Code, § 1640), unless, as is asserted by the defendant, it tended to prove, as alleged in the answer, that the representations made to the defendant by the plaintiff were made for the purpose and with the intent to deceive and defraud him.

[2, 3] The burden of proving fraud is always upon him who relies upon it, and it cannot be presumed (Gray v. Galpin, 98 Cal. 633, 33 Pac. 725; Heller v. Dyerville Mfg. Co., 116 Cal. 127, 133, 47 Pac. 1016), and we find no evidence in this record tending to support the finding of the court that the plaintiff deceived and defrauded defendant. The failure of the salesman of plaintiff to carry out his promise, made in good faith, certainly does not constitute fraud. Plaintiff's agent, testifying on behalf of the defendant on this phase of the case, said:

> "I asked him to sign it as it was, and he refused, and I finally settled it by agreeing absolutely to get him more money for the old car. I was just as sure I could get it as I am that I am sitting in this chair."

[4] A failure to perform a parol agreement made in good faith does not constitute fraud. Feeney v. Howard, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; Langley v. Rodriguez, 122 Cal. 580, 55 Pac. 406, 68 Am. St. Rep. 70; 20 Cyc. pp. 20, 21, and 22.

[5] Section 1572 of our Civil Code provides that actual fraud may consist of "a promise made without any intention of performing it." As is stated in Brison v. Brison, 75 Cal. 525, at page 527, 17 Pac. 689, at page 690, 7 Am. St. Rep. 189, in reference to a promise made, but not performed:

> "It is to be observed on this ground that the essence of the fraud is the existence of an intent at the time of the promise not to perform. But for such intent there would be no actual fraud; for it is well settled that the mere failure to fulfill a promise is not fraud."

The case of Lawrence v. Gayetty, 78 Cal. 126, on page 131, 20 Pac. 382, on page 384 (12 Am. St. Rep. 29), involved an attack upon two deeds on the ground of fraud, and although the question of the admissibility of parol testimony in reference to a writing is not involved, the definition of fraud is always the same, and is there stated:

> "But the making of a promise with no intention at the time of performing it constitutes a fraud for which a contract may be rescinded. Civ. Code, § 1572. See, also, Bigelow on Fraud, 483 et seq. The mere failure to perform the covenant does not relate back to and render the same fraudulent. It is the present intent not to perform it that renders it wrongful."

The judgment is reversed.

32 Cal. App. 320

Ex parte BAKER. (Cr. 522.)

(District Court of Appeal, Second District, California. Dec. 13, 1916.)

1. PROCESS 🔑52—SERVICE—EXPIRATION OF TERM OF OFFICER.

Pol. Code, § 4171, providing that, when any process remains with the sheriff unexecuted in whole or in part at the expiration of his term of office, it shall be executed by his successor, changed the rule at common law and under statutes previous to its first adoption in 1883 that an officer commencing to execute process should complete it, notwithstanding a change in the incumbency.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 59–63; Dec. Dig. 🔑52.]

2. PROCESS 🔑52—OFFICER — EXPIRATION OF TERM.

Under Pol. Code, § 17, defining "process" as a writ or summons issued in the course of judicial proceedings, and section 4319, declaring that "process," as used in that title, includes all writs, warrants, summons, and orders of courts of justice, or judicial officers, the word "process," as used in section 4171, which is in the same title as section 4319, and which provides that when any process remains with the sheriff unexecuted at the expiration of his term it shall be executed by his successor, includes the proceedings which authorize a sheriff to take property in claim and delivery, and the sheriff who had seised property in such proceedings and returned it to the defendant after taking a redelivery bond cannot, after the expiration of his term, be compelled to retake the property and deliver it to plaintiff.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 59–63; Dec. Dig. 🔑52.

For other definitions, see Words and Phrases, First and Second Series, Process.]

3. STATUTES 🔑239—CONSTRUCTION—DEROGATION OF COMMON LAW.

Under Pol. Code, § 4, providing that the provisions of the Code are to be liberally construed with a view to effect its object and to promote justice, the fact that a provision of the Code is in derogation of the common law does not require it to be strictly construed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 320; Dec. Dig. 🔑239.]

Original petition by T. A. Baker for a writ of habeas corpus. Writ granted, and petitioner discharged from custody.

Wiley & Lambert and C. E. Arnold, all of Bakersfield, for petitioner. E. L. Foster, of Bakersfield, Leon E. Morris and Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, and Robert M. Clarke, of Los Angeles, for respondent.

CONREY, P. J. The petitioner is in custody of the sheriff of Kern county by virtue of a commitment issued out of the superior court of that county. Claiming that his imprisonment is unlawful he applied to this court for a writ of habeas corpus, which was granted. The commitment is based upon an order made by the superior court on date September 26, 1916, wherein petitioner was required to pay a fine of $500 as punishment for a contempt of court, and wherein it was further ordered that in default of payment of the fine he be imprisoned in the county jail until the fine is satisfied at the rate of one day's imprisonment for each $2 unpaid of the fine.

Petitioner was sheriff of Kern county for the term ending in January, 1915, when he was succeeded by D. B. Newell, the present sheriff. During the year 1913 one Matthew Bailey commenced an action in the superior court of Kern county against Security Trust Company, a corporation, to recover possession of certain corporation certificates of stock and other documents. Under claim and delivery proceedings in that action, Baker, as sheriff, took possession of that property. Thereafter Bailey applied to the superior court for a peremptory writ of mandate to compel the sheriff to deliver the property to him. In that proceeding a judgment rendered in favor of the sheriff was reversed by this court. Bailey v. Baker, 28 Cal. App. 537, 153 Pac. 242. Baker's defense in that case as presented in this court was that he had lawfully returned the property to Security Trust Company by reason of a redelivery bond received by him from the company, and this court held that under the facts then shown by the record the redelivery bond was ineffective, and that the stated defense could not be maintained. When the case of Bailey v. Baker, as Sheriff, etc., was restored to the calendar of the superior court, it was tried again between the original parties; the plaintiff contending that Baker continued to be sheriff for the purpose of completing the duties pertaining to his office in the claim and delivery proceeding. On February 9, 1916, the superior court filed "findings of fact and conclusions of law" which on February 10th were recorded in its book of judgments, and no other judgment was entered. The so-called findings contained a direction that the writ of mandate issue. On the 9th day of February a writ of mandate was issued to Baker "as sheriff of the county of Kern, state of California, to perform the duties as sheriff * * * in that certain action entitled Matthew Bailey v. Security Trust Co. et al., to deliver possession of the personal property hereinafter mentioned and described to the plaintiff." The writ required Baker, as sheriff, to take into his possession immediately the described property and deliver it to Bailey and to make due return of the writ and of his proceedings thereunder on February 14, 1916. The writ was delivered to Baker on the 9th day of February. He made to the superior court no return whatever, and did not deliver the property to Bailey, nor did he take it into possession.

On April 8, 1916, an affidavit was filed by Bailey's attorney in the case of Bailey v. Baker, supra, setting forth the facts concerning the award and issuance of the writ of mandate, and that Baker had failed and refused to comply therewith, and praying that a citation issue requiring Baker to show cause why he should not be punished for contempt of court in refusing to comply with said writ. In the affidavit it was stated that Baker refused to perform the acts required by the writ and informed affiant that he did not have to perform those acts. At that time the superior court refused to issue the citation for contempt, and a writ of mandate was granted by this court directing that the lower court issue the demanded citation. In that proceeding we held (against the contention of the respondent superior court) that the fact that Baker has appealed from the judgment rendered against him in the mandate proceeding of Bailey v. Baker, supra (no undertaking having been given for stay of enforcement of the writ), would not excuse him from performing the acts required by the writ in that proceeding. Bailey v. Superior Court, 159 Pac. 990. The superior court having issued the citation, tried the issues raised by Baker's answer to the order to show cause, and thereupon made the above-mentioned order of September 26th pursuant to which the commitment was issued whereby Baker is in custody. In that order it was recited that the material allegations contained in the affidavit for contempt were true.

[1] In the above-mentioned proceeding of Bailey v. Superior Court, wherein we directed that the citation issue, the point was presented, but not very fully argued, that Baker, having ceased to be sheriff of the county of Kern, no longer had power to perform any official duties, and therefore could not be required to do the things prescribed by the writ of mandate issued to him. On the other side of the question we were referred to Sagely v. Livermore, 45 Cal. 613, and Perrin v. McMann, 97 Cal. 52, 31 Pac. 837, as well as decisions in other jurisdictions. 35 Cyc. 1543, 1544. In Sagely v. Livermore, supra, it was held that under the statutes then in force it was then the intent of the law that an officer commencing to execute process should complete it, notwithstanding a change in the incumbency. Not only was the rule thus established under the statutes existing at the time of that decision, but the same rule existed at common law. People v. Kendall, 14 Colo. App. 175, 59 Pac. 409. In the present proceeding petitioner renews the contention that his authority as sheriff has ceased and that he was and is without power to comply with the writ of mandate requiring him to retake possession of the property involved in that proceeding. Our attention is now directed to changes in the statutes, to which no reference was made by respondent in Bailey v. Superior Court, by reason whereof petitioner claims that his position is sustained. With this contention (notwithstanding our order and opinion in the case last mentioned) it seems that we must agree. It is provided by section 4171 of the Political Code that:

> "* * * When any process remains with the sheriff unexecuted, in whole or in part, * * * at the expiration of his term of office, said process shall be executed by his successor or successors in office. * * *"

This provision was first placed in County Government Act of 1883, § 107. It was repeated in the successive re-enactments of that act, and then carried over into the Political Code as now contained in section 4171. The subject is discussed in Wood v. Lowden, 117 Cal. 232, 49 Pac. 132. It was there held that under the provisions of the County Government Act, as enacted in 1883, where a writ of attachment was received by the sheriff prior to the expiration of his term of office, and his execution thereof had not been completed at the expiration of his term, but the attached property remained in his hands as sheriff (he being his own successor in office), his acts after the commencement of the new term of office were performed under the authority conferred by his second incumbency, and that the sureties on his bond as sheriff for the first term were not liable for neglects of duty by him in the performance of his duties after the expiration of that first term. The court said that the case was within the terms of the statute which provided that writs unexecuted in whole or in part by a sheriff "shall be executed by his successor."

[2] There is no doubt in our minds that the word "process," as used in Political Code, § 4171, includes the proceedings which authorize a sheriff to take property in claim and delivery. Section 4319 is contained in the same title with 4171, and declares that " 'process,' as used in this title, includes all writs, warrants, summons, and orders of courts of justice, or judicial officers. * * *" And in section 17 of the same Code "process" is defined as "a writ or summons issued in the course of judicial proceedings." In Laughlin v. Thompson, 76 Cal. 287, 18 Pac. 330, it is stated that in case of claim and delivery the affidavit, order indorsed thereon, and undertaking all go into the hands of the officer "and constitute the process."

[3] The fact that a provision of the Code is in derogation of the common law does not require that it be strictly construed. The provisions of the Code and all proceedings under it are required to be liberally construed, "with a view to effect its objects and to promote justice." Section 4, Pol. Code. The policy of the law, as declared in section 4171, seems to be that the official duties pertaining to the office of sheriff shall so far as possible be performed by the actual incumbent of the office, and that the powers of the office shall not continue to be exercised by one whose term has expired. Unexecuted process in his hands does not lose its force, but the power of the law with respect to such process thereafter moves through the arm of the new officer, to whom whatever belongs to the office should be delivered.

Our conclusion as to the matters above

stated renders it unnecessary in this proceeding to determine other questions proposed in the argument of counsel, and which have to do with the validity of the writ of mandamus as it was issued in this case, assuming that it had been directed to a sheriff then having power to act. Neither are we at this time concerned with the liability of the petitioner on account of his failure while sheriff to deliver to the plaintiff property which the plaintiff was entitled to receive from him.

The petitioner is discharged from custody.

We concur: JAMES, J.; SHAW, J.

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32 Cal. App. 333

HANSEN v. SIERRA & SAN FRANCISCO POWER CO. (Civ. 1926.)

(District Court of Appeal, First District, California. Dec. 15, 1916. Rehearing Denied Jan. 13, 1917; Denied by Supreme Court Feb. 12, 1917.)

1. Master and Servant 🔑278(12) — Injuries to Servant—Actions—Evidence.

In an action by a servant injured in loading poles on a truck, evidence *held* to warrant a finding that the master was guilty of negligence in furnishing a defective wooden horse to elevate one end of the poles.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 965; Dec. Dig. 🔑278(12).]

2. Master and Servant 🔑289(1)—Injuries to Servant—Contributory Negligence.

In a personal injury action by a servant, the question of his contributory negligence *held* one of fact for the trial court sitting without a jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1089; Dec. Dig. 🔑289(1).]

3. Damages 🔑132(2)—Personal Injuries—Award.

An award of $11,310.05 to a servant 32 years of age in sound condition mentally and physically, with earning capacity of $85 per month, for personal injuries which affected him both mentally and physically, so that it was questionable whether he would again be able to engage in productive labor, cannot be held excessive, though the court to which the case was tried without a jury considered the servant's expectancy, and in arriving at the measure of damages adopted the methods prescribed in the Workmen's Compensation Act (St. 1913, p. 279).

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 373; Dec. Dig. 🔑132(2).]

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action by Earl T. Hansen against the Sierra & San Francisco Power Company, a corporation. From a judgment for plaintiff and an order denying new trial, defendant appeals. Affirmed.

Denson, Cooley & Denson, of San Francisco, R. C. McComish, of San Jose, and Chickering & Gregory, of San Francisco, for appellant. E. M. Rea, of San Jose, for respondent.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor and from an order denying the defendant's motion for a new trial.

The action was one for damages for personal injuries alleged to have been sustained by the plaintiff while in the employ of the defendant and while engaged as a helper to the driver of a motor truck used by the defendant in hauling electric power poles from its yards at San Martin, in Santa Clara county, to points along its power line on the Monterey road. The action was tried by the court sitting without a jury. The findings of the court set forth the details of the accident in which plaintiff received his injuries substantially as follows: On and prior to the 15th day of April, 1912, the plaintiff was employed by the defendant as helper to a truck driver in and about the construction of its power lines in the above region, and subject to the orders of said truck driver, and also to the orders of the yard foreman of said defendant at San Martin. On said last-named day these three employés of the defendant were engaged in loading a large heavy electric power line pole onto a certain wagon or truck of the defendant by means of a wooden horse, so placed that one end of a large and heavy plank or skid rested on the end of said wooden horse, the other end of said plank resting upon the ground, in order that said electric line pole could be rolled or pulled up the said plank, and thence onto said wagon or truck. While so engaged in loading said pole upon said truck the plaintiff was proceeding under the direction of his fellow employés to so place a block under the legs of said wooden horse as to raise the height of said horse so that the end of the plank or skid resting on the same would be as high as the bed of said truck or wagon, and while the plaintiff was so engaged his fellow employés lifted or raised said wooden horse so high that the end of said plank or skid slipped off the end thereof and fell upon the plaintiff, causing the injuries for which this action was brought. The court further found that said wooden horse was not a fit and proper tool for use for the purposes for which it was being used at the time of said injury, for the reason that it had no cleats bolted or fastened on the end thereof which would have prevented the said plank or skid from slipping from it, and that such cleats as had theretofore been thereon were broken and worn off by usage, and also that the notch in the end of said wooden horse designed to hold said plank or skid in place was worn away, and that imperfect and outworn condition of said appliances was well known to the defendant and was not known to the plaintiff prior and at the time of said injury.

The chief contention of the appellant herein is that the foregoing facts as found by the court were unsupported by the evidence in the case, and for that reason its motion for a nonsuit should have prevailed and its motion for a new trial should have been granted. The appellant makes the further contention that the plaintiff was guilty of contributory negligence which should, as a matter of law, have prevented his recovery in the action.

[1] With respect to the first of these contentions we have carefully read the record relating to the construction and state of repair of the appliance furnished by the defendant to its employés for the purpose of the work in the doing of which the plaintiff's injuries were received, and also relating to the acts in detail of the plaintiff and of the two other superior employés of the defendant under whose direction the plaintiff was working at the time of his injuries; and after such an inspection of the record we are unable to say that the trial court did not have before it sufficient evidence which, if believed by it, would sustain its foregoing findings of fact. The only witnesses to the immediate accident in which plaintiff's injuries were received were the plaintiff himself and the two other employés of the defendant under whose direction he was performing the particular task which put him in the place of danger at the moment when the plank slipped off the end of the wooden horse which his fellow servants were lifting and struck him on the head. The plaintiff himself testified to his own acts under the direction of his fellow servants immediately prior to and at the time of the accident; and while his testimony is in some material respects contradicted by that of his associates, in certain other respects it is inferentially supported by their own statements as to the positions of the three participants in the accident at the moment of its occurrence. The trial judge with these three witnesses before him saw fit to believe the substance of the plaintiff's statement as to the details of the accident, and we are unable to say that in so doing he was in error.

[2] The contention of the defendant that the plaintiff was shown to have been guilty of contributory negligence which should have prevented his recovery we find to be also without merit. Whether the plaintiff knew or ought to have known of the defective qualities of the appliances with which he and his fellow employés were furnished to do the particular thing out of the doing of which his injuries arose was a question of fact for the trial court to determine from the nature and obviousness of the alleged defects, and also from the more or less limited opportunity of the plaintiff to observe them and to appreciate their dangers arising out of his brief time of employment and previous nonuse of these particular appliances; and with its determination of this question of fact in plaintiff's favor we cannot interfere.

This accident occurred after the enactment of the so-called Roseberry Act (St. 1911, p. 796), relieving employés of the defenses of assumption of risk and negligence of their fellow employés; and hence these defenses were not available to the defendant in this action.

[3] The final contention of the appellant is that the award of damages by the trial court was excessive. The sum awarded as damages to the plaintiff was $11,310.05. At the time of his injuries the plaintiff was 32 years of age, in sound condition both physically and mentally, and with an earning capacity of $85 a month. As a result of the accident both his mental and physical condition are seriously and probably permanently impaired, to such an extent that he may never again be able to undergo any productive physical or mental exertion. The trial court seems, in making up its estimate of the amount of the plaintiff's compensation for these injuries, to have taken into account his life expectancy, and to have also made use of the methods of arriving at a proper measure of damages adopted under the so-called Workmen's Compensation Act (St. 1913, p. 279). We cannot see that the use of those methods of arriving at a just admeasurement of damages by the trial court was not entirely legitimate, or that the result thus arrived at was either excessive or unjust, there being no contention that the mind of the trial judge was affected either by passion or prejudice in arriving at the amount specified as the sum which the plaintiff was entitled to recover. This being so, the amount of the judgment will not be disturbed.

In so far as the motion for a new trial was based upon newly discovered evidence supported by affidavits, it does not seem to be contended in the briefs of counsel for the appellant or upon oral argument that the trial court erred in refusing to grant said motion upon that ground. It will not, therefore, be considered upon appeal.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

32 Cal. App. 369

SULLIVAN v. SHEA. (Civ. 1781.)

(District Court of Appeal, First District, California. Dec. 18, 1916.)

1. Gifts 🔑15—Inter Vivos—Requisites and Sufficiency.

The elements essential to constitute a valid gift are the intention to give, and delivery, either actual or symbolical, of the thing intended to be given.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 14; Dec. Dig. 🔑15.]

2. Gifts 🔑33(1) — Requisites and Sufficiency.

Destruction by the donor of evidence of indebtedness with intention to make a gift to the debtor is a sufficient forgiveness of the debt.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 66; Dec. Dig. 🔑33(1).]

3. Gifts 🔑47(1) — Requisites and Sufficiency—Burden of Proof.

The burden of proving a gift is upon the donee.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 81–83; Dec. Dig. 🔑47(1).]

4. Gifts 🔑49(1) — Requisites and Sufficiency—Degree of Proof.

Where a claim of gift is asserted after the death of the donor, every element necessary to constitute a gift must be sustained by explicit and convincing evidence.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95, 96, 99, 100; Dec. Dig. 🔑49(1).]

5. Evidence 🔑67(1)—Presumption of Continued Existence of Note.

Where a note was proved to exist, the presumption exists in favor of the payee that the obligation still exists until overcome by proof of payment, cancellation, or some stronger counter presumption.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 87; Dec. Dig. 🔑67(1).]

6. Gifts 🔑50—Destruction of Note—Question for Jury.

Where a note was proved to have been made, but could not be found, and the maker testified that the payee had made him a gift thereof, it was a question for the jury whether there had been a valid gift.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 101; Dec. Dig. 🔑50.]

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by Hannah Sullivan, as administratrix of the estate of James J. Sullivan, deceased, against Timothy Shea. From a judgment for plaintiff, and an order denying a motion for new trial, defendant appeals. Affirmed.

F. J. Kierce, of San Francisco (Walter Christie, of San Francisco, of counsel), for appellant. Tobin & Tobin, of San Francisco, for respondent.

KERRIGAN, J. This is an action brought by Hannah Sullivan, as administratrix of the estate of James J. Sullivan, deceased, against Timothy Shea upon a promissory note for $1,000, money alleged to have been borrowed by Shea from Sullivan in his lifetime. The complaint, alleging that the promissory note had been lost, set forth its terms, and the answer admitted the execution of the note substantially in the terms set forth.

In the year 1910 the deceased loaned to the defendant the sum of $1,000 without taking therefor a note, receipt, or other evidence of the transaction. About a year later, when the decedent was about to depart for a visit to Ireland, Shea executed in his favor the note in suit. Upon Sullivan's return he took up his abode with Shea and his wife, at whose home he remained for three or four months. The relationship between him and the Sheas was close and intimate, particularly as regards Mrs. Shea, who was his niece. Before leaving for Ireland, in a conversation concerning the loan, Sullivan told Mrs. Shea he did not care whether he ever got any of the money back; that Mrs. Shea and her husband were the best friends he had and were more entitled to the money than any of his other relatives. On another occasion later Mrs. Shea informed Sullivan that the money was in the bank, and offered to get it and repay the loan, but Sullivan refused to accept it and told her that she and her husband should keep the money and use it. On still another occasion, and after Sullivan had left the Shea home and engaged in business, Shea called on him for the purpose of paying the note and interest, but Sullivan at first refused to accept any money on account of the note, but after some persuasion on the part of Shea, accepted the money offered on account of interest, but refused any portion of the principal, and moreover told Shea not to bother about the note. Six or seven months later Sullivan died, and shortly thereafter the plaintiff was appointed administratrix of his estate. She made a thorough search among the papers and effects of Sullivan without succeeding in finding any trace of the note.

The trial court found for the plaintiff, and from the judgment entered thereupon and from an order denying his motion for a new trial this appeal is prosecuted by the defendant.

[1] The elements essential to constitute a valid gift are an intention to give, and the delivery, either actual or symbolical, of the thing intended to be given. Neither alone is sufficient. The rule is very clearly set forth in the case of Jones v. Falls, 101 Mo. App. 536, 73 S. W. 903, where it is said:

> "To constitute a valid gift inter vivos, there must be an intention to give, and a delivery to the donee, or to some one for him, of the property given. An intention of the donor to give is not alone sufficient; the intention must be executed, by a complete and unconditional delivery. Neither will a delivery be sufficient unless made with an intention to give."

See, also, Beaver v. Beaver, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531; Knight v. Tripp, 121 Cal. 678, 54 Pac. 267; Pullen v. Placer, 138 Cal. 170, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19.

[2] It is also settled law that the destruction by the donor of the evidence of indebtedness with the intention to make a gift to the debtor is a sufficient forgiveness of the debt. Darland v. Taylor, 52 Iowa, 503, 3 N. W. 510, 35 Am. Rep. 285; Blake v. Kearney, Man. Unrep. Cas. (La.) 320; Gardner v. Gardner, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340; Licey v. Licey, 7 Pa. 251, 47 Am. Dec. 513; Denunzio v. Scholtz, 117 Ky. 182, 77 S. W. 715, 4 Ann. Cas. 529.

[3] The burden of proving a gift is upon the donee. Lehr v. Jones, 74 App. Div. 54, 77 N. Y. Supp. 213; Thomas v. Tilley, 147 Ala. 189, 41 South. 854; Bray v. O'Rourke, 89 App. Div. 400, 85 N. Y. Supp. 907.

[4] It is also said to be the rule that where a claim of gift is asserted after the

death of a donor, every element necessary to constitute a gift must be sustained by explicit and convincing evidence. In support of this rule, in the case of Whalen v. Milholland, 89 Md. 211, 43 Atl. 50, 44 L. R. A. 208, the court said:

> "Mindful of the facility with which, after the alleged donor is dead, fraudulent claims of ownership may be founded on pretended gifts of his property asserted to have been made whilst he was living, it is but a salutary precaution which demands explicit and convincing evidence of every element needed to constitute a valid donation whether it be a donation inter vivos or mortis causa. Even then, fraudulent claims may prevail, but the rigid requirement of the clearest proof will at least diminish the number."

To the same effect see Davis v. Davis (Sup.) 104 N. Y. Supp. 824; De Puy v. Stevens, 37 App. Div. 293, 55 N. Y. Supp. 810; Denigan v. Hibernia Sav. & Loan Soc., 127 Cal. 141, 59 Pac. 389; Lehr v. Jones, supra.

[5, 6] In this case, the note having been shown to exist, we have on the part of the plaintiff the presumption that the obligation still exists until overcome by proof of payment, cancellation, or some stronger counter presumption. Lawson's Law of Presumptive Ev. 210. On the other hand there was testimony to the effect that the decedent had on several different occasions indicated that he intended to make a gift of the indebtedness to the defendant; and it was a question of fact to be passed on by the trial court, after consideration of this evidence coupled with the inference to be drawn from the circumstance that the note could not be found among the effects of the decedent, whether it had been destroyed by the alleged donor with the intent of forgiving the indebtedness. The burden of proof was upon the defendant to establish the gift by clear and convincing evidence, which in the opinion of the trial court, as indicated by the judgment rendered by it, he failed to do; and we cannot say upon a review of the evidence that the court's conclusion was contrary thereto.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

174 Cal. 251

PACIFIC PORTLAND CEMENT CO. v. HOPKINS et al. (S. F. 7140.)

(Supreme Court of California. Jan. 24, 1917.)

1. CONTRACTS 🔑354—PLEADING 🔑67—NEGATIVING INVALIDITY.

A party in pleading a contract is not called upon to negative the existence of every circumstance which might invalidate the contract, and the findings of the court may follow such pleading.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. 🔑354; Pleading, Cent. Dig. § 139; Dec. Dig. 🔑67.]

2. MECHANICS' LIENS 🔑279—FORECLOSURE—CONTRACT PRESUMED VALID.

Where pleadings and findings in foreclosure of mechanic's lien allege a contract made between owner and contractor, it will not be presumed that the contract was void for noncompliance with Code Civ. Proc. § 1183, requiring contract to be subscribed by all parties and filed with county recorder.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 555, 556; Dec. Dig. 🔑279.]

3. MECHANICS' LIENS 🔑271(1) — FORECLOSURE—STATUTORY PROVISION.

The Mechanic's Lien Law (Code Civ. Proc. § 1200) contemplates foreclosure suits where a contract exists between owner of a building and the contractor, in which the lien is measured by the contract price, and also where there is no contract, when it is measured by actual value, and the lien claimant must show by his pleadings under which theory he claims.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 494; Dec. Dig. 🔑271(1).]

4. APPEAL AND ERROR 🔑171(1)—THEORY OF CAUSE—VARIANCE BETWEEN PLEADING AND CLAIM.

Where a materialman claiming lien under Code Civ. Proc. § 1200, alleged a contract between the owner and contractor under which the latter had not been fully paid, he cannot abandon this theory on appeal and object that the defendant did not plead and the court did not find the existence of conditions which he asserted as a foundation of his rights.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1053; Dec. Dig. 🔑171(1).]

5. MECHANICS' LIENS 🔑290(4) — FORECLOSURE—FINDING—PAYMENTS.

Where the court found on foreclosure of mechanic's lien that the contractor had received from the owner of the building all that he was entitled to, this was prima facie a finding that all payments were made when due.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 595; Dec. Dig. 🔑290(4).]

6. MECHANICS' LIENS 🔑3 — STATUTE—CONSTITUTIONALITY.

The Mechanic's Lien Law (Code Civ. Proc. § 1200), limiting recovery to the unpaid portion of contract price due contractor from owner, is not void as being contrary to Const. art. 20, § 15, giving a lien on property for labor and materials furnished.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 4; Dec. Dig. 🔑3.]

7. MECHANICS' LIENS 🔑290(4) — FORECLOSURE—FINDINGS.

The court's findings in a mechanic's lien foreclosure *held* to show that there was no unpaid portion of the contract price applicable to payment of claimants furnishing labor or materials to the original contractor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 595; Dec. Dig. 🔑290(4).]

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Pacific Portland Cement Company against E. W. Hopkins and others. Judgment for defendant named, and plaintiff appeals on judgment roll alone. Affirmed.

Morrison, Dunne & Brobeck, of San Francisco, for appellant. McGraw & Barry and Hartley F. Peart, all of San Francisco, for respondent.

SLOSS, J. Action to foreclose a mechanic's lien. Plaintiff appeals on the judgment roll alone from a judgment in favor of the defendant owner.

The transaction involved took place in 1909, and our discussion has reference to the Mechanic's Lien Law as it read prior to the amendments of 1911 to section 1183 et seq. of the Code of Civil Procedure. By its complaint the plaintiff sought to enforce a lien for $1,535.10, the unpaid balance of the value of certain cement furnished by it to Webster-Mace Construction Company for use in, and used in, a building being erected by said Webster-Mace Company, as contractor, for E. W. Hopkins, as owner. The plaintiff alleged the making and filing for record of a contract between Hopkins and the Webster-Mace Company, and the abandonment of the contract and work thereunder by the contractor after partial performance on its part. The complaint sought to make a case under section 1200, Code of Civil Procedure, alleging that the value of the work and materials at the time of abandonment, measured by the rule of section 1200, exceeded the sums theretofore paid by the owner under the contract to a sufficient extent to cover plaintiff's claim. The defendant Hopkins in his answer alleged that he had at the time of abandonment paid the contractor more than the value of the work and materials then done and furnished. He did not deny the allegation of the complaint that he had made a contract with the Webster-Mace Company for the construction of the building. On the contrary, he alleged affirmatively that such contract had been made in writing, that it had been filed in the office of the county recorder, and that the contractor had thereafter commenced construction under the contract.

The court found that the plaintiff had furnished the cement as alleged by it, and that the sum of $1,348.65 was due it from the contractor and had not been paid. With regard to the contract between Hopkins and the contractor, the commencement and abandonment of the work, and the value of the work and materials already done and furnished, estimated by the standard of the whole contract price, the findings follow the allegations of the answer. It was further found that at the time of the abandonment the contractor had received from Hopkins under the terms of the contract the sum of $30,643.95, a sum in excess of the value of the work and materials already done and furnished. There was a finding, in accord with the averments of the answer, that Hopkins had fully complied with all of the terms of the contract on his part. As a conclusion of law the court found that there was no fund in the possession of Hopkins applicable to the payment of plaintiff's alleged lien, and that defendant Hopkins was entitled to judgment for his costs. Judgment was entered accordingly.

The appellant's first contention is that the findings are defective in that they do not show that the contract between Hopkins and Webster-Mace Construction Company complied with all of the requirements of section 1183 of the Code of Civil Procedure, as that section read at the time of the making of such contract. It is argued that neither the defendant's answer nor the findings show that the contract was "subscribed by the parties thereto," or that it set forth "the names of all the parties to the contract, a description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be due and payable." It may be remarked, in passing, that the only one of these requirements applicable was that the contract be subscribed by the parties. The other matters were demanded by the section only when a memorandum was filed in place of the contract itself. Snell v. Bradbury, 139 Cal. 379, 73 Pac. 150.

[1] But, apart from this, a party, in pleading a contract, is not called upon to negative the existence of every circumstance which

might invalidate the contract. And the findings may follow the form of the pleadings. This is the settled rule with respect to allegations and findings of contracts within the statute of frauds. A finding that the contract was made imports that it was made in writing. McDonald v. Mission, etc., Homestead Ass'n, 51 Cal. 210; Emerson v. Bergin, 76 Cal. 197, 18 Pac. 264; McCann v. Pennie, 100 Cal. 547, 35 Pac. 158; Yoakum v. Kingery, 126 Cal. 30, 58 Pac. 324.

[2] So where the pleadings and the findings in an action to foreclose a mechanic's lien declare, as they do here, that a contract was made, "it will not be presumed in such case without proof that the contract was void for want of filing or for any other reason." First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 65, 40 Pac. 45, 48.

[3] But, even if there were a defect in the manner of pleading and finding the contract, the appellant is in no position to make the point. The Mechanic's Lien Law contemplated two alternative situations in foreclosure suits by laborers, materialmen, and subcontractors. Where there was a valid contract for the construction of a building, the liens of those claiming under the contractor were measured by the contract price or so much thereof as had not been duly paid to the contractor. Where there was no contract, or the attempt to make a contract had failed for want of compliance with the provisions of the Code, persons furnishing labor or materials had a lien for the value thereof, irrespective of the relations between the owner and the contractor. It was for the lien claimant to show by his complaint whether he was asserting a right against the unpaid part of the contract price due from owner to contractor, or was seeking recovery for labor and materials "deemed to have been done and furnished at the personal instance of the owner," in the absence of a valid contract.

> "In an action to enforce the lien of a mechanic or materialman, the complaint must show either that the building was constructed under a valid statutory contract, or that it was not; and a complaint upon the one theory will not warrant a judgment rendered upon the other." Reed v. Norton, 99 Cal. 617, 620, 34 Pac. 333, 334.

The complaint in this action was prepared upon the theory that there was a valid contract between Hopkins and Webster-Mace Construction Company. It alleged the making of a contract, the filing thereof, and the commencement of work thereafter. The allegations with reference to the value of the work and labor done and materials furnished at the time of abandonment, and payments theretofore made by the owner, were useful only for the purpose of showing the portion of the contract price applicable to payment of liens under section 1200 of the Code of Civil Procedure. These averments had no relevancy or purpose unless there was a valid contract. The answer proceeded upon the same basis, and the findings determined the rights of the parties in view of the making and recording of a valid contract.

[4] The appellant cannot now abandon the theory upon which it began its action, and demand a reversal upon the ground that the defendant did not plead, and the court did not find, with sufficient particularity the existence of the very conditions which the plaintiff had asserted as the foundation of its rights.

[5] The appellant objects, further, that the findings do not show that the payments made by the respondent to the contractor were due at the time they were made. There is nothing in the pleadings to suggest that plaintiff was claiming any rights by virtue of premature payments. But even if the issue were present, the findings would be sufficient to meet it. The court found that at the time of the abandonment the contractor had received from Hopkins "under the terms of said contract" the sum of $30,643.95; also that the defendant Hopkins had on his part fully performed everything agreed to be done or performed "by virtue of the terms of the contract between himself and Webster-Mace Construction Company, and in strict conformity with the terms thereof." This is, at least prima facie, a statement that the payments were made at the times when they should have been made under the contract.

[6] The final point made is that, since the Constitution gives a lien on property upon which labor is bestowed or materials furnished (Const. art. 20, sec. 15), the Legislature has no power to enact a statute which shall limit the lien claimant's recovery to the unpaid portion of the contract price. Whatever might be thought of this as an original question, it is no longer open or debatable in this court. In the recent case of Roystone Co. v. Darling, 171 Cal. 526, 154 Pac. 15, we reviewed the long line of decisions which had established in this state the soundness of the rule that:

> "If there is a valid contract, the contract price measures the limit of the amount of liens which can be acquired against the property by laborers and materialmen."

In the present case the portion of the contract price applicable to the payment of liens was fixed in accordance with the rule laid down in section 1200 of the Code of Civil Procedure. That the specific method provided by this section is not in conflict with the Constitution was expressly decided in Hoffman Marks Co. v. Spires, 154 Cal. 111, 115, 97 Pac. 152.

[7] The findings show that there was no unpaid portion of the contract price applicable to the payment of claimants who had furnished labor or materials to the original contractor. The conclusion of law that the

defendant was entitled to judgment necessarily follows.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

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174 Cal. 256

GRAY v. COTTON et al. (Sac. 2581.)

(Supreme Court of California. Jan. 24, 1917.)

1. APPEAL AND ERROR 🔑780(1)—ORDERS APPEALABLE — RULINGS ON NEW TRIAL MOTIONS.

Since Code Civ. Proc. § 963, as amended in 1915 (St. 1915, p. 209), does not allow an appeal from an order denying a motion for new trial, an appeal from such order must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3121; Dec. Dig. 🔑780(1).]

2. APPEAL AND ERROR 🔑1237 — APPEAL BOND—JUDGMENT—NOTICE OF MOTION.

Under Code Civ. Proc. § 942, requiring an undertaking for the stay of execution upon an appeal from a money judgment to stipulate that if the judgment appealed from, or any part thereof, be affirmed and the appellant fails to make payment thereof within 30 days after the filing of the remittitur in the court below, judgment may be entered on motion of the respondent in his favor against the sureties for such amount, and by signing such undertaking the surety consents to entry of judgment on motion, and no notice of the motion is necessary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4778–4784; Dec. Dig. 🔑1237.]

3. APPEAL AND ERROR 🔑1237—SUPPLEMENTARY PROCEEDINGS—ENTRY OF JUDGMENT ON MOTION.

Where an undertaking on appeal was entered into and the judgment affirmed, the records and files were before the court for the purposes of motion to enter judgment, and formal introduction thereof in evidence was unnecessary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4778–4784; Dec. Dig. 🔑1237.]

4. NEW TRIAL 🔑2—RIGHT TO NEW TRIAL—MOTION PROCEEDINGS.

Code Civ. Proc. § 656, providing that a new trial is a re-examination of an issue of fact in the same court after trial and decision by jury, court, or referee, refers to issues of fact raised by ordinary pleadings, and not to questions of fact on motions, and proceedings for new trial do not lie to secure re-examination of the decision on a motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 4, 5; Dec. Dig. 🔑2.]

5. APPEAL AND ERROR 🔑345(1)—PERFECTING APPEAL—TIME FOR NOTICE.

Where, after remand, judgment was entered on motion against the defendant and a surety on the undertaking on appeal, and the surety thereupon sought a new trial on the motion, a new trial being unauthorized thereon, his notice of appeal, more than 60 days after entry of judgment, was too late.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1895; Dec. Dig. 🔑345(1).]

In Bank. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Harry J. Gray against E. J. Cotton, H. D. Rowe, and others. Judgment for plaintiff and order denying new trial, and Rowe appeals, and plaintiff moves to dismiss both appeals. Appeals dismissed.

Ostrander, Clark & Carey, of Oakland, for appellant. Butler & Swisler, of Sacramento, for respondent.

SHAW, J. In this case on May 8, 1916, judgment was entered, on motion of the plaintiff, against H. D. Rowe, as surety in an undertaking given by him on behalf of the defendants, for the stay of execution upon an appeal taken by said defendants from a judgment against them for $7,443.70, made up of several items set forth in separate counts of the complaint. That appeal was successful only with respect to the first count. As to that item the judgment was reversed. As to the other items it was, in effect, affirmed, and the cause was remanded, with directions to the court below to enter judgment therefor against the defendants in favor of the plaintiff. Gray v. Cotton, 166 Cal. 130, 134 Pac. 1145. Upon the entry of this judgment against him on the motion as aforesaid, Rowe filed a notice of intention to move for a new trial of the motion. This proceeding was decided by the court below on July 29, 1916, the court denying said motion. Rowe filed notices of appeal both from the judgment and from the order denying his motion for a new trial. The respondent now moves to dismiss both appeals.

[1] 1. The amendment of 1915 (St. 1915, p. 209) to section 963 of the Code of Civil Procedure does not allow an appeal from an order denying a motion for new trial. So far as that appeal is concerned, it is immaterial whether a motion for new trial would lie in the case of such a judgment or not. The appeal is unauthorized, and must be dismissed.

2. The notice of appeal from the judgment was filed on August 4, 1916, more than 60 days after the entry of the judgment. It was too late unless it is saved by the clauses allowing an appeal to be taken within 30 days after the termination in the trial court of proceedings on motion for new trial. Sections 939 and 941b. If the court below had power to grant a new trial of the proceeding by which the judgment against Rowe was given, the appeal from the judgment would be in time.

[2] Under section 942 of the Code of Civil Procedure an undertaking for the stay of execution upon an appeal from a money judgment must stipulate that if the judgment appealed from, or any part thereof, be affirmed, and the appellant fails to make payment thereof within 30 days after the filing of the remittitur in the court below, "judgment may be entered on motion of the respondent in his favor against the sureties for such amount." The undertaking executed by Rowe contained this stipulation. The judgment in question was entered on motion as provided in said section and in said undertaking. By signing the undertaking on appeal the surety, Rowe, consented that judg-

ment should be entered against him on motion for the amount as to which the judgment appealed from should be affirmed, and waived notice thereof. No notice to him of the making of the motion was necessary. Meredith v. Santa Clara, etc., Co., 60 Cal. 621; Mowry v. Heney, 86 Cal. 477, 25 Pac. 17; Levy v. Magnolia Lodge, 110 Cal. 309, 42 Pac. 887; Hawley v. Gray Bros., 127 Cal. 560, 60 Pac. 437.

[3] The records and files in the case were before the court for the purposes of the motion. Formal introduction thereof in evidence was unnecessary. The court had to decide, and in this case did in fact decide, only the question of law, whether or not, upon the facts appearing in these documents, the plaintiff was entitled to the judgment against the surety. Meredith v. Santa Clara, etc., Co., supra.

[4] The provisions of the Code allowing a new trial to be ordered (sections 656 to 660, Code Civ. Proc.) follow immediately the provisions for the framing of issues, the trial and the decision of civil actions. "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referee." Section 656. This refers, of course, to the trials and decisions of the issues of fact in the civil actions and proceedings embraced in the preceding Code provisions, issues raised by ordinary pleadings, and it has no reference to decisions of questions of fact on motions. It is well settled that proceedings for new trial do not lie to secure the re-examination of the decision of a motion. Harper v. Hildreth, 99 Cal. 270, 33 Pac. 1103; Doyle v. Republican L. I. Co., 125 Cal. 15, 57 Pac. 667; Estate of Heywood, 154 Cal. 312, 97 Pac. 825.

[5] It follows that the attempt to obtain a new trial was unauthorized, and that the pendency and decision thereof did not extend the time for taking the appeal beyond the 60 days allowed where no motion for a new trial is instituted.

The appeals are dismissed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; LAWLOR, J.

(174 Cal. 269)

GLENN v. RICE. (L. A. 4725.)

(Supreme Court of California. Jan. 25, 1917.)

1. Brokers 🔑67(2) — Commissions from Both Principals—Note.

Where a realty broker was to receive commission from both parties to a transaction, although one of the parties knew the fact, his contract to pay commissions to the broker was against public policy and void, so that the note given in consideration thereof was invalid.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 54; Dec. Dig. 🔑67(2).]

2. Bills and Notes 🔑155, 160—"Negotiable Instrument"—Statute.

Under Civ. Code, § 3088, prescribing the requirements of a negotiable instrument, a note payable at the end of 30 days from date, with no conditions not certain of fulfillment, except an agreement to pay attorney's fees, was a "negotiable instrument," though it provided that interest should be paid quarterly, and that, if not paid when due, the whole sum of principal and interest should immediately be due, at the option of the holder.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 403, 407–410; Dec. Dig. 🔑155, 160.

For other definitions, see Words and Phrases, First and Second Series, Negotiable Instrument.]

3. Bills and Notes 🔑363—Partial Acquisition in Good Faith.

Where the purchaser of a negotiable note paid $600 of the agreed price therefor without notice of the note's invalidity on account of the regularity of the contract from which it originated, he was protected to the extent of his payment, but could not recover against the maker the face of the note, though he had agreed with the seller of the note to pay certain money on the seller's debts.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 790, 791, 960, 962; Dec. Dig. 🔑363.]

4. Interest 🔑39(2)—Judgment—Modification.

Interest on a judgment which is modified on appeal will run from its original date.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 84, 86; Dec. Dig. 🔑39(2).]

5. Interest 🔑22(5), 60—Interest on Judgments—Statutes.

Under Civ. Code, § 1920, relative to interest on judgments, and Code Civ. Proc. § 682, specifying who may issue execution, its form, to whom directed, and what it shall require, a judgment bears interest at the rate of 7 per cent. per annum from its date by force of the law, and not by reason of any declaration it may contain to that effect, and such interest must not be compounded.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 47, 134–137; Dec. Dig. 🔑22(5), 60.]

In Bank. Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by J. H. Glenn against J. C. Rice. From a judgment for plaintiff for less than the amount claimed, plaintiff appeals. Judgment affirmed.

A. H. Sweet and Chas. H. Forward, both of San Diego, for appellant. E. Swift Torrance, of San Diego, for respondent.

SHAW, J. The complaint states a cause of action upon a promissory note for $1,350, executed by the defendant to J. C. Glenn and by him indorsed to the plaintiff, J. H. Glenn. The facts necessary to the decision of the case are stated in the findings.

J. C. Glenn, a real estate broker, as agent of the San Diego Construction Company, and also as the agent of the defendant, Rice, negotiated an exchange between them of a note of the construction company for a parcel of land owned by Rice. He acted, not as a middleman merely, but as the agent of each party. The exchange was duly carried out. Before its consummation the construction company agreed to pay Glenn $1,500 for his services as its agent, and Rice orally agreed to pay a like sum for Glenn's services as his agent. The construction company paid the sum it had agreed to pay, as aforesaid. Glenn owed Rice the sum of $150, which was deducted from the compensation agreed on. For the remainder Rice executed to said Glenn the note sued on.

The construction company did not know that said Glenn was acting as agent for Rice, or that he was to receive from him any remuneration. Rice, however, did know, prior to said exchange, that the construction company had agreed to pay Glenn $1,500, and with that knowledge he made his agreement to pay the like sum to Glenn, but he never expressly or otherwise waived any objection he might have to Glenn receiving the $1,500 from the construction company.

On September 12, 1913, the note was indorsed by J. C. Glenn to J. H. Glenn, the plaintiff, in consideration of $1,350 to be paid by J. H. Glenn, as follows: The sum of $600 in cash to J. C. Glenn; $400 to the American National Bank on the obligation ot J. C. Glenn to said bank; and $350 to George E. Hart upon the obligation of said J. C. Glenn to Hart. He paid the $600 in cash to J. C. Glenn at the time of the indorsement, but he did not pay and has not paid the remainder of the consideration. It does not appear that the plaintiff, at the time he purchased the note and paid the $600 thereon, had any knowledge of the facts relating to the double agency of J. C. Glenn toward Rice and the construction company, as above stated.

On these facts the court rendered judgment for the plaintiff in the sum of $600, with interest thereon and costs, and refused to render judgment for any larger sum. The plaintiff claims that he is entitled to recover the entire amount of the note.

The defendant claims that the facts relating to the double agency of the payee of the note for the two parties to the exchange render the obligation to pay compensation for the services against public policy and void.

[1] The authorities, with practical unanimity, declare that, if an agent is engaged by both parties to effect a sale of property from one to the other, or an exchange between them, not as a mere middleman to bring them together, but actively in inducing each to make the trade, he cannot recover compensation from either party, unless both parties knew of the double agency at the time of the transaction. The reason for the rule is that he thereby puts himself in a position where his duty to one conflicts with his duty to the other, where his own interests tempt him to be unfaithful to both principals, a position which is against sound public policy and good morals. His contract for compensation being thus tainted, the law will not permit him to enforce it against either party. It is no answer to this objection to say that he did, in the particular case, act fairly and honorably to both. The infirmity of his contract does not arise from his actual conduct in the given case, but from the policy of the law, which will not allow a man to gain anything from a relation so conducive to bad faith and double dealing. And the fact that the party whom he sues was aware of the double agency and of the payment, or agreement to pay, compensation by the other party, and consented thereto, does not entitle him to recover. He must show knowledge by both parties. One party might willingly consent, believing that the advantage would accrue to him, to the detriment of the other. The law will not tolerate such an arrangement, except with the knowledge and consent of both, and will enter into no inquiry to determine whether or not the particular negotiation was fairly conducted by the agent. It leaves him as it finds him, affording him no relief. The following cases declare these rules, although the list by no means includes all the cases so holding. Chapman v. Currie, 51 Mo. App. 43; Capener v. Hogan, 40 Ohio St. 203; Rice v. Wood, 113 Mass. 133, 18 Am. Rep. 459; Finnerty v. Fritz, 5 Colo. 175; Green v. Southern States L. Co., 141 Ala. 686, 37 South. 670; s. c., 163 Ala. 514, 50 South. 917; Skirvin v. Gardner, 36 Okl. 615, 129 Pac. 729; Sullivan v. Tufts, 203 Mass. 157, 89 N. E. 239; Lynch v. Fallon, 11 R. I. 311, 23 Am. Rep. 458; Meyer v. Hanchett, 43 Wis. 250; Rice v. Davis, 136 Pa. 441, 20 Atl. 513, 20 Am. St. Rep. 931; Bollman v. Loomis, 41 Conn. 582; Byrd v. Hughes, 84 Ill. 174, 25 Am. Rep. 442. The doctrine was also stated by this court in Berlin v. Farwell, 3 Cal. Unrep. Cas. 643, 31 Pac. 527. The case was not inserted in the official reports, but it has never been overruled.

No cases are cited by the respondent to the contrary. In Jauman v. McCusick, 166 Cal. 517, 137 Pac. 254, the plaintiff was suing for commission as agent for the exchange of real property, and it was said that his rights were not affected "by the fact that under the agreement commissions were to be paid by both parties to the proposed exchange," because the defendant had agreed to pay the commission to the agent with knowledge that he was also to receive a commission from the other parties, and he was not in a position to complain of the illegality of the transaction. On the face of the opinion it does not appear whether or not the other party to the exchange was also aware of the double agency. In fact, however, the record showed that both parties had knowledge thereof. The precise question before the court in the present case was not presented or considered. In Shepherd-Teague Co. v. Hermann, 12 Cal. App. 402, 107 Pac. 622, two justices of the District Court of Appeal say that the fact that the other party was also to pay a commission to the common agent would be no defense to an action against a defendant for such commissions if, when he executed the agreement, he knew of the agreement of the other party to pay commissions. Justice Cooper, concurring specially, stated the proposition to be that, if both principals knew all the facts and each agreed to pay the commissions, there could be nothing unfair in the transaction and both would be liable. In that case also the record shows that both parties knew of the double agency. Neither of these decisions is authority contrary to the rule above stated. In Clark v. Allen, 125 Cal. 278, 57 Pac. 985, it is said that the rule we have stated is sound, but that case was distinguished on the ground that the broker was acting merely as a middleman; his duty being complete when he brought the two parties to the trade together. Our conclusion is that the contract of the defendant to pay commissions to J. C. Glenn was against public policy and void, and that the note given in consideration thereof is consequently invalid. The note sued on reads as follows:

> "San Diego, California, Sept. 2, 1913.
>
> "Thirty days after date without grace, for value received, I promise to pay to the order of J. C. Glenn at San Diego, Cal., thirteen hundred and fifty and no/100 dollars, with interest at the rate of seven per cent. per annum from date until paid, interest payable quarterly, and if not so paid to be compounded annually and bear the same rate of interest as the principal; and should the interest not be paid when due then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note; principal and interest payable in gold coin of the United States. Should suit be commenced, or an attorney employed to enforce the payment of this note I agree to pay an additional sum of ten per cent. on principal and accrued interest as attorney's fees in such suit. J. C. Rice."

[2] This note is negotiable in form. A negotiable instrument must be payable in money only, without conditions not certain of fulfillment, except the contingent agreement to pay attorney's fees and costs if suit be brought thereon. Civ. Code, § 3088. This note was payable at the end of 30 days from its date with no conditions not certain of fulfillment except the agreement to pay attorney's fees. This brings it within the definition of the Code. The provisions that the interest should be paid quarterly, and that, if not paid when due, the whole sum of principal and interest should immediately be due, at the option of the holder, does not change its character. The quarterly interest could not become due until at least 60 days after the maturity of the note itself, and hence that clause did not alter the positive character of the promise to pay the principal 30 days after date, and does not affect the character of the note as a negotiable instrument. The decisions in Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110, and National Hardwood Co. v. Sherwood, 165 Cal. 1, 130 Pac. 881, are not inconsistent with the above conclusion.

[3] The plaintiff, having paid the $600 without notice of the invalidity of the note, is protected to the extent of that payment. But with respect to the remainder of the consideration agreed to be paid by him upon the purchase of the note his position is different. He was a purchaser in good faith only to the extent of the part of the price actually paid by him. Where a purchaser of an invalid note, after paying a part of the consideration and receiving the note, learns of its invalidity before paying the residue he agreed to pay, he cannot recover the full amount of the note, but only the amount paid by him before the discovery of its illegality. Hubbard v. Chapin, 84 Mass. (2 Allen) 328; Dresser v. Missouri, etc., Co., 93 U. S. 92, 23 L. Ed. 815; Certain v. Smith, 53 Ind. App. 163, 101 N. E. 319. The same rule has been applied in this state to the case of one who purchases real property incumbered by mortgage not properly recorded, and who pays a part of the price before notice of the mortgage. In such case he is protected as to the amount paid, but takes subject to the mortgage as to the portion unpaid at the time he received notice thereof. Davis v. Ward, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29; Kenniff v. Caulfield, 140 Cal. 45, 73 Pac. 803. The agreement of the purchaser to pay certain money upon the debts of the seller had no greater effect to make him an innocent purchaser than if he had agreed to pay it directly to the seller. It does not appear that he had entered into any transaction with the creditors whereby he was bound to pay them in any event, regardless of the validity of the note, and he can therefore set up his defense in answer to any suit such creditors may bring against him. Bank v. Gibson, 109 Cal. 199, 41 Pac. 1008; Henry v. Phillips, 163 Cal. 141, 124 Pac. 837, Ann. Cas. 1914A, 39.

The cases cited by plaintiff to the effect that the bona fide purchaser of a negotiable instrument may recover its full face value, although he paid much less for it, apply only where he pays, or becomes indisputably bound to pay the whole price before he discovers the facts which render the instrument invalid. They are not contrary to the established rule above stated.

To the extent of the $600 which he paid he is entitled to full protection, including the benefit of the agreement in the note to pay attorney's fees. The court should have allowed him 10 per cent. thereon as attorney's fees. To that extent the judgment was erroneous, and should be modified accordingly.

[4] The interest will, of course, run from its original date. It does not appear, however, that this point was urged in the court below, and the appellant should not recover the costs of appeal on account of such modification.

[5] In entering a judgment, it is not necessary to declare therein that it shall bear interest. It bears interest at the rate of 7 per cent. per annum from its date by force of the law, and not by reason of any declaration it may contain to that effect. Civ. Code, § 1920; Code Civ. Proc. § 682. And such interest must not be compounded. The judgment appealed from was erroneous in declaring that the interest thereon at 7 per cent. should be compounded annually. Civ. Code, § 1920. Neither party is entitled to costs on appeal.

The judgment is modified so as to read as follows:

> "It is now, on this 12th day of November, 1914, considered by the court that the plaintiff recover of the defendant the sum of $660, together with costs, taxed at $15.25."

As thus modified the judgment is affirmed, without costs of appeal to either party.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

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174 Cal. 276

MAGEE v. MAGEE et al. (Sac. 2285.)

(Supreme Court of California. Jan. 26, 1917.)

1. Appeal and Error 🔑348(1)—Time for Appeal—Statute.

Where appeal from the judgment was taken within six months after entry, and the record does not show that any notice of such entry had been served on appellant, the appeal was within the time prescribed by Code Civ. Proc. § 941b, relative to the time of filing notice of appeal by the alternative method, and, under section 941c, concerning the effect of such an appeal, any question, including the sufficiency of the evidence to support the findings, may be reviewed, notwithstanding appellant may have had knowledge of the entry of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1900; Dec. Dig. 🔑348(1).]

2. Specific Performance 🔑28(1) — Definiteness of Contract.

A contract will not be specifically enforced unless its terms are clear, definite, and certain.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61, 65, 66; Dec. Dig. 🔑28(1).]

3. Contracts 🔑192 — Uncertainty — Construction—Agreement to Convey.

Where one brother agreed to give another land if the other would erect and furnish thereon a house for the occupancy of their parents, such contract was not uncertain, but was properly construed as meaning that the one would transfer the legal title to the other, though the word "convey" was not used in the conversations between the brothers.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 846–851; Dec. Dig. 🔑192.]

4. Specific Performance 🔑41—Contracts Enforceable—Statute of Frauds—Part Performance.

It is no objection to specific performance of a contract to convey land that the agreement was not in writing, where the grantee has made valuable improvements on the property on the faith of the agreement and those claiming under him have gone into possession.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 120–123; Dec. Dig. 🔑41.]

5. Specific Performance 🔑32(3) — Contracts Enforceable—Mutuality.

Specific performance of a contract whereby one brother agreed to give the other land if the latter would erect and furnish thereon a house for the occupancy of their parents will not be denied for want of mutuality where the grantee has performed in so far as possible, by building a house and permitting the parents to take possession.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 92–98; Dec. Dig. 🔑32(3).]

6. Specific Performance 🔑75—Agreement Not for Continuing Acts.

Under Civ. Code, § 3386, providing that neither party to an obligation can be compelled specifically to perform it, unless the other party has performed or is compellable, where one brother agreed to give another a lot if the other would erect and furnish thereon a house for the occupancy of their parents, and the other brother erected and furnished the house, the first brother's contract to convey was not unenforceable on the ground that the second brother's obligation was an agreement for continuing acts or personal services, since the purpose that the parents should have a right of possession and enjoyment during their lives was given complete effect by the decree vesting a life estate in the surviving father.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 210; Dec. Dig. 🔑75.]

7. Specific Performance 🔑114(2) — Complaint — Allegations — Consideration—Reasonableness.

A complaint for specific performance need not declare in the words of Civ. Code, § 3391, that there was "an adequate consideration for the contract," and that it was "just and reasonable"; the proper mode being to allege facts from which consideration and reasonableness appear.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 357–361; Dec. Dig. 🔑114(2).]

8. Pleading 🔑8(4)—Conclusions—Consideration and Reasonableness of Contract.

Allegations that there was adequate consideration for the contract, and that it was just and reasonable, are objectionable as mere conclusions.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 14; Dec. Dig. 🔑8(4).]

9. Specific Performance 🔑49(2) — Contracts Enforceable—Consideration.

A contract to convey land to the grantor's brother on the latter's agreement to erect and furnish thereon a house for the occupancy of their parents, which the grantee performed, was supported by adequate consideration to warrant specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 141–151; Dec. Dig. 🔑49(2).]

10. Specific Performance 🔑51—Contracts Enforceable—Reasonableness.

Specific performance will not be denied on ground that such contract was not just and reasonable, where the land was worth $500, and the expenditure made by the grantee was $3,700.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 153, 154; Dec. Dig. 🔑51.]

Department 1. Appeal from Superior Court, Solano County; A. J. Buckels, Judge.

Action by James Magee, Jr., against James Magee, Sr., and others. From a judgment for defendants on their cross-complaint, and from an order denying his motion for new trial, plaintiff appeals. Judgment and order appealed from affirmed.

Theodore A. Bell, of San Francisco, for appellant. T. T. C. Gregory, of San Francisco, and Theodore W. Chester, of Sacramento, for respondents.

SLOSS, J. This action was brought to quiet title to a lot of land in the city of Vallejo. In their answer the defendants denied plaintiff's title, and set up, by way of further defense and as a cross-complaint, a state of facts in consequence of which, as they claimed, they were the equitable owners of the property or entitled to a conveyance thereof from the plaintiff. The court made findings in accordance with the affirmative allegations of the answer and cross-complaint, and entered judgment accordingly. The plaintiff appeals from the judgment and from an order denying his motion for a new trial. The respondents move to dismiss both appeals.

[1] The appeal from the judgment was taken within six months after entry. As the record does not show that any notice of such entry had been served upon the appellant, the appeal was within the time prescribed by section 941b of the Code of Civil Procedure, and any question, including that of the sufficiency of the evidence to support the findings, may be reviewed. Code Civ. Proc. § 941c. The fact that the appellant may have had knowledge of the entry of the judgment does not limit his time for appeal under the alternative method to 60 days from the date upon which such knowledge was brought home to him. Estate of Keating, 158 Cal. 109, 110 Pac. 109, relied on by the respondents, has no application to the taking of an appeal. That case turns upon the provisions of sections 953a, 953b, and 953c of the Code of Civil Procedure, creating a method of preparing a record on appeal. The language of section 941b is different, and under it the appellant's right to serve his notice of appeal within six months after entry of judgment is not cut down, except where written notice of the entry has been served upon him. Huntington Park Imp. Co. v. Park Land Co., 165 Cal. 429, 132 Pac. 760; Title Ins. & Trust Co. v. Cal. Dev. Co., 168 Cal. 397, 143 Pac. 723.

It is probable that the appeal from the order denying a new trial was not taken within the time allowed by subdivision 3 of section 939 of the Code of Civil Procedure, as that section read at the time of the proceedings under review. The record does not, however, show all the data necessary to a definite determination of this point, and, since all the questions raised may be considered on the appeal from the judgment, we shall decide the case on the merits.

James Magee, Jr., is a son of the defendant James Magee, Sr., and a brother of the defendants Catherine Magee and Nellie Magee Murphy. Patrick Magee, who died in 1899, was a brother of the plaintiff, James Magee, Jr. The court found, in effect, these facts: Prior to 1895 James Magee, Sr., and his wife, the parents of James Magee, Jr., and Patrick Magee, were living in Ireland. The plaintiff and Patrick were living at Vallejo, in this state. Plaintiff was the owner of the piece of land here involved, having purchased the same for $500. He has never made any conveyance of the land, and the record title still remains in him.

James Magee, Sr., with his wife and minor children, came to California at the invitation of James, Jr., or Patrick, or both. The sons were apparently desirous of providing a home for their parents, and in June, 1895, Patrick agreed with the plaintiff James, Jr., that if the said James, Jr., would give or convey to Patrick the lot in controversy, he, said Patrick, would erect thereon a suitable home for his parents and would furnish the same at his own cost and expense. To this the plaintiff agreed. Thereafter, relying on said agreement, Patrick entered into a contract for the construction of a dwelling house on said property, and caused the house to be erected and furnished at his expense. Upon completion of the house the defendant James Magee, Sr., with his wife and daughters, entered into possession of the house and land. He and his daughters have remained in possession ever since, the mother having died in the meanwhile.

The court finds that at the time of the making of said agreement the real property was worth $500, that the cost of constructing the house exceeded $3,000, and that the cost of furnishing it was $700 or more. In 1899 Patrick Magee died intestate. His estate was administered in probate, and $^1/_{18}$ thereof was distributed to the plaintiff, $^{12}/_{18}$ to the defendant James Magee, Sr., and $^1/_{18}$ to each of the other defendants.

On these facts the court concluded and adjudged that the defendant James Magee, Sr., is the owner of a life estate in the said real property, and that he is the owner of $^{12}/_{18}$ of the remainder, that each of the defendants Catherine Magee and Nellie Magee Murphy is the owner of an undivided $^1/_{18}$ of the remainder, and that plaintiff is the owner of a like $^1/_{18}$. It is further adjudged that plaintiff convey to the defendants the title so adjudged to belong to them.

[2-4] The plaintiff attacks as unsupported the findings relative to the making of the agreement between himself and Patrick in June, 1895. The evidence is, to be sure, conflicting, but there was testimony to the effect that the agreement, as found by the court, had been made by the brothers. It is, of course, well settled that a contract will not be specifically enforced unless its terms are clear, definite, and certain. Agard

v. Valencia, 39 Cal. 292; Magee v. McManus, 70 Cal. 553, 12 Pac. 451; Stanton v. Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; Monsen v. Monsen (Sac. No. 2271) 162 Pac. 90, decided December 19, 1916. But we do not see that the contract found to have been made between the plaintiff and his brother Patrick is lacking in certainty or definiteness. Patrick was to erect on the land, and to furnish, a house for the use of the parents of the contracting parties, and in consideration of these acts the plaintiff was to convey the land to Patrick. It is true that the word "convey" may not have been used in the conversations between the brothers. But there was testimony that James said he would "give" Patrick the lot for the purposes named, if Patrick would make the expenditures referred to. In view of the surrounding circumstances, the court was justified in construing the language of plaintiff as meaning that he would transfer the legal title to Patrick.

It is no objection to specific performance that the agreement was not in writing. Patrick had made valuable improvements on the property on the faith of the agreement, and those claiming under him had gone into possession. This is enough to take the case out of the statute of frauds. Burlingame v. Rowland, 77 Cal. 315, 19 Pac. 526, 1 L. R. A. 829; Manning v. Franklin, 81 Cal. 205, 22 Pac. 550; Calanchini v. Branstetter, 84 Cal. 249, 24 Pac. 149.

[5] It is further urged by the appellant that the contract cannot be enforced for want of mutuality. The argument is that some of the obligations on Patrick's part still remain unperformed, and that these are of such a character that a court of equity could not specifically enforce them. If this position be sound, it will, no doubt, afford a sufficient answer to a demand for specific performance against the plaintiff. Civ. Code, § 3386; Cooper v. Pena, 21 Cal. 404; Banbury v. Arnold, 91 Cal. 608, 27 Pac. 934; O'Brien v. Perry, 130 Cal. 526, 62 Pac. 927. The court found, and the evidence fully supports the finding, that Patrick had, during his lifetime, performed every part of his agreement that it was possible for him to perform. He had built and furnished the house, and has permitted the occupancy of it by his parents.

[6] But it is claimed that he was required to permit the further occupancy of the premises so long as the parents, or either of them, should live, and this, it is said, is an agreement for continuing acts or personal services, which a court of equity will not undertake to supervise or to enforce specifically. 36 Cyc. 584. There is, however, nothing in the agreement calling for any such acts or services. All that was contemplated was that the parents should have the right of possession and enjoyment during their lives, a purpose that could be given complete effect by the execution of a single paper on the part of Patrick, or his successors in interest. This purpose was fully met by vesting a life estate in the surviving husband and father, as was done by the terms of the decree.

[7, 8] Finally, it is argued that specific performance could not properly be decreed in this case for want of allegation and evidence that the plaintiff received an adequate consideration, and that the contract was, as to him, just and reasonable. Civ. Code, § 3391. Such pleading and proof has always been required in the chancery courts. It is not necessary, however, that the complaint for specific enforcement should declare, in the very words of the Code, that there was "an adequate consideration for the contract," and that it was "just and reasonable." These allegations, standing alone, would be objectionable as embodying the mere conclusion of the pleader. The proper mode of pleading is to set forth the facts from which the court may conclude that the contract is supported by an adequate consideration, and is, as to the defendant, fair and just. Stiles v. Cain, 134 Cal. 171, 66 Pac. 231; White v. Sage, 149 Cal. 613, 87 Pac. 193.

[9, 10] The facts here alleged by the defendant and found by the court on satisfactory evidence are, we think, sufficient to show the existence of the equitable requisites. Taking into account the relations of the parties, the desire of the plaintiff and his brother Patrick to provide a home for their parents, the value of the land contributed by the plaintiff, the extent and value of the improvements furnished by Patrick, and the fact that Patrick could receive no pecuniary benefit from the land or from his expenditures until after the death of both of his parents, the court was fully justified in drawing the inference, implied in its decree, that the contract was fair and just as to the plaintiff, and that said plaintiff received, in the expenditures by Patrick and the provision for the parents, a consideration which was entirely adequate to support his agreement to contribute the lot. This was not the ordinary case of a sale of land for a money consideration alone. The transaction was one between brothers, bound by a common tie of filial duty, and seeking to benefit their parents, rather than to deal for profit. These were elements to be given due weight by the trial court, which is to exercise a sound discretion in determining whether, under all the circumstances, the contract was just, and the consideration adequate. O'Hara v. Lynch, 172 Cal. 525, 157 Pac. 608. It cannot be said that any abuse of discretion appears here.

No other points are made.

The judgment and the order appealed from are affirmed.

We concur: SHAW, J.; LAWLOR, J.

174 Cal. 180

Ex parte ISCH. (Cr. 2053.)

(Supreme Court of California. Jan. 8, 1917.)

1. Counties 🔑47—Legislative Powers—Board of Supervisors.

Except as affected by the initiative and referendum provisions of the law, the legislative power of a county is vested in its board of supervisors, and the board is vested with the right to exercise within the limits of its jurisdiction the entire police power of the state, subject to the control of general laws.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 55; Dec. Dig. 🔑47.]

2. Counties 🔑55—Police Power—Constitution.

Const. art. 11, § 11, providing that any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws, gives a county the right to determine what police regulations it will prescribe, and the only limitation upon the exercise of the power is that such regulations shall not be in conflict with the general laws of the state.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 71, 72; Dec. Dig. 🔑55.]

3. Intoxicating Liquors 🔑11—Power to Regulate—Counties—Police Ordinance—Validity—Statute.

Ordinance No. 168 of San Bernardino county, prohibiting the sale of intoxicants outside of municipal corporations and prescribing a penalty of fine not exceeding $600 or imprisonment in the county jail for not more than seven months, or both, is not violative of Pen. Code, § 19, providing that, except in cases where a different punishment is prescribed by the Code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail for not exceeding six months, or by a fine not exceeding $500, or both, since the section was not intended to declare a general rule limiting the power of counties, cities, and towns in the matter of prescribing penalties for the violation of regulations enacted under the authority conferred by Const. art. 11, § 11.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 13; Dec. Dig. 🔑11.]

4. Counties 🔑55—Limitation of Power to Prescribe Penalties—Statute.

If Pen. Code, § 19, were applicable, it could not reasonably be construed as a limitation on the power of local bodies in the matter of prescribing penalties, but simply as a law prescribing the penalty where a different punishment is not prescribed by the local body.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 71, 72; Dec. Dig. 🔑55.]

5. Counties 🔑55—Police Ordinance—Fixing Penalty.

County boards of supervisors, in enacting a police ordinance under Const. art. 11, § 11, are not required to so fix the penalty that the case shall come within the prescribed jurisdiction of the justices' court, or that it shall not come within the jurisdiction of the superior court.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 71, 72; Dec. Dig. 🔑55.]

In Bank. Petition for writ of habeas corpus by Fred Isch. Writ discharged, and petitioner remanded to custody.

See, also, 162 Pac. 140.

Frank T. Bates, of San Bernardino, for petitioner. T. W. Duckworth, of San Bernardino, for respondent.

ANGELLOTTI, C. J. The question presented by this proceeding is as to the validity of the provision of Ordinance No. 168 of San Bernardino county, prescribing the penalty for a violation of such ordinance. The ordinance is one enacted by the board of supervisors of that county, prohibiting the sale of intoxicating liquors within the county outside of municipal corporations. The section prescribing the penalty is section 18, and is as follows:

> "Any person violating any of the provisions of this ordinance shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding six hundred dollars, or be imprisoned in the county jail of San Bernardino county for not more than seven months, or be punished by both such fine and imprisonment."

The claim is that the board of supervisors exceeded its power in providing a penalty exceeding $500 as to fine and six months as to imprisonment. Section 11, art. 11, Const., reads as follows:

> "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

[1, 2] Except as affected by the initiative and referendum provisions of our law, which are in no way involved here, the legislative power of a county is vested in the board of supervisors thereof. As was said in Odd Fellows Cen. Ass'n v. San Francisco, 140 Cal. 226, 231, 73 Pac. 987, 988:

> "The power conferred by the Constitution in this respect, subject to the two exceptions, that it is local to the city, and that it is subject to general laws, is as broad as that of the Legislature itself"

—and the board was vested with the right to exercise within the limits of its jurisdiction, to use the words of the case just cited, "the entire police power of the state, subject only to the control of general laws." Necessarily this constitutional provision gives to a county "the right to determine what police regulations it will prescribe, and the only limitation upon the exercise of the power is that such regulations shall not be in conflict with the general laws of this state." Ex parte Cheney, 90 Cal. 617, 620, 27 Pac. 436, 437. In no respect is it claimed that the ordinance before us is in conflict with any general law of the state, except in the matter of the penalty prescribed. Of course no claim can well be made that in the enactment of such police regulations the county or city may not provide for the enforcement thereof by prescribing a penalty for the violation thereof. The claim simply is that here the county had no power to impose the particular penalty prescribed. In view of the broad grant of power in the Constitution, this contention must necessarily be based on the claim that the penalty provision is in conflict with some general law of the state.

[3] It is claimed that it is in conflict with

section 19 of the Penal Code. That section is as follows:

> "Except in cases where a different punishment is prescribed by this Code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or by both."

The preceding section (18) provides:

> "Except in cases where a different punishment is prescribed by this Code, every offense declared to be a felony is punishable by imprisonment in the state prison, not exceeding five years."

The Penal Code contains many provisions declaring various offenses felonies and misdemeanors without prescribing any penalty except as the same is prescribed in the sections we have quoted. These sections are contained in that part of the Penal Code which is entitled "Preliminary Provisions." To our minds their intent and scope are very clear. They manifestly refer only to offenses declared by the Code of which they are a part (the Penal Code), and were designed solely to provide a penalty for any such offense where no other penalty was specially provided therefor, and cannot reasonably be read in any other way. It certainly would not be reasonable to read them as showing an intention to prescribe the maximum penalty for offenses that might be declared by the Legislature by statutes not a part of any Code, or by provisions of the other Codes of the state, for which the Legislature might desire to provide a more severe penalty, as, of course, it would have the right to do. And yet such is the meaning that would have to be given to the section under the construction claimed for it, for it would then purport to apply to every offense as to which a different punishment was not prescribed by the Penal Code, whether the offense was or was not one declared by such Code. The mere fact that it could not avail against a later expression of the will of the Legislature as shown in some other statute declaring a particular offense and prescribing a different penalty therefor is not material in this connection, except as tending to show that those enacting the Code could not have intended any such futile effort. Manifestly they were talking solely about offenses declared "by this Code." Certainly nothing in the section furnishes a reasonable basis for a conclusion that it was intended thereby to declare a general rule, limiting the power of counties, cities, and towns in the matter of prescribing penalties for the violation of regulations enacted under the authority conferred by section 11, art. 11, of the Constitution. It is to be observed that section 19 of the Penal Code prescribes only a maximum penalty for the offenses to which it applies, thus leaving it within the discretion of the court pronouncing judgment to impose any penalty not exceeding that prescribed. If applicable to city or county ordinances, the section would preclude the fixing by city councils or boards of supervisors of any minimum penalty. It is a matter of common knowledge that many such ordinances do prescribe a minimum penalty, below which the court pronouncing judgment is not permitted to go, and it certainly has never been supposed that section 19, Penal Code, precludes such a course. In Ex parte Cheney, 90 Cal. 617, 27 Pac. 436, it was claimed that the penalty provision of an ordinance of the city and county of San Francisco which prohibited the carrying of a concealed weapon, and by which the penalty was fixed at "a fine of not less than $250 and not exceeding $500," or imprisonment, or both, was invalid for the reason that the minimum penalty prescribed was "repugnant to and not in harmony with the spirit and letter of the law * * * of the state of California." Section 19 of the Penal Code was not mentioned, but it was substantially declared that the city had the power to make the provision as to a minimum penalty and the same was upheld. We are satisfied that section 19, Penal Code, is not applicable in the matter of city, town, and county ordinances.

[4] We are further satisfied that if it could be held applicable, it could not reasonably be construed as a limitation on the power of local bodies in the matter of prescribing penalties, but simply as a law prescribing the penalty where a different punishment is not prescribed by the local body. There is no decision in conflict with our views. Arfsten v. Superior Court, 20 Cal. App. 269, 128 Pac. 949, was decided upon the theory that the prosecution was under an ordinance prohibiting the carrying on of a business, without a license, the offense declared by section 435, Penal Code, and as to which the penalty was prescribed, of course, by section 19, Penal Code.

In Ex parte Solomon, 91 Cal. 440, 27 Pac. 757, it was held that an ordinance prescribing a minimum fine of $250, and a minimum imprisonment of three months for having lottery tickets in one's possession, when under the general law of the state such misdemeanors as conducting the drawing of a lottery, selling lottery tickets, etc., were punishable by fine not exceeding $500, or imprisonment not exceeding six months, without any prescribed minimum, providing as it did a greater penalty than that provided by statute for kindred offenses, was not in harmony with the general laws of the state, and was therefore unreasonable and void. See, also, In re Ah You, 88 Cal. 99, 25 Pac. 974, 11 L. R. A. 408, 22 Am. St. Rep. 280. This ruling would prevent counties, cities, and towns from going to the possible extremes suggested by learned counsel for petitioner. But it can have no effect in the case at bar for the simple reason that the legislative enactment known as the Local Option Law (Stats. 1911, p. 599), a kindred law of the state, prescribes the same maximum penalty.

[5] That by reason of other provisions of our Constitution and statutes the jurisdiction in cases of violation of the ordinance is in the superior court instead of in the justices' court simply because the punishment may exceed six months' imprisonment and $500 fine, we regard as altogether immaterial to the question before us. There is nothing in our law expressly or impliedly requiring boards of supervisors to so fix the penalty that the case shall come within the prescribed jurisdiction of the justices' court, or that it shall not come within the jurisdiction of the superior court. The penalty being prescribed, the law determines the matter of jurisdiction of the offense.

We see no reasonable ground upon which it may be held that the provision assailed is in conflict with any general law of the state, or against public policy. The same conclusion was reached by the District Court of Appeal of the Second Appellate District in People v. Fages (App.) 162 Pac. 137.

The writ is discharged, and the petitioner remanded to the custody of the sheriff of San Bernardino county.

We concur: SLOSS, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.; SHAW, J.; MELVIN, J.

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174 Cal. 813

Ex parte WAITE. (Cr. 2054.)

(Supreme Court of California. Jan. 8, 1917.)

In Bank. Petition for writ of habeas corpus by E. R. Waite. Writ discharged, and petitioner remanded to custody.

See, also, 162 Pac. 140.

Allison & Dickson, of San Bernardino, for petitioner. T. W. Duckworth, of San Bernardino, for respondent.

PER CURIAM. On the authority of In re Fred Isch, Crim. No. 2053, 162 Pac. 1026, this day decided, the writ is discharged and the petitioner remanded to the custody of the sheriff of San Bernardino county.

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174 Cal. 259

W. F. BOARDMAN CO. v. PETCH.

(S. F. 6978.)

(Supreme Court of California. Jan. 24, 1917.)

1. MASTER AND SERVANT 🔑70(1)—CONTRACTS FOR EMPLOYMENT—COMPENSATION—CONSTRUCTION.

A contract for services requiring payment of a monthly salary, and providing that, if the plant were sold, the employé should receive 6 per cent. of the profits obtained by reason of such sale in addition to his salary, which contract was for a period of five years, the servant was entitled to a sum equal to $250 per month for five years, plus 6 per cent. of the profits, and sale during the five years did not terminate his right to the salary.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 82, 83; Dec. Dig. 🔑70(1).]

2. MASTER AND SERVANT 🔑40(3)—CONTRACTS FOR EMPLOYMENT—COMPENSATION—CONSTRUCTION.

Under such contract, where a sale was negotiated within five years and the servant continued to work for the new company, the mere fact that checks for his salary were those of the new company did not show that the contract for employment with the original company had ended.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 49; Dec. Dig. 🔑40(3).]

3. MASTER AND SERVANT 🔑39(1), 40(2)—EVIDENCE—ADMISSIBILITY.

In an action by a master to reform contract of employment, wherein it was an issue under the cross-complaint whether the servant had continued the work satisfactorily after a sale of the business, it was error to exclude evidence showing failure of the servant to comply with the contract and to refuse amendment of the master's answer to the cross-complaint, to embrace such issue.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 12, 45, 48; Dec. Dig. 🔑39(1), 40(2).]

In Bank. Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the W. F. Boardman Company against Thomas D. Petch. Judgment for defendant on his cross-complaint and order denying plaintiff's motion for new trial, and plaintiff appeals. Reversed.

William C. Crittenden and William A. Nunlist, both of San Francisco (Chickering & Gregory, of San Francisco, of counsel), for appellant. McGowan & Westlake, of San Francisco, for respondent.

ANGELLOTTI, C. J. The appeal is from a judgment in favor of defendant on a cross-complaint and from an order denying plaintiff's motion for a new trial.

On January 28, 1911, plaintiff and defendant entered into the following contract:

"The parties of the first part are the owners of the Rogue River Valley Gas Company, with its principal place of business in the town of Medford, Oregon, and have furnished the entire capital for the erection and completion of the Rogue River Valley Gas Company. * * * The parties of the first part agree to pay the party of the second part the sum of $3,000 per year, in installments of $250 per month for the term of five years from the first day of February, 1911, ending the first day of February, 1916; or if the party of the second part does not begin actual services in Medford at that time, then it is to begin at the date at which the said second party begins actual services in taking charge of the Rogue River Valley Gas Company, but in all events the said party agrees that his services will not begin later than March first, 1911, and as much earlier as he can get away from present position.

"In addition to the salary above mentioned, the parties of the first part agree to pay the party of the second part six per cent. of the net profits received by the parties of the first part on the sale of the Rogue River Valley Gas Company, should said sale be made on or before the expiration of five years from the date of the signing of this contract."

Then follows a stipulation as to how the net profits shall be computed if the property is sold within the five years, and, if not sold within said period, how an appraisement shall be made and the increase in the value of the property determined upon which as actual profits shall be computed 6 per cent. which the party of the second part shall receive. The first party then agrees to deliver to the said second party, or his heirs, at the time of said sale, this 6 per cent. in cash, or, if the property has not been sold, in stocks or bonds.

"In consideration of the above agreement party of the second part agrees to devote his time, attention and ability to the management of the property mentioned, by using every effort in his power to make it successful.

"In the event of disagreement between both parties, or inability through sickness on the part of the party of the second part to the performance of his duties as general manager the above contract is to be settled by arbitration in the same manner described theretofore.

"It is understood and agreed that the party of the second part is to have the entire management in outlining the conditions under which this property is to be operated, being under the jurisdiction and control of the following parties, namely: J. R. Anderson, Geo. H. Eckert and W. F. Boardman, or their successors.

"The party of the second part has entered into a five-year agreement with the Rogue River Valley Gas Company on January 18, 1911. This contract includes all terms and provisions in the above five-year agreement, and is made to cover all points and stipulations in same, or in other words, is to take the place of said agreement."

The said contract of January 18th, it may be said, provided for the employment of said party of the second part for the same time and at the same salary as said agreement of January 28th, as manager and superintendent of the Rogue River Valley Gas Company, but there was no reference to any sale of the property. The defendant commenced his services as said manager about February 15, 1911. The property then consisted of a high-pressure gas plant located near Medford, Or., and was supplying gas to the towns of Medford, Phœnix, Tallant, and Ashland, all of which, except Medford, were very small towns, a few miles apart. The whole cost of the property was $126,778.65. The entire property was thereafter, on June 3, 1911, sold to the Oregon Gas & Electric Company, not for cash, but said company issued to plaintiff in exchange for its rights 195 bonds of the newly organized company of the par value of $1,000 each, and in addition gave as a bonus with each bond 15 shares of its stock of the par value of $100 each. As a part of this sale consideration, the plaintiff agreed to supervise, for the Oregon Gas & Electric Company, the property purchased, which agreement it has been carrying out. After procuring the property in question the Oregon Gas & Electric Company commenced the development and construction of other gas properties in the towns of Roseburg and Grants Pass, Or., where, theretofore, neither the Rogue River Valley Gas Company nor the plaintiff had ever had any property. In order to do this work and to improve the old property the company sold 155 additional bonds for $139,500 in cash, which was used for said purpose. On March 23, 1912, defendant was discharged from his employment. This action was commenced by the plaintiff to reform said contract of January 28, 1911, so as to conform to the understanding of the parties:

(1) "That the said monthly sum of two hundred and fifty dollars should be paid and accepted as payment and in full for all services rendered and to be rendered by the defendant to the said Rogue River Valley Gas Company." (2) "That the services for which plaintiff was to be liable to the defendant were the services which the defendant was to render the Rogue River Valley Gas Company."

As to that issue, the court granted a nonsuit, from which no appeal was taken. The defendant filed an answer and cross-complaint, asking for damages upon two grounds, namely: (1) For 6 per cent. of plaintiff's profits from the sale of the property of the Rogue River Valley Gas Company; and (2) for a wrongful discharge. The case was tried before a jury, and a verdict rendered for defendant for the sum of $19.323.22. A new trial was sought by plaintiff, and the trial judge made a conditional order reducing the verdict to $13,992.84, without specifying any ground for the diminution. Defendant agreed to the reduction, and the motion for a new trial was denied. At the trial plaintiff admitted that the defendant's share of the profits at the time, including interest, approximated $3,313.80, and filed its written offer to allow defendant to take judgment for $3,500.

What we have said is taken from the opinion rendered by the District Court of Appeal of the Third Appellate District.

In view of the condition of the pleadings, the theory on which the case was tried, and the concessions to that effect contained in the briefs of both parties, it must be taken as a conceded fact that there was a sale on June 3, 1911, of the Rogue River Valley Gas Company property within the meaning of the contract, and that thereby defendant became entitled as of that date to 6 per cent. of the net profits received by plaintiff on such sale, in cash. At the trial it was admitted by plaintiff that defendant was entitled to receive on this account, including interest, the sum of $3,313.80. Consideration of the record has satisfied us that there is therein no substantial evidence warranting the award of a larger amount on this account. In our opinion, any conclusion of a greater actual profit to plaintiff than $48,721.35 would be based only, as the record now is, upon the merest conjecture and surmise. Defendant was entitled to 6 per cent. on this amount, with interest thereon from the date of sale to the date of verdict.

Justification for the amount of the judgment in excess of $3,313.80 must be found, if at all, in defendant's right to his compensation under the contract for his services from March 1 to March 23, 1912, when he was discharged, and to damages for his alleged wrongful discharge on that date and plaintiff's refusal to pay him the specified $250 per month from that date to February 15, 1916, his employment having commenced February 15, 1911.

[1] It is earnestly urged that under the contract all right on the part of defendant to be paid $250 per month terminated with the sale of June 3, 1911. The theory, of course, is that the contract shows, as it in fact does, that it was one contemplating personal service on the part of defendant in connection with the property of the Rogue River Valley Gas Company, and that it was the intention of the parties that a sale of that property within the five years should, ipso facto, terminate defendant's rights in so far as the payment of $250 per month was concerned, leaving him with a right only to 6 per cent. of the profits obtained by plaintiff by reason of such sale. We are unable so to read the contract. As the contract itself shows, the parties were stipulating, with a possible sale of the property within five years in mind, and expressly provided for such a contingency. This being the situation, plaintiff agreed in so many words to pay defendant $3,000 per year, in installments of $250 per month "for the term of five years," and to pay "in addition to" this 6 per cent. of the net profits on a sale of the property within five years, and in the event that no sale was made within that time, 6 per cent. of the actual profits of the concern at the end of such five years. In other words, defendant was to receive, in consideration of his part of the contract, $250 each month for a term of five years, together with 6 per cent. of the net profits of plaintiff in the event of a sale within five years, or, if no sale be made within that time, 6 per cent. of the profits of the concern at the end of the five years. In consideration of this undertaking on the part of plaintiff, defendant agreed "to devote his time, attention and ability to the management of the property mentioned, by using every effort in his power to make it successful." If by reason of a sale of the property it followed that there was no longer any property to the management of which for the benefit of plaintiff he could devote his time, attention, and ability, the obligation of plaintiff to pay the stipulated sum was nevertheless in no way impaired or lessened. Authorities to the effect that when parties contract upon the assumption of the continued existence of a given person or property or of certain circumstances, and the person or property ceases to exist or the circumstances change, the obligation is at an end, are not in point, for here the parties did not contract upon any such assumption. As written, the contract plainly shows the intention we have stated, and there is nothing in the circumstances appearing in evidence to indicate any other intention, or that the contract, so construed, is at all absurd or even unreasonable. In fact the circumstances tend to support rather than to operate against such construction, and certainly the conduct of the parties until the time of defendant's discharge was in line with such a construction. No one appeared to have supposed that defendant's rights or duties under the contract terminated with the sale. The evidence indicates that plaintiff was in control of the Oregon Gas & Electric Company, the vendee, and that defendant continued as general manager, under the terms of the contract between himself and plaintiff, until the date of his discharge.

The five-year term actually commenced February 15, 1911. Defendant was paid only to March 1, 1912. This left 47½ months for which he was not paid, which, at $250 per month, would have yielded $11,875. He received from another source for personal services, $1,400, leaving a balance of $10,475, as prima facie, the amount of damage. There is nothing in the evidence to support a larger award on this account.

It thus appears that there is evidence fully supporting an award to defendant of $3,318.80, plus $10,475, an aggregate of $13,793.80, where as he was given by the modified judgment $13,992.84, an excess of $199.04. We can find no sufficient support in the evidence for this excess.

Defendant's undertaking under the contract was "to devote his time, attention and ability to the management of the property mentioned by using every effort in his power to make it successful." Any right of plaintiff to terminate the relation between itself and defendant within the five-year term was necessarily limited by the language of this provision. As long as defendant did what he had agreed to do, give his time, attention, and ability to the management of this property and use every effort in his power to make it successful, no ground existed for a repudiation of its part of the contract by plaintiff.

An examination of the record has satisfied us, as it did the District Court of Appeal, that the evidence sufficiently supports the conclusion in favor of defendant in this regard, in so far as the particular property owned by the Rogue River Valley Gas Company prior to the transfer is concerned.

[2] As we have seen, immediately after the sale, the new company, the Oregon Gas & Electric Company, commenced the development and construction of other gas properties in Roseburg and Grants Pass, to be operated in conjunction with the property received from the Rogue River Valley Gas Company. Plaintiff was largely interested, if not indeed the controlling factor in the new corporation, and until the time of his discharge defendant acted as "general manager" of all the properties, receiving his monthly $250 in checks of the new corporation. While, in view of the issues made by the pleadings and the theory on which the case was tried, it

must be held, as we have seen, that there was a "sale" of the property within the meaning of the provisions of the contract entitling defendant to a certain percentage of the profits in the event of a sale, there can be no question, in view of the evidence, that it was the understanding of both plaintiff and defendant that defendant was entitled and required under the contract to continue his services in the management and development of the property. The mere fact that the checks for his salary were checks of the new corporation does not detract in the slightest degree from the evidence in this regard. Defendant's contract was for the management and development of the gas plant of the Rogue River Valley Gas Company for the benefit of plaintiff. If without any sale, that company, by increasing its available capital by means of the issuance of bonds and additional stock, had extended its operations so as to include Grants Pass and Roseburg territory, there can be no question that the additional properties would have been a part of the property referred to in the contract as to which defendant's services and management were required. So far as the property was concerned, this was what was substantially done. The Rogue River Valley Gas Company property was transferred to a new corporation, in which plaintiff was very largely interested, which, with the aid of additional capital, proceeded to develop the plant by including Roseburg and Grants Pass territory within its operations.

[3] Much can be said in support of the theory that, in view of the circumstances, defendant's obligations to plaintiff, under the contract, extended to the whole property operated by the new corporation, including the Roseburg and Grants Pass additions. These were practically simply by way of development of the original plant. The trial court, however, excluded much evidence offered to show a failure on the part of defendant to comply with his part of the contract in so far as the Roseburg and Grants Pass extensions were concerned, on the theory that the same was not within the issues made by the pleadings, because such extensions were not a part of the property referred to in the contract. Complaint is made of the rulings in this regard. Whether this complaint be well based or not, it appears that plaintiff sought to amend its answer to defendant's cross-complaint to obviate the objection that such evidence was not within the issues. As stated by the District Court of Appeal, the desire of plaintiff was to show that, if the original contract was not extinguished by the sale, "it was modified or virtually superseded by an executed parol agreement of the parties, considerably enlarging the scope of the written one, with the effect that defendant 'became obligated to manage the new property at Grants Pass and Roseburg as well as the original property at Medford, Oregon.'" Upon objection being sustained to testimony in so far as Roseburg and Grants Pass were concerned, plaintiff asked leave to amend the answer in this regard, and later renewed the motion, and the court denied the application, on the ground that it came too late. At the conclusion of the introduction of evidence, plaintiff again moved the court for its permission to amend its answer to the cross-complaint, "in order to make the said answer conform to the evidence introduced at the trial in this action, and also in order to plead more definitely a subsequent executed oral agreement on the part of the defendant and the plaintiff." This application was denied. As to this the District Court of Appeal, in deciding this case, said:

> "We cannot resist the conclusion that the court unduly restricted plaintiff in its efforts to establish one vital defense upon which it relied. It may be admitted that its original answer is somewhat defective, but it does appear therein that the original contract was superseded by an employment of defendant by the said Oregon Gas & Electric Company, and that by the latter he was discharged for cause. From evidence received without objection it also appears that defendant was employed by said company to manage its plant at various places, including said Grants Pass and Roseburg, but when evidence of his mismanagement at these points was offered, an objection was sustained on the ground that it was not within the issues. Immediately, plaintiff requested to amend the pleading, but was denied the privilege. The matter was one of great importance to appellant, and involved the consideration of a complete trial upon the merits.
>
> "It would certainly be better, ordinarily, if such motions were not opposed. It may be that counsel for appellant should have been more careful in framing their original pleading, but it is hardly necessary to say that the rigor of the old rules of pleading has been greatly relaxed, and the effort of courts is and should be directed to the end that the cause, if possible, may be fully tried and determined.
>
> "Respondent was manifestly awarded $10,000, in round numbers, as damages for his discharge. If he was wrongfully discharged, he is entitled to it, but the door should have been open for the fullest investigation as to whether under the original engagement or an added or substituted obligation there was ample justification. If said showing had been made, the result might have been, of course, the same. Of that we cannot say, but the consideration to which we have adverted is so vital that we think a new trial should be had.
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> "There was, indeed, as we have seen, some evidence of the theory contended for, including the declared misconduct of defendant at Grants Pass and Roseburg, but a complete showing was not permitted, and, besides, the court withdrew that consideration entirely from the jury."

Full consideration has satisfied us that this is correct, and we adopt the same as a part of this opinion.

We do not deem it necessary for the purposes of a new trial to consider any other point made by plaintiff on this appeal further than to say that the real question in regard to the right of plaintiff to terminate the relation existing between it and defendant, as it attempted to do, is whether defendant failed to devote his time, attention, and ability to the management he had assumed, and used every effort in his power to make the property successful. Such was his undertaking.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.; LAWLOR, J.

(174 Cal. 243)

SUTTMAN v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 8166.)

(Supreme Court of California. Jan. 23, 1917.)

1. DIVORCE 🔑161—INTERLOCUTORY JUDGMENT—VACATION OF—STATUTES.

In view of Civ. Code, § 131, providing that neither party may dismiss divorce action after entry of interlocutory judgment without other party's consent, the court had no jurisdiction to vacate such a judgment merely at wife's request without notice to or consent of husband, wife's request not being made under Code Civ. Proc. § 473, providing for review of final judgments, this being the only method provided by law, and it was immaterial that the judgment was in her favor, or that husband had suffered default.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 522-526; Dec. Dig. 🔑161.]

2. JUDGMENT 🔑381—VACATION OF—VOID ON FACE.

Where an order of court is void upon its face, it can be vacated at any time by the court on its own motion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 725; Dec. Dig. 🔑381.]

3. DIVORCE 🔑161—INTERLOCUTORY JUDGMENT—VACATION OF—AFTER DEFAULT.

Where a husband had been defaulted in a divorce action, he nevertheless had authority under Code Civ. Proc. § 473, providing for review of final judgments, to object to the vacation of an interlocutory decree entered against him.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 522-526; Dec. Dig. 🔑161.]

In Bank. Application by Julia M. Suttman for a writ of review prayed for against the Superior Court of the State of California, in and for the City and County of San Francisco, and Hon. John J. Van Nostrand, Judge of said court. Application denied.

Jos. L. Taaffe, of San Francisco, for petitioner.

ANGELLOTTI, C. J. This is an application for a writ of review, the object being to obtain the annulment of an order of the superior court, purporting to vacate a previous order which purported to vacate an interlocutory judgment previously given in a divorce action, declaring the plaintiff therein to be entitled to a divorce.

The action was one in which defendant husband had failed to appear, and his default had been entered. The interlocutory judgment was regularly given and entered. Some three months thereafter the plaintiff wife asked the court to make its order setting aside the interlocutory judgment, her application stating simply that she "is desirous of setting aside the interlocutory decree," etc., and not in any sense being an application for relief under section 473, Code of Civil Procedure. On October 26, 1916, the superior court made its order purporting to grant the application and to vacate, annul, and set aside such judgment. All this was done without notice to or consent of the defendant husband. On December 23, 1916, the superior court made an order on the application of the defendant husband vacating, annulling, and setting aside the order of October 26, 1916. The last named order is the one here sought to be reviewed.

[1] We are satisfied that the order of October 26, 1916, was in excess of the jurisdiction of the court. In view of our statutory provisions, the interlocutory judgment provided for by section 131, Civil Code, is, when regularly entered, subject to be modified or vacated only in some way provided by law for the modification or vacating of final judgments. The character of such an interlocutory judgment in this regard is fully shown by what is said in Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897. It is final except against such attack as is expressly authorized by statute. It is subject to be vacated on appeal, or on motion for a new trial, or by proceedings under section 473, Code of Civil Procedure (Claudius v. Melvin, supra), or in any other way that may be expressly authorized for the review of final judgments. There is no statutory provision authorizing the superior court to vacate a valid interlocutory judgment for divorce which has been regularly made and correctly entered simply because one of the parties desires it to be vacated, even though that party be the one in whose favor the judgment was given. It is expressly provided in section 131, Civil Code, that:

> "After the entry of the interlocutory judgment, neither party shall have the right to dismiss the action without the consent of the other."

Pending entry of final decree the interlocutory judgment can be affected only in some way provided by statute for its review, and with the lapse of one year from the date of its entry, in the absence of some authorized review, either party becomes entitled to have a final decree entered in accord with its terms. See Claudius v. Melvin, supra. It is immaterial in this connection that the defendant suffered default.

[2, 3] The facts stated herein are fully set forth in the petition of the wife to this court for a writ of review. They show that the order of October 26, 1916, was in excess of the jurisdiction of the superior court. Even if we assume that such order is not void on its face, void in the light of such

record as is available on a collateral attack thereon (in which event it could be vacated at any time by the court on its own motion [People v. Davis, 143 Cal. 673, 77 Pac. 651]), nevertheless the superior court undoubtedly had jurisdiction to entertain and grant the application of the defendant, made under the provisions of section 473, Code of Civil Procedure, within six months after such order was made, that such order be vacated. There is no doubt in our minds that in view of the provisions of our statute such defendant had such standing as entitled him, notwithstanding his default, to insist on the integrity of the interlocutory decree and its immunity from such action as was attempted by the order of October 26, 1916.

The application for a writ of review is denied.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; LAWLOR, J.

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174 Cal. 232

LIMONEIRA CO. et al. v. RAILROAD COMMISSION OF CALIFORNIA.

(L. A. 3886.)

(Supreme Court of California. Jan. 23, 1917. Rehearing Denied Feb. 19, 1917.)

1. Waters and Water Courses ⚷257(1)—Public Water Company—Regulations—Mutual Ditch Company.

A mutual water company, supplying water to its stockholders to be used on their lands, which takes its water from a corporation operating a ditch as a public utility, occupies the same position as any other consumer taking water from the ditch, and the rental charges against it are equally subject to public regulation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 312; Dec. Dig. ⚷257(1).]

2. Waters and Water Courses ⚷257(1)—Public Water Company—Regulation—Contract.

Under the provision of the Constitution of 1879 that the use of all water appropriated for sale, rental, or distribution is a public use, subject to the regulation and control of the state in the manner to be prescribed by law, and that the right to collect compensation for the use of the water is a franchise, which cannot be exercised, except by authority and in the manner prescribed by law, a contract for the rental of water from a ditch company, made after the adoption of the Constitution, does not affect the right of the state thereafter to regulate the charges for the delivery of the water contracted for, since the power to prescribe rates is a necessary incident of the power of regulation, and such power is a continuing one, which may be exercised at any time.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 312; Dec. Dig. ⚷257(1).]

3. Constitutional Law ⚷154(2)—Impairing Contracts—Regulation of Water Rates—"Impairing Obligation of Contract."

The exercise by the state of the power reserved in its Constitution to regulate the rental charges for the distribution of water after the execution of a rental contract does not impair the obligation of the contract, within the meaning of the federal Constitution, where the state has not surrendered to the public utility involved by the contract any portion of its regulatory power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 461–473; Dec. Dig. ⚷154(2).

For other definitions, see Words and Phrases, First and Second Series, Impairing Obligation of Contract.]

4. Waters and Water Courses ⚷253—Appropriation—Character of Use—Reservation from Conveyance.

A corporation, engaged as a public utility in appropriating water for distribution and sale, cannot, by reserving from a conveyance of all its property the right to water used on the lands of its sole stockholder, with right of way for the flow of such water through the ditch, divest that water of the public use imposed on it by the Constitution, or deprive the Railroad Commission of power to fix the charges for the delivery of the water.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⚷253.]

5. Public Service Commissions ⚷6—Jurisdiction—Determination of Facts.

Under the provisions of Const. art. 12, § 22, and the Public Utilities Act (St. Extra Sess. 1911, p. 18), giving the Railroad Commission jurisdiction to regulate a public utility by fixing rates, the Commission has power, subject to review by the court, to determine the validity of asserted rights of property which affect the exercise of its jurisdiction.

[Ed. Note.—For other cases, see Public Service Commissions, Dec. Dig. ⚷6.]

In Bank. Original petition for certiorari by the Limoneira Company and others against the Railroad Commission of California, to annul an order fixing rates to be charged by the Santa Clara Water & Irrigating Company, in so far as it affected petitioners. Order of the Commission affirmed.

George E. Farrand, of Ventura, Andrews, Toland & Andrews, Lewis W. Andrews, Thos. O. Toland, A. V. Andrews, and E. M. Selby, all of Los Angeles, Don G. Bowker, of Ventura, and Hiatt & Selby, of Los Angeles, for petitioners. Douglas Brookman, of San Francisco, for respondent.

ANGELLOTTI, C. J. This is a proceeding in certiorari looking to the annulment, in so far as it affects petitioners, of an order fixing the rates to be charged by the Santa Clara Water & Irrigating Company, hereinafter referred to as the Santa Clara Company, admittedly a public utility subject to the jurisdiction of the Railroad Commission. The Santa Clara Company, having passed a resolution raising the rate to be charged by it to 25 cents per miner's inch, except as to water under contract at a lower rate, applied to the Railroad Commission for an order declaring the proposed rate reasonable and making it effective. The proposed rate in no way affected either Limoneira Company, a corporation, which was receiving through the ditches of the Santa Clara Company 200 inches of water, claiming by virtue of certain contracts and under the right to have the same delivered by the petitioner company free of charge or the Thermal Belt Water Company, hereinafter styled the Thermal Belt Company, which was receiving 200 inches under a lease for the consideration of $800 per annum. These companies were made parties to the proceeding before the Railroad Commission, together with the Farmers' Ditch Irrigating Company, hereinafter styled the Farmers' Ditch Company, the alleged owner of the 200 inches that were being delivered to Limoneira Company; the Limoneira Company being the sole stockholder of said Farmers' Ditch Company. The order of the Commission fixed a rate of 20 cents per miner's day inch for all consumers except the Limoneira and Thermal Belt Companies, and fixed as the rate to be paid by each of them annually the sum of $2,000. It is the portion of the order purporting to affect these companies that is complained of. We do not understand that any question is raised as to the reasonableness of the rate so fixed, in the event that the Commission had the power to fix any rate at all so far as these companies are concerned. The claim is that, under the circumstances shown by evidence free from conflict, the Commission was without power to prescribe any rate at all as to the Limoneira Company, or any other rate than $800 per annum as to the Thermal Belt Company.

At first glance the facts appear to be very complicated, but consideration thereof makes it possible to state what we believe to be the material facts in such a manner as to clearly show in comparatively few words the real questions involved. The Santa Clara Company owns and controls two separate and distinct systems for selling and distributing water for irrigation purposes, one on the southerly side of the Santa Clara river, in Ventura county, which it owned and operated for many years prior to 1905, and the other on the northerly side of said river, which it acquired in 1905 from Leopoldo Schiappa Pietra, who had acquired it in 1904, apparently for the company. The Limoneira Company and the Thermal Belt Company are served by the northerly system, and we are not concerned here with any question as to the water served by means of the southerly system.

The system on the north side of the river was known as the Farmers' Ditch. It was inaugurated somewhere about the year 1871 by a few settlers for the irrigation of their lands; the water being diverted on the north side of the river and conveyed through ditches. The record furnishes practically no information as to terms and conditions upon which water was furnished prior to the year 1896, but there is nothing to indicate that the use was not the same prior to that year that it was in 1896 and subsequently. The record is apparently destitute of information as to the owners prior to the year 1896, or the quantity of water claimed or actually diverted from the river to the ditch prior to that year. We have merely the fact that about the year 1871 the ditch was at least partially constructed for the purposes of some 17 settlers on the northerly side of the river, and that some water was furnished for irrigation by means of the same. In 1896 we find that the system was owned by one Lisle, who then leased it to E. Nichols and C. A. Belyea, who operated it purely as a public utility for two or three years, furnishing water for a compensation to those under the ditch who desired it. They were then diverting and delivering between 400 and 500 inches. In 1898 Lisle caused the Keystone Mining, Manufacturing, Land & Power Company to be incorporated, and it became the owner of the system, Nichols continuing in charge for the corporation, which operated the property in the same way as Nichols and Belyea had done under their lease; i. e., as a means of selling and distributing water for a compensation. This company in 1898 entered into the first contract with the Thermal Belt Company for 200 inches of water, the same to be delivered through the ditches of the system at the pumping plant of the Thermal Belt Company to be erected on the ditch, for an annual rental or sum. The instrument purported to be a lease for a term of years of such water and the right to have the same diverted from the river and carried through the ditches to such point. The Thermal Belt Company was and is a mutual water company, supplying water to lands above the ditch. In the instrument the Keystone Company covenanted that it was the owner and had the right to divert from the river, and was distributing, at least 1,500 inches of water, and that it was a portion of such waters that it was contracting to deliver. The Farmers' Ditch Company was then organized as a corporation, and the Keystone Company conveyed to it all of its property. It was provided in the articles of incorporation that one of the purposes was:

> "To divert, take, convey, have, buy, sell, use, distribute, supply * * * water for any and all beneficial uses, and erect, construct and maintain waterworks of every kind and nature and water pumping plants."

This company (Farmers' Ditch) in 1901 entered into an agreement with one Clarice H. Ramsey by which it purported to demise and let to her a continuous flow of 200 miner's inches during the irrigating season, for ten years, at $200 per year, the same to be delivered at any point on the ditch designated by her where she chose to locate her pumping plant. In 1903 the Farmers' Ditch Company entered into the contract with the Thermal Belt Company under which the latter bases its claim herein. It was practically a renewal of its former contract with the Keystone Company, except that it was for a term expiring October 31, 1942, and the annual rental or charge was $800. On September 1, 1904, the Farmers' Ditch Company conveyed all of its property to Schiappa Pietra, the deed containing a purported reservation which is material in determining the claim of the Limoneira Company, and which will be discussed hereafter. On April 15, 1905, Schiappa Pietra conveyed the property to the Santa Clara Company, which has ever since operated it. An examination of the record leaves us in no doubt as to the sufficiency of the evidence to warrant the conclusion of the Commission that up to the time of the conveyance to Schiappa Pietra the various owners of the Farmers' Ditch system were engaged solely as a public utility, appropriating for distribution and sale within the meaning of our constitutional provision *all* of the water diverted and carried through their ditches, and that the Thermal Belt Company and Mrs. Ramsey were simply consumers from a public service water company, differing from the other consumers only in the fact that they had contracts for a term of years at specified rates. This has continued to be the situation ever since the conveyance to Schiappa Pietra and the Santa Clara Company, except as to the 200 inches of water contracted to be furnished Mrs. Ramsey and material in the matter of the Limoneira Company claim, which we shall discuss separately.

There is nothing to compel a conclusion that there was any *new* appropriation of water to enable the utility to satisfy the requirements of these contracts, and certainly nothing to fairly support a conclusion that there was any private appropriation for the benefit of particular lands or particular consumers. The public utility continued to take waters to which it claimed to be entitled, for purposes of distribution and sale. Of course, the addition of its two new consumers may have made it essential for it to actually take and carry through its ditches more water than it had originally taken and carried; but in no sense did it do this as a private agency of these consumers, and, as we have seen, it was taking only water of which it then claimed to be the owner and which it had the right to divert, and distribute and sell, and it was taking it for the purpose of distribution and sale. If the contract with the Thermal Belt Company be construed as one contemplating the use of the water on the particular lands supplied by that company, or even as giving that land the right to receive water for permanent and continuous use for irrigation, it "would not technically attach it to the land as an appurtenance," and "would do nothing more than bring the land within the territory to which the public use extended, and establish its status as land permanently entitled to share in the public use." Leavitt v. Lassen Irr. Co., 157 Cal. 89, 91, 106 Pac. 404, 29 L. R. A. (N. S.) 213. The same is true as to the Ramsey contract. Of course, it is entirely immaterial who were the stockholders of the Farmers' Ditch Company, or even that Mrs. Ramsey was the sole stockholder, except as to shares held by others merely to qualify them as directors.

It may be added that no special reliance is apparently placed by learned counsel on the fact that the ditch was at least partly constructed and some water diverted prior to the adoption of the constitution of 1879. The record is such that it does not appear how that fact can possibly be material to any contention made by petitioner here. There is no basis in the record for any conclusion as to the amount of water actually diverted prior to 1880.

[1] This being the situation, the question as to the Thermal Belt Company is a very simple one, in view of our well-settled law. The fact that it is a mutual water company, supplying the water it obtains to its stockholders to be used on their lands, does not make it any the less a consumer, with the rights and subject to the obligations of the other consumers. It occupies the same position precisely as does a single individual taking water from the utility for the irrigation of his lands, and the fact that it represents a combination of several persons is immaterial here. It is one of "the public" that is being served by the public utility.

[2] The only difference between it and the other consumer was that it had a contract for a term of years at a fixed, discriminatory rate. But it cannot now be questioned that this contract, made in the year 1903, was subject to the power of the state to practically annul it in so far as the prescribed rate was concerned in the regulation of the public use. Ever since 1879 our Constitution has provided:

> That "the use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law," and also that "the right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

The power to prescribe the rates at which water devoted to public use shall be furnished is, of course, a necessary incident of the power of regulation possessed by the state, for the purpose, among others, of preventing discrimination between persons entitled to the benefit of the use, and insuring to such persons the furnishing of the water to which they may be entitled upon fair and reasonable terms. It is a continuing power that may be exercised at any time, regardless of any attempted contract existing between the public utility and a consumer. We are speaking, of course, with reference to appropriation of water and contracts made since

1879, for the exigencies of this case require no consideration of alleged rights of an earlier date. Any such contract, although not in violation of any existing law or regulation when made, was necessarily made subject to this continuing power of the state to so affect it, just as much so as if the contract had contained a provision expressly making it so subject. No preferential right as to rates to be paid for the use of any part of the water devoted to public use can be so created by contract between the parties as to be immune from such regulation by the state. The effect of the provisions of our own Constitution in this regard is so exhaustively and clearly stated in Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404, 29 L. R. A. (N. S.) 213, where our earlier decisions are reviewed, as to render further citation or discussion unnecessary. See, also, Penney & Boyle Co. v. L. A. Gas etc. Co., 168 Cal. 12, 18, 141 Pac. 820, L. R. A. 1915C, 282, Ann. Cas. 1915D, 471; Southern Pacific Co. v. Spring Valley Water Co., 159 Pac. 865.

[3] The uniform course of decision of the United States Supreme Court on questions similar in principle precludes any claim that the exercise by the state of the power to thus affect such an existing contract as that here involved impairs the obligation of a contract within the meaning of the federal Constitution. We are speaking, of course, of a situation where the state cannot be held as matter of fact to have surrendered to the public utility involved, by something tantamount to a contract between it and the public utility, any portion of this regulatory power, which is the situation here. The Railroad Commission has been vested by the state with this power of regulation, and the contract of the Thermal Belt Company cannot be held to prevent the exercise of that power in so far as the fixing of the rate to be paid by it is concerned.

[4] The Limoneira Company's claim to be served with the 200 inches free of charge is, to our minds, equally untenable, though it depends on facts of a somewhat different nature. The Limoneira Company is the successor of Mrs. Ramsey, the owner of the lands formerly owned by her and supplied with water under her contract of lease, and also the sole stockholder of the Farmers' Ditch Company. It is claimed that the ownership of the right to this water never passed to Schiappa Pietra, or his grantee, the Santa Clara Company, but remained in the Farmers' Ditch Company, and that all that the Santa Clara Company acquired in connection therewith was its obligation to divert and convey its water through its ditches to the pumping plant and there deliver it to be carried to the lands to be supplied. This claim is based on the attempted reservation in the deed to Schiappa Pietra, to which we have already referred, and the covenants of the grantee in connection therewith. Save and except for this attempted reservation, the deed of the Farmers' Ditch Company was an absolute conveyance of all its water and water rights, and claims thereto, in and to the waters of Santa Clara river and Santa Paula Creek, their branches, sloughs, and tributaries, its right to divert water therefrom, its right to use, own, sell, rent, distribute, etc., said water and water rights, its works, ditches, etc., and all other property owned by it; in other words, a grant of its whole system and all property and rights owned by it in connection therewith, "excepting and reserving" only—

> "subject to the terms, covenants, and conditions herein contained, unto the party of the first part, its successors and assigns forever, out of and from the water and water rights and other property above described, such a quantity of water of the waters of the Santa Clara river that when the same shall be diverted by means of the dams and head works herein mentioned and shall be conducted from said Santa Clara river by means of the water ditch, ditches, conduits, and flumes herein mentioned to the pumping station situated in the northwest corner of subdivision 18 of the Rancho Santa Paula y Saticoy, and hereinafter more particularly described, it shall produce or measure 200 inches of water at said pumping station, and the right to divert said amount of water hereby excepted and reserved from said Santa Clara river; also excepting and reserving a right of way and easement in, along and through the water ditch and dams, head works, conduits, ditches, and flumes, and over and along the rights of way above described, to divert said quantity of excepted and reserved water from said Santa Clara river, and to convey and conduct the same or any part thereof from said point of diversion to said pumping station, together with a right of way and easement in said ditches, flumes, and conduits herein mentioned for conveying whenever necessary the waste or surplus of and the waste or surplus incident to the handling of the water hereby excepted and reserved, from said pumping station to the place where the main ditch or conduit of the water system above described crosses or shall cross the place usually called the 'Wheeler Canyon' or 'Todd Baranca.' The party of the first part does for itself, its successors and assigns forever, hereby covenant and agree to and with the party of the second part, his heirs and assigns forever, that the 200 inches of water herein excepted and reserved by and to the party of the first part and to its successors and assigns shall and may be used and sold, leased, or rented for irrigation, domestic, and stock purposes and for other lawful uses and purposes by the party of the first part, its successors and assigns, for use upon, but not elsewhere than upon, the following lands."

Then follows a description of what are known as the "Olive Lands" and certain portions of the Limoneira ranch. Then follow covenants to the effect that the grantee, Schiappa Pietra, shall maintain the system and deliver the water, and if such is not done the party of the first part, the grantor, may do so at the expense of the grantee. It is further agreed that the existence of the contract between the Farmers' Ditch Irrigating Company and the Thermal Belt Water Company, of the 1st day of September, 1903, be recognized, and that all rentals, rights, and advantages secured to the party of the first part are granted, sold, and assigned and transferred to the party of the second part. The party of the second part undertakes to perform the obligations of the party of the first part to the Thermal Belt Water Company. It is further agreed that the lease of the Farmers' Ditch Irrigating Company with Clarice H. Ramsey of December 9, 1901, expiring on the 9th day of December, 1911, shall continue to be held and the burdens and responsibilities thereof shall continue to be assumed and borne by the party of the first part. And the party of the first part covenants to save harmless Schiappa Pietra, the party of the second part, from any and all of the conditions and provisions contained in said lease. Apparently the consideration given by Schiappa Pietra for the transfer was $33,000, the obligations assumed by him being the continued delivery of the water and the payment of the $33,000, and in return he received the rent of $800 per year from the water sold to the Thermal Belt Water Company and all the other water of the system.

On the 15th day of April, 1905, Schiappa Pietra conveyed all of the property theretofore acquired from the Farmers' Ditch Irrigating Company to the Santa Clara Water & Irrigating Company for the sum of $33,995. The same reservation was made in this conveyance from Schiappa Pietra to the applicant herein as was made in the conveyance to Schiappa Pietra. Upon this, Limoneira Company, now the sole stockholder of the Farmers' Ditch Company, claims to be entitled to the delivery of this water without charge. In view of the facts of the case, as we have heretofore stated them, the case of Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404, 29 L. R. A. (N. S.) 213, appears to be conclusive against the claim. The property and rights attempted to be reserved were simply a part of property devoted *wholly* to public use, an inseparable part of the system owned by the grantor, the Farmers' Ditch Company, exclusively devoted to that use. Certainly the instrument of conveyance was drawn with great care and ability in an effort to carve a private right of ownership out of this public use as to a part of the property devoted to public use, for the benefit of the Farmers' Ditch Company and its then sole stockholder, Mrs. Ramsey. The difficulty is that such a thing could not be accomplished under our law by the parties to this transaction. This case cannot be distinguished on the facts from Leavitt v. Lassen Irrigating Company, supra. There Leavitt, granting his water system, attempted to make a reservation of the right to take water for the irrigation of his ranch. Mr. Justice Henshaw said, in an opinion concurred in by all the members of the court except Chief Justice Beatty:

> "Treating Leavitt's appropriation as being wholly and entirely for public use, he, the owner of the system, was but an instrumentality for the distribution of the waters which he gathered to such members of the public as might apply for them and pay to him the legal charge for the service that he rendered. As the agent of such a public use, he had no power whatsoever to reserve to himself for his private purposes any part of this water. If he could reserve a part, he could reserve all, and thus, by his ipse dixit, convert a public use into private ownership; or, if he could reserve a part for himself, he could with equal authority give away parts of the supply to others, and by this method destroy what the constitution itself has declared shall forever remain a public use."

And again:

> "If * * * the facts should be that he did not make such private appropriation, his attempted reservation of a private right out of a public trust, as above stated, would be futile and void."

In the case at bar it is clear that the attempted reservation was solely for the purpose of creating a private right for the lands of Mrs. Ramsey, which it is claimed has now been fully accomplished. The Railroad Commission had full support in the record for its conclusion that the attempted reservation was futile and void, and that the whole property passed to the grantee.

[5] A large part of the briefs of learned counsel for petitioner is devoted to discussion of a claim that the Railroad Commission was without jurisdiction to determine any question as to the validity of petitioner's asserted rights of property in regard to the waters claimed by them in good faith. In view of the provisions of our Constitution and the Public Utilities Act, and our decisions thereunder, we do not see how it can be doubted that the Railroad Commission had the power to determine *for the purposes of the exercise of its jurisdiction to regulate a public utility by the fixing of rates*, subject to such power of review as is possessed by this court, all questions of fact essential to the proper exercise of that jurisdiction. And, of course, as said in Palermo Land & Water Co. v. Railroad Commission, 160 Pac. 228, "Wherever a court or board is authorized to act upon the existence of a certain state of facts, it has jurisdiction to determine the existence or nonexistence of the requisite facts," and "its jurisdiction cannot be affected by the circumstance that these facts are denied." The opinion in the case just cited sufficiently answers the claims of petitioner in this regard.

We find in the briefs no other objection meriting discussion.

The order of the Railroad Commission is affirmed.

We concur: HENSHAW, J.; SHAW, J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.; LAWLOR, J.

(174 Cal. 246)

EDMUNDS v. ATCHISON, T. & S. F. RY. CO. et al. (L. A. 3878.)

(Supreme Court of California. Jan. 23, 1917.)

1. EVIDENCE 🔑174(1)—SECONDARY EVIDENCE—ADMISSIBILITY.

A carbon copy of a letter written and sent by plaintiff's counsel to counsel for defendant was admissible without previous notice to defendant and demand for production of the original, where plaintiff's counsel produced a letter which was apparently an answer to the carbon, and testified that up to the date of the receipt of such answer he had written defendant but one letter, of the body of which the offered carbon was a correct copy.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 561, 563, 568, 569; Dec.Dig. 🔑174(1).]

2. TRIAL 🔑252(8)—INSTRUCTION—APPLICABILITY TO EVIDENCE.

In an action for personal injuries inflicted by defendant's special policeman, where the evidence did not show a ratification by the defendant of the agent's acts, an instruction on ratification of the employé's act in assaulting plaintiff and defendant's liability in punitive damages was not justified.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 603; Dec. Dig. 🔑252(8).]

3. PRINCIPAL AND AGENT 🔑170(4)—UNLAWFUL ACTS OF AGENT—RATIFICATION.

Although a person may ratify the oppressive acts of an agent, and failure to discharge such agent may be evidence tending to show ratification, the omission to dispense with the services of the offender, unsupported by any other circumstances indicating the employer's approval of his course, does not establish ratification, and where it is not shown that the employer had an opportunity to investigate, failure to discharge is not even an element of proof of ratification.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 643; Dec. Dig. 🔑170(4).]

4. MASTER AND SERVANT 🔑330(3)—TORT OF SERVANT—RATIFICATION—EVIDENCE.

In an action for personal injuries inflicted upon the plaintiff by defendant's special policeman, evidence *held* not to show an opportunity on the part of defendant to investigate its agent's acts or subsequent conduct by which the defendant approved his alleged acts of oppression.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1272; Dec. Dig. 🔑330(3).]

5. APPEAL AND ERROR 🔑1066—REVIEW—REVERSIBLE ERROR.

In an action for personal injuries inflicted by defendant's special policeman, where the verdict was not segregated into items of punitive and other damages, and the actual injury was small, and there was no evidence justifying punitive damages, an instruction authorizing punitive damages was reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. 🔑1066; Trial, Cent. Dig. § 596.]

6. EVIDENCE 🔑471(17)—OPINION EVIDENCE—ADMISSIBILTY.

In an action for personal injuries inflicted on plaintiff by defendant's special policeman in ejecting plaintiff from defendant's premises, where one of the issues was whether the officer used more vigorous measures than were necessary to eject plaintiff, it was error to permit a witness to submit his opinion on the subject.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. 🔑471(17); Witnesses, Cent. Dig. §§ 833, 835.]

Department 2. Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by Edward G. Edmunds against the Atchison, Topeka & Santa Fé Railway Company and another. From a judgment against the named defendant and from an order denying its motion for a new trial, it appeals. Judgment and order reversed.

U. T. Clotfelter and M. W. Reed, both of Los Angeles, Rollin Laird, of Crescent City, and A. H. Van Cott, of Los Angeles, for appellant. R. H. Wilson and M. S. Platz, both of Bakersfield, and E. B. Drake, of Los Angeles, for respondent.

MELVIN, J. The Atchison, Topeka & Santa Fé Railway Company (a corporation) appeals from the judgment and from an order denying its motion for a new trial.

The plaintiff, Edward G. Edmunds, was engaged in the business of selling newspapers in the city of Bakersfield. He had been ordered by John Lambert, a special policeman in the employ of the appellant corporation, not to offer for sale or to sell papers at the station or on the right of way of the company in Bakersfield. The officer, on the theory that Edmunds had violated this order, forcibly ejected him from the right of way. Edmunds brought suit for damages against Lambert and the Atchison, Topeka & Santa Fé Railway Company. Later the complaint was dismissed as to Lambert and the San Joaquin Valley Railway Company, appellant's lessor, was substituted as a party defendant. The case was tried by a jury, and a verdict for $4,000 as damages was returned against appellant alone; the court giving judgment accordingly.

Appellant insists that the evidence shows without contradiction that no more force than was necessary was used to eject plaintiff from its premises, but we think there was a substantial conflict of testimony regarding the amount of force used. The verdict is also attacked as excessive and several other reasons are urged for reversal, but we need not consider all of these in detail, as we must reverse the judgment and order because of misdirection to the jury.

[1] The court permitted the plaintiff to introduce in evidence without previous notice to appellant and demand for a production of the original, a carbon copy of a letter written and sent by plaintiff's counsel to one of the counsel for the Santa Fé Company. The ruling was based upon the fact that plaintiff also produced a letter written by Mr. Camp, appellant's solicitor, which was apparently an answer to one written by plaintiff's counsel who testified that up to the date of the re-

ceipt of Mr. Camp's communication he had written to the company but one letter, of the body of which the offered carbon was a correct copy. The ruling was proper and is supported by the authority of Pratt v. Phelps, 23 Cal. App. 755–757, 139 Pac. 906. The letter from plaintiff's counsel to a representative of the railway company was dated August 12, 1911, and purported to be a description of the attack upon Mr. Edmunds by the special police officer. It gave the date of the occurrence as August 9th. It is not necessary to produce the letter in its entirety. Suffice it to say that it graphically described an attack by a powerful man upon one who was physically his inferior, and who was suffering from the results of a railroad accident. There was a denial that at the time of the occurrence Mr. Edwards was selling papers on the company's property. The letter also contained the following language:

> "For these injuries and indignities we expect the company to stand responsible. * * *
>
> "In the utmost good part we are laying this matter before you just as it is. If you think you can defeat us with these facts satisfactorily proven, we cannot agree. Otherwise we hope to arrive at an adjustment and speedy settlement."

Mr. Camp's reply, which was very brief, was as follows:

> "Mr. R. H. Wilson, Attorney at Law, Fish Building, Bakersfield, Cal.—Dear Sir: Yours of the 12th inst., addressed to the legal department, has reached my hands. I am making some investigation in regard to the matter, but as Mr. Lambert, the special officer, is away on a short vacation, I shall hardly be able to get his side of the story before the 1st of September. I am assured that there is another and very different side to the story and I certainly hope that Mr. Edmunds will not attempt to sell papers on our premises where he has been forbidden to peddle them, and I assure you that all necessary force will be used at any time to prevent the forbidden action. Yours truly, E. W. Camp, Solicitor."

[2] This correspondence is very important in view of certain instructions given by the court. The jurors were instructed that, if Lambert acted with oppression or malice towards plaintiff with the approval or ratification of his employer, the Atchison, Topeka & Santa Fé Railway Company, they might give, in addition to actual damages, an award of smart money or punitive damages. They were also instructed as follows:

> "If you believe from the evidence that John Lambert, while acting as the servant of the defendant Atchison, Topeka & Santa Fé Railway Company, in the general scope of his employment, used oppression or malice in the alleged assault upon plaintiff at the time and place alleged in his complaint, and that the attention of defendant was called to such oppressive or malicious assault, and that it had the means of verifying the truth of such charge, and thereafter retained said John Lambert in its employ, then you are instructed that said defendant ratified the act of said Lambert, and it is liable to plaintiff in punitive damages by way of example in addition to any actual damage that you may find plaintiff has suffered."

[3, 4] This instruction was not justified by the evidence, nor is it a correct statement of the law. It is undoubtedly true that a principal may ratify and approve the oppressive acts of an agent and that failure to discharge such agent may be evidence tending to show ratification, but the omission to dispense with the services of the offender, standing by itself and unsupported by any other circumstances indicating the employer's approval of his course, is never sufficient to establish ratification. By continuing the wrongdoer in his service after knowledge or opportunity to learn of the misconduct and by other acts, the principal may become an abettor of the oppression, and may make himself liable in punitive damages. In this case the evidence shows that upon receipt of the letter from plaintiff's representative the railroad company's solicitor promptly promised a thorough investigation of the matter upon the return of the police officer from his vacation. It is not shown that after the offer to treat with the railroad company for the purpose of reaching an adjustment of Mr. Edmund's claim out of court any other negotiation was had between the parties prior to the commencement of the action, which, according to counsel for appellant, was some ten days prior to September 1st, the date mentioned by Mr. Camp as the probable time of Lambert's return. The record does not show definitely the time of the filing of either complaint, but certain it is that plaintiff did not show an opportunity on the part of the employer to investigate its agent's acts and its subsequent conduct by which that corporation approved his deeds of oppression if any were committed. No proofs were furnished, so far as the record shows, nor were the names of the many alleged witnesses given to Mr. Camp or to any other representative of the railroad company. Under these circumstances the failure to discharge the special officer was not even an element of proof of an approbation, indorsement, or ratification of his acts. If a plaintiff in a case such as this wishes to charge a principal with vindictive damages, he should inform the principal of the facts before commencing the action, and should give him an opportunity of redressing the wrong. The mere notification of the principal of the claim of the injured person is not enough. There should be, in addition to this, time and opportunity for investigation. Foley v. Martin, 142 Cal. 256–264, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123.

[5] The instruction was obviously very injurious to appellant. The verdict was not segregated into items of punitive and other damages, but, in view of the admitted fact that plaintiff was incapacitated for his usual work only a few hours following the alleged brutality of the policeman, there can be small doubt that at least a portion of the verdict of $4,000 was intended by the jury as punish-

ment for the wrong which the jurors believed had been inflicted upon plaintiff.

[6] In view of the possibility of another trial, we need only review one other alleged error. One of the witnesses was permitted to testify that in his opinion Mr. Lambert used more force than was necessary. This was error which will doubtless not occur at another trial. One of the issues before the jury was whether or not the officer was using more vigorous measures than were necessary to eject plaintiff from the premises. It was error to permit the witness to submit his opinion on this subject. Raynor v. Railway Company, 129 N. C. 195, 39 S. E. 821; Zube v. Weber, 67 Mich. 54, 34 N. W. 264; Kendall v. Limberg, 69 Ill. 358.

The judgment and order are reversed.

We concur: HENSHAW, J.; LORIGAN, J.

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174 Cal. 118

SNYDER v. PLUMMER, Superior Court Judge. (Sac. 2616.)

(Supreme Court of California. Dec. 22, 1916.)

CERTIORARI 🔑10—ORIGINAL APPLICATION TO SUPREME COURT — PRIOR APPLICATION TO APPELLATE COURT.

Where an application had been made to the district court of appeal for a writ of review, and had been denied by that court, petitioner cannot apply to the Supreme Court for a similar writ, but must petition therein for hearing of the proceeding in the court of appeal.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 17.]

In Bank. Petition by William Snyder against J. A. Plummer, as Judge of the Superior Court, for a writ of review. Petition denied without opinion, and application for rehearing denied.

A. H. Carpenter, of Stockton, for petitioner.

PER CURIAM. In denying a rehearing it is proper to state that the petition for a writ of review was denied because it showed on its face a prior application to the District Court of Appeal of the Third Appellate District, and a denial by that court. This barred a new application for such a writ to this court; the only remedy of petitioner being a petition for hearing in this court of the district court of appeal proceeding.

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174 Cal. 204

SNYDER v. PLUMMER, Superior Court Judge. (Sac. 2630.)

(Supreme Court of California. Jan. 11, 1917.)

CERTIORARI 🔑5(1) — ORDERS REVIEWABLE — APPEALABLE ORDER.

The Supreme Court will not grant a hearing after decision by the district court of appeal on petition for certiorari to review an order of the superior court made after final judgment, from which order an appeal lies under Code Civ. Proc. § 963, so that certiorari will not lie under section 1068, authorizing certiorari when there is no appeal nor plain, speedy, and adequate remedy.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 5.]

Petition by William Snyder against J. A. Plummer, as Judge of the Superior Court. On petition for a hearing in the Supreme Court after decision by the district court of appeal. Petition denied.

See, also, 162 Pac. 1040.

A. H. Carpenter, of Stockton, for petitioner.

PER CURIAM. In denying the petition for a hearing in this court after decision by the District Court of Appeal of the Third Appellate District, we deem it proper to say that the denial is made solely for the reason that the order of the superior court sought to be reviewed is a special order made after final judgment, and is therefore one from which an appeal lies. Section 963, Code Civ. Proc. This being so, certiorari will not lie. Section 1068, Code Civ. Proc.

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31 Cal. App. 701

PACIFIC COAST CASUALTY CO. v. PILLSBURY et al., Industrial Acc. Commission. (Civ. 1958.)

(District Court of Appeal, First District, California. Oct. 18, 1916. On Petition for Rehearing, Nov. 16, 1916.)

1. MASTER AND SERVANT 🔑405(4) — INDUSTRIAL ACCIDENT COMMISSION—FINDINGS.

The findings of the Industrial Accident Commission that employer knew that deceased and other employés operated the elevator which killed deceased when he attempted to operate it, although this was contrary to rules, and that employer did not make plain to deceased the danger, *held* not sustained by the evidence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. 🔑405(4).]

2. MASTER AND SERVANT 🔑417(3) — INDUSTRIAL ACCIDENT COMMISSION—WRIT OF REVIEW.

A writ of review will lie to review proceedings of Industrial Accident Commission in awarding compensation, where the evidence fails to support their findings.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. 🔑417(3).]

On Petition for Rehearing.

3. MASTER AND SERVANT 🔑380—PROCEEDING BEFORE INDUSTRIAL ACCIDENT COMMISSION —EVIDENCE—WILLFUL MISCONDUCT.

Where an employé met his death in attempting to operate an elevator contrary to rules and warnings, his action constituted willful misconduct, and will prevent recovery before Industrial Accident Commission, in the absence of a showing that disregard of rules was condoned by the employer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. 🔑380.]

Petition by the Pacific Coast Casualty Company to review the proceedings of A. J. Pillsbury and others, constituting the Industrial Accident Commission of the State of California, in the matter of the application of Mrs. J. Cassell to recover compensation for the death of Simon Cassell under the Workman's Compensation Act (St. 1913, p. 279). Writ granted, and action of the Commission annulled. Petition for rehearing denied.

T. T. C. Gregory, of San Francisco, for petitioner. Chris M. Bradley, of San Francisco, for respondents.

PER CURIAM. This is an application for a writ of review directed against the Industrial Accident Commission by the petitioner, who is the insurer of the Simon Millinery Company of San Francisco, which company was the employer of one Simon Cassell, an errand boy, who was killed in an elevator accident during the time of his employment by said company.

The facts of the case as disclosed by the record are briefly these: The deceased, Simon Cassell, entered the employment of the Simon Millinery Company as an errand boy about one month prior to the accident in which he met his death. The place of business of the Simon Millinery Company was in the Lincoln building, situate near the corner of Fifth and Market streets in said city. There were several passenger and freight elevators in said building. The tenants in the portion of the building fronting on Market street used chiefly the freight and passenger elevators near the entrance to said building on said street. There was also a freight and passenger elevator chiefly used by tenants in that portion of the building fronting upon Fifth street, and it was in the freight elevator near the Fifth street entrance that the deceased met with the accident which caused his immediate death. On the 3d day of September, 1915, the deceased was directed by his employer, the Simon Millinery Company, to go to a certain place on Mission street and obtain some piping. He went upon said errand, and returning with the piping attempted to enter the building and ascend to the floor upon which his employer had its place of business by way of the freight elevator near the Fifth street entrance, and in so doing to operate the elevator himself. In some manner not made very clear by the evidence he was crushed and killed in the attempt to thus operate this elevator.

There was evidence introduced before the commission that upon entering the employment of the Simon Millinery Company the deceased had been expressly warned not to ride in or attempt to operate the freight elevators under penalty of immediate discharge. There was also some evidence before the commission tending to show that notices were posted at or near the entrances to both freight elevators in the building warning persons against attempting to operate or ride in them without the presence of the regular operator of said elevators. There was also some evidence before the commission that these warnings or notices had been occasionally disregarded by certain of the employés of the Simon Millinery Company, and that upon several occasions the errand boys had ridden up and down in the freight elevators of the building in violation of the express warning and instruction not to do so.

[1, 2] We have examined the record carefully for the purpose of determining whether there is any evidence therein that these instances of the disregard of the instructions and warnings on the part of its employés were ever brought to its notice, and as to whether or not there is any evidence showing that the employer was derelict in not taking notice of the fact that its orders were being disobeyed by its employés; but upon such examination we have failed to find any evidence whatever of any such knowledge on the part of the employer, or of any such negligence on its part from the fact of which such knowledge would be chargeable. This being so, we are of the opinion that the finding of the Industrial Accident Commission "that the deceased and other employés of the defendant frequently operated said Fifth street elevator by themselves without reproof or discipline by said defendant," and also the finding "that the signs placed by the owners of said building upon the doors of the elevators were habitually disregarded without protest," and also the finding "that the protection of its employés from serious bodily injury or death in connection with the operation of such elevators was not made plain to them nor to Cassell in a manner suited to the intelligence of a person of his age," are without evidence to support them, and are contrary to the evidence in the case; and that, since these findings of fact were essential to the recovery of the applicant before the Industrial Accident Commission, the action of that body in awarding such compensation without any evidence sufficient to sustain said findings was beyond the jurisdiction of the commission, and hence that a writ of review would properly lie, and that such writ should issue, and that the action of the commission in awarding such compensation should be annulled.

It is so ordered.

On Petition for Rehearing.

[3] The petition for rehearing is denied. We are of the opinion that the undisputed evidence in the case showed that the deceased had been expressly warned not to ride in, or attempt to operate, the freight elevators in the building in which he met his death, under penalty of discharge and that notices were posted at, or near, the entrance of such elevators of similar import, and that the disregard of such warning by the employé must, in the absence of evidence mitigating such disobedience, be held to constitute such willful misconduct as would prevent a re-

covery before the commission, where, as in the instant case, there is no evidence tending to show that the disregard of its warnings, orders, and notices was condoned by the employer.

(32 Cal. App. 337)

BURKETT v. DOTY. (Civ. 1543.)

(District Court of Appeal, Third District, California. Dec. 15, 1916. Rehearing Denied by Supreme Court. Feb. 12, 1917.)

1. Assignments 🔑137 — Delivery—Presumptions.

As Civ. Code, § 1055, declares that there is a presumption that an instrument was delivered on the day of its date, the delivery of a written assignment is sufficiently established by plaintiff's production of the same at trial; it appearing that plaintiff had previously had the instrument recorded.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 234; Dec. Dig. 🔑137.]

2. Bills and Notes 🔑310 — Validity — Transfers.

That a grantor did not deliver possession of notes assigned to the grantee does not affect the validity of the transfer; the instrument not being rendered executory because no actual delivery was made.

[Ed. Note.—For other cases, see Bills and Notes, Cent.Dig. §§ 742, 743; Dec.Dig. 🔑310.]

3. Sales 🔑1(2)—Transfer of Possession —Necessity.

A sale of personal property is good as between the parties whether possession be delivered or not; want of delivery rendering it void only as to creditors and subsequent purchasers.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 3; Dec. Dig. 🔑1(2).]

4. Wills 🔑89—Validity — Testamentary Instruments.

An assignment of notes which provided that it should not be recorded until the grantor's death was duly executed and delivered to the assignee. After the assignor's death it was recorded and the assignee claimed the notes. Civ. Code, § 1054, declares that a grant takes effect upon delivery, while section 1056 declares that a grant cannot be delivered to the grantee conditionally. *Held*, that as the assignment was delivered it conveyed a present interest, and was not testamentary in its character; the purpose of recordation as shown by Civ. Code, §§ 1213, 1217, being to serve notice on other persons, and so the provision withholding the instrument from record did not affect its character.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 218; Dec. Dig. 🔑89.]

5. Evidence 🔑392—Parol Evidence Rule —Admissibility.

Where a written assignment showed the conveyance of an immediate present interest, parol evidence contradicting its terms is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1733–1735½; Dec. Dig. 🔑392.]

6. Gifts 🔑4—Validity—Consideration.

Where a gift inter vivos is perfected by delivery of possession or delivery of a deed of gift, it is complete, though unsupported by consideration.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 3, 17; Dec. Dig. 🔑4.]

7. Evidence 🔑419(8) — Parol Evidence Rule—Consideration.

While the recitals of consideration in a written instrument are not conclusive as to the amount or character of the consideration when those matters are in issue, evidence of want of consideration or of a different consideration is not admissible to vary and defeat the covenants by which rights are expressly stated, and hence an assignment of notes duly executed cannot be defeated by proof that the recitals of consideration were untrue.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1919; Dec. Dig. 🔑419(8).]

8. Principal and Agent 🔑72 — Conversion By Agent—What Constitutes.

The holder of notes having assigned them, directed her agent to procure them, and she indorsed the notes, and the agent, negotiated one note. After the holder's death and his appointment as administrator of the holder's estate, the agent took up the note and refused to surrender it to the assignee. *Held*, that the agent was guilty of a conversion, and could not defeat recovery on the theory of agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 148, 149; Dec. Dig. 🔑72.]

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Emma M. Burkett against W. M. Doty. From a judgment for defendant, plaintiff appeals. Reversed.

Devlin & Devlin, of Sacramento, and Lon Bond, of Chico, for appellant. Guy R. Kennedy, of Chico, and W. H. Carlin, of Marysville, for respondent.

CHIPMAN, P. J. This is an action to recover damages for the conversion of a promissory note executed September 25, 1911, for $1,395.85 by Harry Harrington to Nellie Mead Doty, the then wife of defendant. This note was the first of a series of three notes executed and delivered by Harrington to Mrs. Doty each of the same date and for the same amount and secured by mortgage. The conversion is alleged to have occurred April 1, 1912.

Defendant answered: Denied that plaintiff was on that day or at any other time the owner or entitled to the possession of said note or of any moneys due or to become due thereon; alleged that in the month of March, 1912, Nellie Mead Doty was the owner of said note, and by her direction defendant cashed the same at the Sacramento Valley Bank of Biggs, and thereafter in said year and prior to her death, at her request and direction, he applied the proceeds of said note to her use and benefit to the extent of about $1,000; that said Nellie Mead Doty died on the 18th day of July, 1912, and thereafter, to wit, on April 7, 1913, defendant was duly appointed administrator of her estate; that all the moneys realized from said note and not expended for the benefit of said Nellie during her life were received by defendant as such administrator and not otherwise, and he has since retained possession thereof; denied that on April 1, 1912, or at any other time, defendant unlawfully, or at all, converted or disposed of said note, and denied that plaintiff ever had any ownership in, or right or title to, said note or to any of the moneys represented thereby.

The cause was tried by the court without a jury, and the following findings were made by it: That plaintiff was not, on April 1, 1912, or at any other time, the owner of or entitled to possession of said note, which was on April 1, 1912, of the value, principal and interest, of $1,486.57; that on said day, or at all, defendant did not, nor has he at any time, unlawfully, or at all, converted said note to his own use, or at all, or "done anything in connection therewith except as hereinafter in these findings set forth"; that said note was executed as alleged in the complaint and thereafter, as alleged in the answer and while in the possession of Mrs. Doty, the said note was by her delivered to defendant who thereafter, under her instructions, as alleged in the answer, delivered the same to said bank "and from said bank then and there received the full value * * * and applied and used all thereof to and for the use and benefit of said Nellie Mead Doty, something over $1,000 of the same being so applied and used during her lifetime and the remainder after her death in payment of her just debts and liabilities"; that she died July 18, 1912, and defendant was, as alleged in the answer, duly appointed administrator of her estate, and he thereupon took charge of all her estate and has ever since retained such possession; that said note was not paid at its maturity and since his said appointment "defendant was called upon by said bank to protect the said indorsement of said promissory note made by said Nellie Mead Doty aforesaid, and accordingly he did protect the same by paying to said Sacramento Valley Bank the full amount of said promissory note, paid as aforesaid by said bank when it cashed the same as hereinbefore specified; and thereupon said bank delivered said promissory note to defendant, who has ever since retained and now does retain the same," but at no time has plaintiff ever had any right to or title in said note or any moneys represented thereby. Judgment was accordingly entered for defendant that plaintiff take nothing by the action. Plaintiff appeals from the judgment on bill of exceptions.

Plaintiff introduced the Harrington notes and mortgage, and also the assignment of the same to plaintiff. The latter reads:

> "Know all men by these presents: That Nellie Mead Doty, of the city of Biggs, county of Butte, state of California, the party of the first part, for and in consideration of ten ($10.00) dollars, lawful money of the United States of America, to her paid by Emma M. Burkett (a widow), of the city of Chico, county of Butte, state of California, the party of the second part, the receipt whereof is hereby acknowledged, by these presents assigns to the party of the second part, a certain indenture of mortgage, bearing date the 25th day of September, 1911, made by Harry Harrington, of the county of Butte, state of California, on the following land and premises: [Description.] Together with the three (3) promissory notes therein described, and the money due and to become due thereon, with the interest. * * * This assignment of said mortgage is not to be placed as of record during the lifetime of Nellie Mead Doty, the party of the first part."

Duly executed "and recorded at the request of Emma M. Burkett on July 19, 1912, in Book B of Assignments of Mortgages, at page 483, records of Butte county."

It was stipulated that on December 30, 1911, Mrs. Doty was the owner of the note and mortgage in question, and that she was the wife on that day of defendant, and that she died July 18, 1912; "that the note itself was never delivered to plaintiff, but remained in the custody of Nellie Mead Doty until the time it was turned over by her to the defendant in this action." Defendant testified that the note in question on December 30, 1911, was in a tin box in the vault of said bank to which both he and his wife had access.

He testified:

> "In February or March of 1912, Mrs. Doty was taken sick, and we had to take her to the hospital, and she realized we had to have money and she had me go to the bank and make arrangements with Mr. Brough, the cashier of the Sacramento Valley Bank, to get money on the note and use it for her sickness. In accordance with those instructions, I borrowed the money first. I took the note and had her indorse it and put it in the bank. I had to go to the bank and ask for the box and take out the note. At that time the note was not indorsed. I took it to Sacramento where she was sick, and she indorsed it there. I think it was in the Sisters' Hospital at Sacramento. I then returned it to the bank as collateral for the money I borrowed. During her illness I drew against this note and paid her bills. This was done under her instructions."

Over the objection of plaintiff, he testified as to the amount of money used prior to Mrs. Doty's death for her benefit, and also after her death for funeral expenses, doctor's bills, etc., amounting in all to "more than the full amount of the note." Over objection, proof of her death, and of the appointment of the administrator was made. On cross-examination, he testified:

> "By Mr. Schwab: Q. Mr. Doty, I understood you to say that you took this note from the box in the Sacramento Valley Bank and took it to the Sacramento Hospital at Sacramento and had Mrs. Doty indorse it and brought it back to the bank; is that right? A. That is right. Q. And then you, as I understand you to say, that you deposited as collateral that note and borrowed money on it—that is a fact—did you actually pass title to it? Did you negotiate it? A. Did I negotiate it? What do you mean? Q. Tell us what you did; I don't quite understand you; you said at one time that you borrowed money on it, and then afterwards that you got this money and deposited it in the bank there; what did you do? I want to get the facts, that is all. A. I negotiated with the bank that I might borrow money on the note. Q. What has become of the note now? A. I have it; I took it up afterwards. Q. Do you still own it now? A. Yes, sir. Q. In other words, at the present time, you have possession of the note, and it

is a binding obligation as to Harry Harrington, the maker of the note? A. Yes, sir. * * *

"Mr. Schwab: Q. Is it the fact that you claimed the note as administrator of the estate of Nellie Mead Doty, as administrator of that estate? A. I claim it as my own.

"The Court: Q. Did you take it up with your own money? A. Yes, sir; I took it up with my own money.

"Mr. Schwab: Q. You still claim possession of it? A. Yes, sir; certainly. Q. And still claim the title to it, and that you own it? A. Yes, sir; certainly. Q. And you never did actually pass title to the bank at the time that you got the money there? You simply deposited it as a collateral security, is that the fact? A. I placed it in the bank to draw against it, and if he had taken it all up and the note had been paid, I would have had nothing to do with it. Q. The understanding was that that was simply a collateral security? A. Necessarily so; we had used all of the note, and if Mr. Harrington had gone forward and paid the note there would have been nothing more to do."

Over objection by plaintiff, the witness testified:

"A. The last of the series remained there up to the time of my wife's death. The second of the series, she realized that we were going to use a great deal of money, that she had better indorse the other one and use it the same as we did the other one, and I went to the box and took up the same as I did the other one; took it to the house, and she indorsed it. I then took it and put it in my safe and never used it. Q. She had indorsed that looking to the time that it might be needed? A. Yes, sir. She died before it was needed. No. 2 of the series remains in my possession, and No. 3 remained in the box unindorsed. No. 1 had been indorsed and used."

Over plaintiff's objection plaintiff was called as defendant's witness, and testified that she did not pay Mrs. Doty anything for the assignment. A motion to strike out the answer was denied, and plaintiff excepted.

This is substantially the evidence in the case. There was no evidence of any circumstances attending the assignment or of the relation of the parties to each other or as to the motive of Mrs. Doty in making the assignment. There was no suggestion of fraud, mistake, or undue influence in the execution of the assignment.

Plaintiff's position is that by the assignment the title to the note and mortgage in question passed absolutely to plaintiff, although the note was then in the possession of Mrs. Doty and remained in her possession, and although she afterwards indorsed it and her husband by her direction used it as collateral for a loan for her benefit. It was because of this view of the assignment that plaintiff objected as immaterial, irrelevant, and incompetent, to testimony as to the hypothecation of the note by Mrs. Doty's direction and the uses made of the money borrowed by her husband; also the evidence as to her death and the appointment of the administrator of her estate; also the testimony that the notes were kept in a box to which Mrs. Doty and her husband had access; also the testimony of plaintiff, when called by defendant, that she paid no money consideration for the assignment.

The position of defendant is that "the whole transaction shows conclusively that Mrs. Doty did not intend to deliver or part title with any of the promissory notes"; that "she didn't indorse them, but on the contrary, she kept them in her possession with a view to using them if necessary"; that there is nothing in the transaction "which shows any evidence of a delivery of the property, which, of course, is capable of manual delivery, or of any intent to do so during the life of the donor"; that "the plaintiff testified that no consideration was paid, and that unless she can establish the transaction as a gift she will have no standing before this court (Civ. Code, §§ 1146, 1147, 1149; Hart v. Ketchum, 121 Cal. 426, 53 Pac. 931)"; that "a written gift need not be actually delivered, but no gift of personal property, whether written or verbal, is complete and effectual unless the donor intends to divest himself completely of control or dominion over the property given," citing Estate of Hall, 154 Cal. 529, 98 Pac. 269; Noble v. Garden, 146 Cal. 225, 79 Pac. 883, 2 Ann. Cas. 1001; Noble v. Learned, 153 Cal. 245, 94 Pac. 1047; Humble v. Gay, 168 Cal. 516, 143 Pac. 778. Treated as a sale, defendant's position is that "not being accompanied by any immediate or continued change of possession the transaction was void (Civ. Code, § 3440), and void not only as to creditors, but as to the executrix of the will (Kelly v. Murphy, 70 Cal. 560, 12 Pac. 467)."

[1] It seems to us that the decision in this case must turn upon the admissibility of the evidence objected to by plaintiff. If that evidence can be considered it has a tendency to show that the donor or assignor did not intend to presently pass the title to the property. We cannot attribute to Mrs. Doty a purpose to knowingly violate her transfer of the notes and mortgage to Mrs. Burkett. She must be held to have acted upon the assumption that she had a right to dispose of the note in question and to convert the proceeds to her own use notwithstanding assignment to plaintiff. We are brought, therefore, to consider the character and legal effect of the assignment.

The assignment bears date December 30, 1911, was signed and acknowledged of that date, and recites: "Signed, sealed and delivered in the presence of F. F. Carduff." "A grant takes effect so as to vest the interest intended to be transferred only upon its delivery by the grantor." Civ. Code, § 1054. "A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made." Civ. Code, § 1056. There is a presumption that the instrument was delivered on the day of its date. Civ. Code, § 1055. Plaintiff had possession of the instrument and produced it at the trial, having previously caused it to be recorded. This sufficiently established delivery, and there was no evidence to the contrary. Towne v. Towne, 6 Cal. App. 697, 701, 92 Pac. 1050.

[2, 3] The fact that the grantor did not deliver possession of the property to the grantee was a matter of no importance as affecting the completion or efficiency of the transfer. Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471; Francoeur v. Beatty, 170 Cal. 740, 151 Pac. 123. The instrument of assignment was not rendered executory because accompanied by no actual delivery to the transferee of the property transferred. "A sale of personal property is, however, good as between the parties whether the possession be delivered or not. Want of delivery renders it only void as to creditors and subsequent purchasers." Driscoll v. Driscoll, supra. No question arises here as to the rights of creditors or subsequent purchasers.

[4] What Mrs. Doty's motive was in inserting in the grant the provision that "this assignment of said mortgage is not to be placed of record during" her life, is not apparent and can only be conjectured. We have seen that by section 1056 of the Civil Code a grant cannot be delivered to the grantee conditionally. The placing of the instrument of record was not essential to its efficacy. Recordation has no other function than that of notice to the world (Civ. Code, § 1213); and "an unrecorded instrument is valid as between the parties thereto and those who have notice thereof" (Civ. Code, § 1217).

We must look alone to the terms of the instrument to determine whether it is testamentary in nature and not to be operative as a transfer of the property purported to be conveyed by it, until the death of the maker. As was said in Tennant v. John Tennant Memorial Home, 167 Cal. 570, 579, 140 Pac. 242, 246:

> "This is always essential. If the instrument, according to its proper legal effect under the rules of conveyancing, passes at the time of its execution a present interest or title in the property to a third person, although it may be only an interest in a future estate and may be subject to defeat on the happening or nonoccurrence of a future event, it is a present conveyance and not a will."

That the assignment is absolute in its terms and conveyed a present interest in the notes and mortgage cannot be doubted. We can discover nothing in the provision as to recording which shows or has a tendency to show an intention of the grantor to reserve to herself the title to the property or to postpone its enjoyment by the grantee until after the death of the grantor. Nor do we think the clause in question gives any indication that the grantor did not intend to divest herself completely of control or dominion over the property, which is the test given in the cases cited by respondent, such as Estate of Hall, supra, and others. We cannot see that the provision amounted to anything more than a request that the assignment be not recorded until after the assignor's death. But it was held in Dimmick v. Dimmick, 95 Cal. 323, 328, 30 Pac. 547, that the fact that the grantor requested the grantee to refrain from recording the instrument until after his death was entirely immaterial.

[5] If, as we hold, the clause in question had no operative effect upon the instrument as a present grant of the property, it was not competent to prove by parol any facts "tending to establish an agreement contrary to the plain import of the written assignment, which on its face is absolute." Albert v. Albert, 12 Cal. App. 268, 271, 107 Pac. 156. See Mowry v. Heney, 86 Cal. 471, 476, 25 Pac. 17.

[6] Proof that no consideration was paid for the assignment doubtless was admitted to show that the transaction was a gift, but even so, the rule of construction would be the same as in case of a grant—i. e., the language of the instrument must control. As was said in the Driscoll Case:

> "Where a gift inter vivos is perfected by delivery of possession of the thing or delivery of a deed of gift it is complete, although made without any consideration."

[7] The assignment stated that it was made in consideration of $10 in hand paid to and received by the assignor. The rule is thus stated in Arnold v. Arnold, 137 Cal. 291, 296, 70 Pac. 23, 24:

> "As to the subject of consideration, the law is, that while the recitals of consideration in written instruments are not conclusive as to the amount or character or payment of the consideration, when these latter matters are the subject of litigation, evidence of want of consideration, or of a different consideration, is not admissible for the purpose of varying, contradicting, and defeating covenants by which rights are expressly vested." Hendrick v. Crowley, 31 Cal. 472; Feeney v. Howard, 79 Cal. 525, 530, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162, and many other cases, are cited to like effect.

[8] The evidence showed a conversion by defendant. 38 Cyc. pp. 2005, 2009; Dodge v. Meyer, 61 Cal. 405; Wood v. McDonald, 66 Cal. 546, 6 Pac. 452. Defendant cannot escape liability on the ground that he was acting as the agent of Mrs. Doty. 28 Am. & Eng. Ency. of Law, p. 688; 38 Cyc. p. 2056 (d); Swim v. Wilson, 90 Cal. 126, 27 Pac. 33, 13 L. R. A. 605, 25 Am. St. Rep. 110.

The judgment is reversed.

We concur: BURNETT, J.; HART, J.

32 Cal. App. 357

SUPERIOR CALIFORNIA FRUIT LAND CO. et al. v. GROSSMAN et al.

(Civ. 1577.)

(District Court of Appeal, Third District, California. Dec. 15, 1916. Rehearing Denied by Supreme Court Feb. 12, 1917.)

1. QUIETING TITLE 🔑30(2)—PARTIES PLAINTIFF—JOINDER—STATUTE.

Under Code Civ. Proc. § 381, providing that any two or more persons claiming any estate or interest in land under a common source of title may unite in an action against any person claiming an adverse estate or interest therein to determine such adverse claim, or to remove a cloud, plaintiff fruit land company acquiring title through a third person, who had acquired under an agreement to purchase from the holder of an option, and plaintiffs' grantees of a part of the land might unite in a suit to quiet title, pursuant to section 749, providing for the determination of adverse claims to real property, against defendants claiming under an earlier agreement with the option holder as the common source of title for the purchase of all the lands owned by the respective plaintiffs.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 65; Dec. Dig. 🔑30(2).]

2. SPECIFIC PERFORMANCE 🔑90—DEFENSES—LACHES.

Defendants in an action to quiet title, who, under a cross-complaint, sought to set up a cause of action for specific performance of an option contract executed to them by an option holder, as the common source of title, which cross-complaint was filed three years and nine months after such contract to purchase, and after the option holder had sold and conveyed to a third party through whom the plaintiffs claimed, who did not show any valid tender of the money representing the purchase price, and who after record of the instruments under which plaintiffs claimed, and after plaintiffs' possession, had remained silent and inactive, lost their rights of action in equity, if any, by reason of laches.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 228; Dec. Dig. 🔑90.]

3. SPECIFIC PERFORMANCE 🔑114(1) — DAMAGES—BREACH OF CONTRACT —PLEADING.

The fact that Civ. Code, § 3387, provides that it is presumed that the damages for failure to comply with the terms of a contract for the sale of real estate will not furnish adequate compensation does not relieve the pleader from showing such damages and stating a cause for the equitable interposition of the court.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356, 366, 367, 370; Dec. Dig. 🔑114(1).]

4. PLEADING 🔑193(4)—DEFENSES—LACHES.

The defense of laches, which in substance is that the complaint does not show equity or fails to state facts sufficient to constitute a cause of action, can be taken advantage of by demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 432; Dec. Dig. 🔑193(4).]

5. SPECIFIC PERFORMANCE 🔑105(3)—LACHES —LIMITATIONS.

The statute of limitations, which would apply to an action at law, does not determine a question of laches in equity, where one is seeking specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 327–341; Dec. Dig. 🔑105(3).]

Appeal from Superior Court, Colusa County; H. M. Albery, Judge.

Action to quiet title by the Superior California Fruit Land Company and others against A. B. Grossman and others, in which defendants sought specific performance of an option or agreement to sell to them. Judgment and decree for plaintiffs, and defendants appeal. Affirmed.

R. H. Countryman, of San Francisco, for appellants. De Ligne & Jones, of Sacramento (H. T. Hiatt, of Sacramento, of counsel), for respondents.

PLUMMER, Judge pro tem. Plaintiffs instituted this action to remove a cloud therefrom and quiet their title to a tract of land, embracing 6,173 acres, situate in the county of Colusa. The defendants, by answer and cross-complaint, sought specific performance of a certain option or agreement of sale relating to the same premises. Plaintiffs had judgment and decree of the trial court, as prayed for, from which judgment and decree defendants appeal, the merits of which may be determined by the solution of two questions:

First. Was the trial court right in holding that the plaintiffs were entitled to unite in the prosecution of this action?

Second. Was the trial court correct in sustaining the plaintiffs' demurrer to the defendants' cross-complaint?

[1] The cause comes before this court upon the judgment roll, and involves only the ruling of the trial court upon the demurrers interposed to the pleadings in the court below. The facts as gleaned from the pleadings are as follows: On the 21st day of March, 1908, Hyman Estate Company, being the owner of $^{35}/_{36}$ of the tract of land above referred to, entered into an agreement or option to purchase with one S. Rummelsburg. This agreement was recorded on the 7th day of July, 1910. On the 12th day of March, 1910, the said Rummelsburg entered into a contract or option of sale with appellant Grossman for the whole of the tract of land referred to, which agreement or option was recorded on the 16th day of March, 1910. On the 29th day of March, 1910, it is alleged that the appellant Grossman in writing demanded of Rummelsburg a deed of conveyance of said real property, and of the whole thereof, and also tendered and offered to pay the purchase price of said property; that on the 6th day of May, 1910, the said Rummelsburg entered into an agreement to convey the said lands and premises to one Fleming, which agreement was recorded on the same day; that on the 10th day of May, 1910, the Hyman Estate Company acquired the outstanding $^{1}/_{36}$ interest in and to the lands and premises hereinbefore referred to, the deed to the same being recorded on the 12th day of May, 1910; that on or about the 1st day of July, 1910, the said Fleming assigned his interest in the contract theretofore obtained by him from

Rummelsburg to the fruit company, plaintiff in this action; this assignment was recorded on the same day; that on or about the 26th day of August, 1911, the Hyman Estate Company granted and conveyed all of the premises herein referred to to the said Rummelsburg, the deed being recorded on the day of its date. On the 2d day of July, 1912, the said Rummelsburg granted and conveyed the premises involved herein to the plaintiff Fruit Land Company, which deed was also recorded on the day of its date. The other plaintiffs herein have succeeded to the interest of the Fruit Land Company in a portion of the premises involved in this action, by deeds of conveyance from said company. The price of the land named in the option given to the defendant Grossman was slightly in excess of $80,000.

The complaint filed by the plaintiffs is in the usual form of an action to quiet title, or to remove cloud therefrom, and is directed to the option or agreement to purchase executed and delivered by Rummelsburg to the defendant Grossman. This instrument, by its terms, included and covered all the premises owned by the respective plaintiffs, and constituted the cloud upon the title of the lands held by them severally, and its removal is the object of the action now before the court.

Section 381, Code of Civil Procedure, provides that:

> "Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, * * * may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or of establishing such common source of title * * * or of removing a cloud upon the same."

The common source of title through whom all the parties to this action assert an interest in the real estate hereinbefore referred to is the person Rummelsburg. Plaintiffs derived their title from Rummelsburg, through Fleming, and the defendants claim directly from Rummelsburg. It is difficult to imagine a case that would more completely fit the provisions of section 381 of the Code of Civil Procedure. The action herein is authorized by section 749, Code of Civil Procedure, and the parties who may unite in the prosecution of it are provided for by section 381, as above stated. That this action is properly prosecuted, and that the plaintiffs were properly joined, and that the trial court did not err in overruling the defendants' demurrer for misjoinder, seems to us beyond question. Gillespie v. Gouly, 152 Cal. 643, 93 Pac. 856. A number of other cases might be cited in support of the ruling of the trial court, but this one seems sufficient.

[2] The second question for determination is: Was the ruling of the trial court correct in sustaining the plaintiffs' demurrer to the defendants' cross-complaint? The cross-complaint sought to set up a cause of action for specific performance of the option contract dated March 12, 1910, executed by Rummelsburg and the defendant Grossman, and to enforce the same for the conveyance of the lands and premises herein referred to as against the plaintiffs in this action. Many reasons have been urged by counsel pro and con as to the correctness or incorrectness of the ruling of the trial court, but, for the reasons hereinafter stated, only one needs to be considered, as it is determinative of this question.

The option contract referred to bears date of March 12, 1910. The cross-complaint for specific performance was filed December 8, 1913, almost three years and nine months later. On May 6, 1910, Rummelsburg entered into an agreement to convey the lands and premises to George Fleming. This agreement was recorded on the day of its date, less than two months after the date of the option given by Rummelsburg to the appellant Grossman. All that appellants have ever done towards seeking performance of their contract appears in the following allegation:

> "That the said Grossman, on the 29th day of March, 1910, in writing, demanded of said Rummelsburg a deed of conveyance of said real property, and of the whole thereof, and tendered and offered to pay the purchase price of said property in the sum named and fixed in said agreement, and according to the terms of said agreement," etc.

The cross-complainant further alleges:

> "That no time was fixed in said contract for its performance, or for payment of the purchase price mentioned therein."

From which it appears, from the very language of the defendants' cross-complaint, that the pleader did not state, and the trial court could not conclude, that any valid tender of the money representing the purchase price, to wit, $80,249, had ever been made. It further appears that at the date of the alleged tender the cross-complainant knew that the Hyman estate did not own all of the premises for which Grossman was demanding a deed of conveyance. This interest belonged to a minor, and, by the defendants' cross-complaint, was not acquired until the 10th day of May, 1910. After this date it does not appear that any kind of tender or offer of performance was made by either of the cross-complainants in this action until the 8th day of December, 1913, at which time their pleadings in this action were filed. On the 6th day of May, 1910, the Fleming agreement was made a matter of record, and the subsequent instruments hereinbefore referred to were from time to time recorded. The plaintiffs went into possession thereunder, notwithstanding which the cross-complainants remained silent and inactive for nearly four years.

Have the cross-complainants lost their right of action, if any, in equity, by reason of laches? We think so. The language of Justice Brewer quoted in the case of Troll v. City of St. Louis, 257 Mo. 662, 168 S. W.

175, where the doctrine of laches is thoroughly considered, appears pertinent:

> "No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claims. It gives to the actual and longer possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works out justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many."

[3] It may be noted, in passing, that the cross-complainants do not allege that they have suffered any injury or any pecuniary loss by reason of the failure of Rummelsburg to convey, or that they will suffer any injury or pecuniary loss unless specific performance is enforced herein. The fact that the Civil Code (§ 3387) provides that it is presumed that the damages for failure to comply with the terms of a contract for the sale of real estate will not furnish adequate compensation does not relieve the pleader from showing such damages and stating a cause for the equitable interposition of the court. Herzog v. A., T. & S. F. Ry., 153 Cal. 502, 95 Pac. 898, 17 L. R. A. (N. S.) 428, and cases cited.

[4] The defense of laches can be taken advantage of by demurrer. Such a defense is, in substance, that the complaint does not show equity, or fails to state facts sufficient to constitute a cause of action. The Supreme Court of this state has so held in Marsh v. Lott, 156 Cal. 643, 105 Pac. 968. It was there also held:

> That "no artificial rule as to the lapse of time or the circumstances which will justify the application of the doctrine of laches can be laid down; that each case, as it arises, must be determined by its own circumstances. If, after the vendor's violation or express repudiation of the contract of sale, the vendee delays to proceed in the enforcement of the contract for such a length of time as to constitute acquiescence in vendor's breach, or to create a presumption of abandonment of his right to specific performance, relief in equity will be denied."

In the Lott Case the delay was for a period of three years, five months, and a few days, being less than the period which has elapsed in the case at bar. The fact that Rummelsburg may have had no just reason for violating the terms of his agreement with the cross-complainants (assuming, for the purposes of argument, that such is the case, the terms of the agreement are not before the court, and cannot be considered) does not alter the situation. The record shows Rummelsburg, after giving the option contract to the defendant Grossman, immediately contracted with one Fleming, that the premises were thereafter conveyed to Fleming, and by mesne conveyance passed to the plaintiffs, all of these instruments being of record, and the plaintiffs coming into possession under the instruments referred to. To these facts the language of Mr. Pomeroy, in his work on Specific Performance, is applicable:

> "Where one party, even without any just or sufficient reason for so doing, and as a mere act of arbitrary will, notifies the other that he will not perform the contract, shall treat it as at an end, acquiescence by the party notified will cut off the latter's right of enforcement, and this acquiescence will be sufficiently shown by a delay in commencing a suit which would otherwise be too short to prejudice his rights."

Or, as otherwise stated in 26 Am. & Eng. Ency. of Law:

> "If, after the violation or express repudiation of the contract, the party seeking specific performance delays to proceed for such a length of time as to constitute acquiescence in the breach, or a presumption of abandonment of his right to specific performance, relief in equity will be denied."

[5] The statute of limitations, which would apply to an action at law, does not determine the question of laches in equity, where one is seeking specific performance. Marsh v. Lott, supra, and cases there cited.

The question of laches in actions for specific performance has been passed upon a number of times by the Supreme Court of this state, and all of them enforce the doctrine, even though the action would not be barred if it were one at law.

In Fowler v. Sutherland, 68 Cal. 414, 9 Pac. 674, the complaint showed that a period of two years and three months had elapsed before specific performance was sought. No relief was granted, even though the party seeking specific performance had been let into possession.

In O'Donnell v. Jackson, 69 Cal. 622, 11 Pac. 251, relief was denied on the ground of laches where a period of a little over 3 years had elapsed. The party seeking specific performance had in this case also taken possession of the premises in controversy.

In Requa v. Snow, 76 Cal. 590, 18 Pac. 862, it was held that:

> "Specific performance of a contract for the sale of land, at the instance of the vendee, will be refused when there has been an unexplained delay by him of upwards of three years in performing the conditions of the contract with respect to the payment of the purchase price."

This case cites with approval the case of Green v. Covillaud, 10 Cal. 317, 70 Am. Dec. 725, where it was held that a delay of between twenty-one and twenty-two months was sufficient to bar the remedy on the grounds of laches.

The only explanation offered by the defendants for their delay herein is that in the summer of 1910 (date not stated) Rummelsburg left the state of California, and did not return until the spring of 1911 (date not stated), and that Rummelsburg never offered to convey, and that no time is fixed in the contract for its performance or for the payment of the purchase price.

As before stated, within two months after the execution of the option contract delivered to Grossman, Rummelsburg entered into an agreement of sale with other parties, and thereafter conveyed to them. The contract held by the defendants fixed no time for payment, in which case the law provides that it must be within a reasonable period.

The absence of Rummelsburg from the state of California was, at most, only for a few months, and offered no reason why the defendants did not promptly institute action to enforce their right to specific performance, if any existed under their contract, immediately after the agreement of sale entered into between Rummelsburg and Fleming, through whom the plaintiffs claim. During all the period referred to herein the plaintiffs, as appears from the pleadings and the judgment roll, were in possession of the premises in dispute, and their title should not be disturbed unless valid reasons exist therefor, especially where the cross-plaintiffs do not even allege that they have been injured.

For the reasons herein given, we are of the opinion that the defendants' cross-complaint does not state facts sufficient to constitute a cause for specific performance, and that the question of laches was properly raised by demurrer.

The judgment of the lower court is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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32 Cal. App. 804

SUPERIOR CALIFORNIA FRUIT LAND CO. et al. v. MAY. (Civ. 1578.)

(District Court of Appeal, Third District, California. Dec. 15, 1916. Rehearing Denied by Supreme Court Feb. 12, 1917.)

Appeal from Superior Court, Colusa County; H. M. Albery, Judge.

Action by the Superior California Fruit Land Company and others against E. F. May. Judgment for plaintiffs, and defendant appeals. Judgment affirmed.

R. H. Countryman, of San Francisco, for appellant. De Ligne & Jones, of Sacramento (H. T. Hiatt, of Sacramento, of counsel), for respondents.

PLUMMER, Judge pro tem. This action, No. 1578, is a companion cause of action to No. 1577, 162 Pac. 1046, this day decided, and for the reasons therein given the judgment in this action is hereby affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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32 Cal. App. 364

BRAZIL v. AZEVEDO et al. (Civ. 1852.)

(District Court of Appeal, First District, California. Dec. 16, 1916.)

1. Bankruptcy 🔑391(1)—Effect on Other Actions—Jurisdiction of State Court.

While under Bankr. Act July 1, 1898, c. 541, § 11a, 30 Stat. 549 (U. S. Comp. St. 1913, § 9595), providing for stay of suits pending until adjudication on the petition in bankruptcy, where the claim is one for which a discharge would be a release, all such actions are stayed, the state court in which a suit on such a claim is pending is not deprived of jurisdiction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 637–642, 644–648; Dec. Dig. 🔑391(1).]

2. Partnership 🔑212—Actions Against—Complaint—Ambiguity.

An amended complaint against several defendants constituting a partnership is not ambiguous and uncertain for alleging that each defendant became indebted to plaintiff for the goods furnished which were furnished at the special instance and request of each of the defendants, since the liability of any one defendant would be established by proof that the goods were supplied to the copartnership at the request of any copartner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 404–407, 410, 414; Dec. Dig. 🔑212.]

3. Partnership 🔑212—Actions Against—Complaint—Ambiguity.

A complaint in an action against a copartnership is not ambiguous for failure to disclose whether the partnership was formed within the state or whether the business was conducted and the goods sold in the state, where the action was brought in a court of general jurisdiction, and personal service was had upon one copartner who appeared in person and by counsel.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 404–407, 410, 414; Dec. Dig. 🔑212.]

4. Damages 🔑68—Measure—Interest.

Under Civ. Code, § 3287, providing that every person entitled to recover damages certain, the right to which is vested on a particular day, can also recover interest from that day, the seller of goods to a partnership on contract at certain prices or current market value, who also has a claim for agreed rental or for money loaned with interest fixed by agreement, can recover interest.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 141–143; Dec. Dig. 🔑68.]

5. Assignments 🔑41 — Sufficiency—Compliance with Bankruptcy Act.

Though an assignment may not be sufficient in form to comply with the rule of the United States District Court in bankruptcy proceedings, that court has not laid down the requisites for a valid assignment of a chose in action generally.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 76, 77; Dec. Dig. 🔑41.]

6. Appeal and Error 🔑757(3)—Scope of Review—Record—Sufficiency.

The court on appeal does not always deem failure to comply with the rule, requiring evidence referred to by counsel in support of a point to be printed in the brief, a sufficient reason for refusing to consider a point that is apparently meritorious.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. 🔑757(3).]

7. Partnership 🔑219(3)—Effect of Discharge in Bankruptcy — Judgment Against Solvent Partner.

Since a copartner while his obligation is joint is still liable to a creditor for the entire amount of the debt, where the creditor joined the partners and the partnership, but all save one partner had been discharged in bankruptcy, a judgment against the remaining partner alone was proper.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 434; Dec. Dig. 🔑219(3).]

Appeal from Superior Court, Alameda County; J. O. Moncur, Judge.

Action by M. S. Brazil against Manuel Azevedo and others, as a copartnership operating the Melrose Central Creamery. From judgment for plaintiff, Azevedo appeals. Affirmed.

A. Q. Lomba and W. W. Moreland, both of Oakland, for appellant. Gonsalves & Keller, of Oakland, for respondent.

LENNON, P. J. This action was brought against Manuel Azevedo, John S. Marshall, J. Rodgers, and Melrose Central Creamery, the latter being a copartnership consisting of the three individual defendants named, and was for the recovery of the value of merchandise sold by the plaintiff to said copartnership, and also for the recovery of various amounts due other creditors and which had been assigned to the plaintiff. After trial judgment went in favor of the plaintiff and against defendant Manuel Azevedo, it having appeared by the answer of Azevedo's codefendants—and which was admitted to be true by the plaintiff—that in bankruptcy proceedings they had severally been discharged from the indebtedness upon which the plaintiff's claim was founded. The appeal is by Azevedo from the judgment, and the first point made by him is that his demurrer to the amended complaint should have been sustained. The demurrer was upon the ground of lack of facts, and particularly upon the ground that the trial court had no jurisdiction to proceed with the trial of the action because it was shown by the averments of the amended complaint that bankruptcy proceedings were pending in the United States District Court against the copartnership of which appellant and his other codefendants were members and against his said copartners.

[1] The pendency of these proceedings in bankruptcy did not deprive the superior court of jurisdiction of this cause. Section 11a of the United States Bankruptcy Act of 1898 provides that:

> "A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined."

It is apparent from this provision of the act that while a suit of the character mentioned is stayed until the adjudication or dismissal of the petition, and may be further stayed by the United States District Court as therein provided, a state court in which such a suit is pending is not deprived of jurisdiction. Speaking of the effect of this section of the Bankruptcy Act, it is said in Collier on Bankruptcy (6th Ed.) at page 145:

> "But the state court does not lose jurisdiction (citing Bindseil v. Smith, 5 Am. Bank. R. 40). The stay is directed to the suitor, not the court, and the latter may go on if the cause is moved by the person enjoined, and a judgment resulting will be valid. The remedy of a party thus aggrieved is in contempt proceedings."

[2] It is also urged that the amended complaint is ambiguous and uncertain for the reason that it is therein alleged that each of the defendants became indebted to the plaintiff for the goods furnished, and that they were so furnished at the special instance and request of each of the defendants. We do not see that such an allegation makes the complaint either ambiguous or uncertain. The allegation might or might not be susceptible of proof, but the appellant's liability would be established by proof that the goods were supplied to the copartnership at the request of any of the copartners. The apprehension that the plaintiff was seeking to recover his total claim against each of the partners was set at rest by the proof offered and by the amount of the judgment rendered.

[3] Another ground of ambiguity urged is that the complaint did not disclose whether the partnership was formed in the state of California, nor whether its business was conducted and the goods sold in this state. In view of the fact that the action was brought in a court of general jurisdiction, that personal service was had upon the appellant, who appeared in person and by counsel, these matters became immaterial. We think it evident that the court committed no error in overruling the demurrer to the amended complaint.

[4] Appellant next complains that the court allowed interest on the various amounts found to be due to the plaintiff. As the liability of the defendant was in each instance based upon contract for goods sold at certain prices or at current market value, or was for an agreed rental or for money loaned with interest fixed by agreement, the court was justified under section 3287 of the Civil Code in allowing interest as it did.

[5] The form of the assignment to the plaintiff of certain claims included in his demand is also criticized as not complying with a certain rule of the United States district court. As to this it is sufficient to say that while that court in bankruptcy proceedings might not recognize an assignment unless made in accordance with its rule, that court has not undertaken to lay down requisites for a valid assignment of a chose in action generally.

[6] Certain findings of the court as to the several amounts due on claims are also attacked as not supported by the evidence, and certain portions of the record are referred to in support of appellant's contention. The respondent in his brief, in answer to these objections of the appellant, has contented himself with saying:

> "As we understand the rules of this court and the law applicable to appeals under the alternative method, we do not believe that that portion of the brief headed 'The Evidence' contains any matters which we should be justified in taking up the time of this court in answering."

If by this the respondent alludes to the rule of the court requiring any evidence referred to by counsel in support of a point to be printed in the brief, and to the neglect of the appellant to follow this requirement, we would say that the court does not always deem the failure to comply with this rule a sufficient reason for refusing to consider a point that is apparently meritorious. In the present instance the court thought proper to pass upon the point raised, and, as the result of respondent's failure to answer it in his brief, we were required to devote considerable time to a minute examination of a complicated account, the evidence as to which had been introduced in a loose, disconnected, and haphazard manner; and our examination would have been greatly facilitated if respondent's counsel had applied to his opponent in less laconic fashion. As the result of our examination, we are of the opinion that the appellant's contention as to the findings in question is not borne out by the record.

[7] The remaining points raised by the appellant are all grounded upon the general proposition that a judgment was rendered against him alone upon a partnership liability. But a copartner, while his obligation is joint, is still liable to a creditor for the entire amount of the debt; and, as we have seen, in the case at bar the appellant's copartners and the copartnership were all joined as defendants, and the judgment would have gone against them but for the fact appearing in the record that they had been discharged by the bankruptcy court from their liability to pay the claims for which the appellant was held. We do not see how, under the circumstances, the trial court could have rendered any other judgment than the one it did, or how a judgment against his codefendants would have been of any benefit to the appellant.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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32 Cal. App. 381

KNIGHT v. ALL PERSONS et al.

(Civ. 1941.)

(District Court of Appeal, First District, California. Dec. 26, 1916.)

1. DEDICATION 🔑19(4), 35(1) — STREETS — PLATS—SUFFICIENCY.

Where the surveyor's map and plat extended streets beyond the city boundaries and the city council approved and adopted the map "for the location of streets within the city limits" and in a certain division, the map was not valid as a dedication or acceptance of the lands in the extended street beyond the city limits.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 44, 45, 69, 71.]

2. EVIDENCE 🔑186(9) — DOCUMENTS — DOCUMENTS DESTROYED—HOW PROVED.

Where original record of suit and judgment quieting title was destroyed in the conflagration of 1906, an abstract of title, purporting to be correct and complete abstract and showing the filing of the complaint and entry of judgment in such suit, may be admitted to show such judgment under Code Civ. Proc. § 1855a, as amended by St. (Ex. Sess.) 1911, p. 64.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 671.]

3. JUDGMENT 🔑679 — CONCLUSIVENESS — PERSONS CONCLUDED.

Judgment quieting title against a city in lands claimed as a street is conclusive against all persons claiming easement in the land, depending on the city's title to use it as a public street.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1200.]

Appeal from Superior Court, City and County of San Francisco; William M. Conley, Judge.

Suit by Serena H. Knight against All Persons, etc., George L. Center, and others. Decree for complainant, and Center and others appeal. Affirmed.

Morrison, Dunne & Brobeck and Edward Lynch, all of San Francisco, for appellants. Percy E. Towne and Peter A. Breen, both of San Francisco, for respondent. Percy V. Long, of San Francisco, for City and County of San Francisco.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor in an action to quiet title under the McEnerney Act (St. [Ex. Sess.] 1906, p. 78). The land in question is a rectangular lot lying at the southeasterly end of South Beach block No. 40 in the city and county of San Francisco, near the corner of Eighth and Channel streets, and which would be included within a prolongation of Alameda street. The plaintiff alleges that she is the owner of said lot deriving her title thereto by a deed from her husband, Thomas Knight, dated September 17, 1901, and from her alleged open, actual, peaceable, exclusive, and notorious possession of said property since said date. The defendants, George L. Center, Joseph B. Coryell, and William Matson, who are the appellants herein, and who appeared in the said proceeding to contest the plaintiff's claims, are the owners of premises adjoining that claimed by the plaintiff, and which would abut upon Alameda street if such street were prolonged so as to cover the property in dispute. These defendants in their answers deny that plaintiff is the owner of said premises through her deed thereto from Thomas Knight or otherwise, and deny that she has been in the actual, peaceable, or exclusive possession of the same since the 17th day of September, 1901, or since any other date than July 1, 1910; and in addition to said denials they affirmatively allege that the said tract of land was duly laid out, dedicated, and accepted to public use as a street by the city of San Francisco, the then owner of all the lands in that region, including said tract, by virtue of an ordinance duly and regularly adopted by the constituted authorities of said city on the 20th day of June, 1855, numbered 822, and also by an ordinance confirmatory of said ordinance 822 duly and regularly adopted on September 27, 1855, and numbered 845, under which said ordinances a certain official map of that portion of said city, known as the "Van Ness map," was made; and also by an act of the Legislature ratifying and confirming both of said preceding ordinances, duly adopted on March 11, 1858. The said defendants allege that they have an easement in the said premises thus claimed to have been dedicated as a public street, and pray that the plaintiff take nothing by her said action.

Upon the issues thus framed the cause proceeded to trial, whereupon it appeared that the lands in question were originally a part of the pueblo of said city lying within the exterior limits of South Beach block No. 40, and were part of a large area of tidelands within the charter limits of said city as defined in the charter act of April 15, 1851; that from a very early date in the history of the city these lands began to be gradually filled in by the dumping of earth and garbage, and also began to be the subject of occupation and adverse possession by various persons seeking to obtain title thereto by various and sometimes devious ways. It is not necessary to deal in detail with the tangled history of the several sorts of title thus sought to be imposed upon this property; but it sufficiently appears that in the month of August, 1865, Thomas Knight, the immediate predecessor in interest of the plaintiff herein, became the grantee of a deed to a tract of said land of which the property in question is a part, from one Henry B. Brooks, who had acquired his claim of title thereto from one E. C. Marshall, who in his turn had sought to gain title thereto by means of a pre-emption thereof under the federal laws. In the same year said Knight also received a deed to the same premises from the grantor, who had mediately gained color of title thereto through a conveyance by the state of California to one J. F. McDougald, dated November 7, 1855. From the time of the first of these conveyances to him said Thomas Knight had been and continued to be in possession of said premises claiming to own the same, and being engaged in almost continuous litigation with various and sundry sorts of claimants asserting hostile titles to the property. In the year 1868 said Knight commenced an action against the city and county of San Francisco to quiet his title to the whole of South Beach block No. 40, describing it by metes and bounds and claiming to be its owner. The city appeared and answered in said action, a trial was had, and a judgment rendered in plaintiff's favor to a portion of said block embracing the lands in question here. There is, in our opinion, sufficient evidence to have justified the trial court in its conclusion that the plaintiff through these various efforts of her immediate predecessor acquired title to these premises, and also through her own adverse possession of the same had become and was the owner thereof at the time of the institution of the present action, unless these efforts of her predecessor and herself to thus acquire title to the same had been rendered ineffectual by the action of the city amounting to a dedication of the property to public use as a street, accomplished through the passage of several ordinances and acts referred to in the answer of the defendants and appellants herein, and through the making and recordation of the so-called Van Ness map of that portion of the city.

The first of the ordinances relied upon by the defendants in support of their said claim is that numbered 822, known as the Van Ness ordinance, and dated June 20, 1855. It is needless to go afield in a search through reliable or unreliable historical records for the reasons underlying the passage of these ordinances, since they sufficiently speak for themselves as to the lands which under their direction were to be claimed and acquired by the city under the township laws of the United States, and were to be included in the survey and map of said lands so directed to be made. In both of these ordinances these lands are designated as being "that portion of the city lying west of Larkin street and southwest of Johnson street." It was these lands and these only of which the city surveyor was directed to make an official survey and map by the express terms of ordinance numbered 845. It is true that in the making of said map the city surveyor extended the lines of the streets delineated thereon beyond the limits prescribed for his official survey, and that in so doing he represented Alameda street upon said map as extended over the premises in question here; but in the certificate to said map signed by the said city surveyor, and also by the three commissioners appointed to assist in the making of said official survey and map, it is certified as having been made under and by virtue of said ordinance "for the location and dimensions of the streets to be laid out within the city limits west of Larkin and southwest of Johnson streets." This map was approved and adopted by the board of supervisors of said city in October, 1856; and in the ordinance approving and adopting the same it was declared to be the plan of the city in respect to the location of streets and avenues in that portion of the city named in said ordinances.

[1] It would thus seem to be perfectly clear that the only portion of the so-called Van Ness map which can be deemed official or effectual as amounting to a delineation, or as tending to lay the foundation for a dedication of any lands embraced therein as pub-

lic streets, must be confined to those lands which lie west of Larkin and southwest of Johnson streets, and hence cannot be given effect as to that portion thereof which undertakes to cover the lands lying without said boundaries, which it is conceded the lands in question do. That it was so confined in its operation and effect we find to have been settled in the early case of San Francisco v. Canavan, 42 Cal. 554, wherein the direct question was involved and decided. If said map is to be limited in its official operation and effect to the lands lying within said boundaries by virtue of the express terms of said ordinance authorizing the making of the same, it must follow that any acts of the Legislature or of Congress which refer to said ordinance or to said map cannot be held to have given to it a broader application than that to which it was limited by the original ordinance which authorized its creation.

It follows that the contention of the appellants herein that the extension of Alameda street over said lands as shown upon said map was effectual as working a dedication of said lands to public uses as an extension of said street, cannot be sustained.

The appellants have not pleaded and do not seriously contend that by any of the other or later ordinances or maps of the lands of said city such a delineation and dedication of the premises involved in this action as would constitute the same a public street was ever sufficiently made to prevent or defeat the acquisition of title thereto in the plaintiff or her predecessors by adverse possession.

[2] At the trial the plaintiff sought to rely upon a judgment obtained by her predecessor, Thomas Knight, in the year 1868, quieting his title to said premises against said city. The original record of said suit and judgment was destroyed in the conflagration of 1906, and hence in proof thereof the plaintiff offered in evidence an abstract of title made by the City Abstract and Title Insurance Company, purporting to be a correct and complete abstract of all matters appearing of record affecting the title to the property in question, and also purporting to show the filing of the complaint in said action and the entry of such judgment therein. We are satisfied from an examination of said abstract of title that it comes within the provisions of the act of 1911 (St. [Ex. Sess.] 1911 p. 64), amendatory of section 1855a of the Code of Civil Procedure, permitting secondary evidence of the records destroyed by said fire, and hence that such abstract was properly admitted in evidence. We are also of the opinion that the other objections which the defendants urged against the admission of said abstract, based upon alleged inaccuracies and omissions therein, went rather to the weight than to the admissibility in evidence of such secondary proof as to the existence and scope of said judgment.

[3] This judgment when proven must be held to be conclusive as to its effect in quieting the title to said premises in favor of the plaintiff's grantor and against the city and county of San Francisco, and hence also against all persons claiming an easement in said premises, depending upon the right and title of the municipality to the same, as a public street. Strand Improvement Co. v. City of Long Beach, 161 Pac. 975.

With respect to the evidence offered touching the adverse possession of said premises by the predecessor of plaintiff prior to 1901, and by herself thereafter, we think that it was sufficient to justify the finding of the trial court, resolving whatever conflicts there were therein in plaintiff's favor, and, this being so, its finding in that behalf will not be disturbed. We discover no error in the record which would justify a reversal of the case.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

MEMORANDUM DECISIONS

32 Cal. App. 802

PROVIDENT GOLD MINING CO. v. HAYNES. (Civ. 1510.) (District Court of Appeal, Second District, California. Nov. 16, 1916.) Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge. Action by the Provident Gold Mining Company against Dora L. Haynes and others. From a judgment for plaintiff, defendant Haynes appeals. Affirmed. Thomas C. Job and Joseph E. Hannon, both of Los Angeles, for appellant. Robert Young, of Los Angeles, for respondent.

CONREY, P. J. In this action plaintiff seeks to enforce a liability of defendant and appellant Dora L. Haynes and others, as stockholders of the Manhattan Securities Company, an Arizona corporation, for an indebtedness of that corporation. Judgment having been rendered against the respective defendants in several amounts, some of the defendants appealed to the Supreme Court. The judgment against Dora L. Haynes being for less than $2,000, her appeal is to this court. The appeals in each instance are from the judgment and from orders denying motions of the defendants for a new trial. The appeals of the other defendants to the Supreme Court involved the same questions upon which the appeals of Dora L. Haynes depend. Those appeals were decided by the Supreme Court July 11, 1916, and the judgments and orders were affirmed as to them. Provident Gold Mining Co. v. Haynes et al., 159 Pac. 155. Upon the authority of that decision, the judgment and order appealed from herein are affirmed.

We concur: JAMES, J.; SHAW, J.

CALIFORNIA REPORTER

163 PACIFIC REPORTER

(174 Cal. 342)

BULLFROG, GOLDFIELD R. CO. v. JORDAN, State Secretary. (L. A. 4631.)

(Supreme Court of California. Feb. 2, 1917.)

RAILROADS ⟜33(1) — LICENSE FEES—"DOING INTRASTATE BUSINESS."

Where a railroad was operated wholly within another state, but its general offices were located and all business conducted in this state, *held*, that it was "doing intrastate business" within the state and was liable for the license tax prescribed in such cases by St. 1915, p. 422.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 70.

For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

In Bank. Application for writ of mandate by the Bullfrog, Goldfield Railroad Company against Frank C. Jordan, Secretary of State of the State of California. Writ discharged.

C. O. Whittemore, of Los Angeles, for petitioner. U. S. Webb, Atty. Gen., and Raymond Benjamin, of San Francisco, for respondent.

HENSHAW, J. Petitioner, a railroad corporation, organized and existing under the laws of the state of Nevada, made tender to respondent, Secretary of State of the state of California, and offered for filing in the office of that official a certified copy of its articles of incorporation, and a certified copy of a resolution of its board of directors designating an agent for the state of California upon whom process issued out of the courts of this state might be served, and with these papers tendered the fee of $75 as a prerequisite to such filing. Respondent refused to accept and file the papers until, in addition, petitioner paid the license tax contemplated by the statute adopted in 1915 (Stats. 1915, c. 190). Petitioner then sued for and obtained this alternative writ of mandate.

The facts are not in controversy. The single question presented is the legal one whether or not, under those facts, petitioner should be called upon to pay this additional license tax. The petitioner owns and operates a steam railroad which begins and ends entirely within the state of Nevada. In the city of Los Angeles, state of California, it maintains the general offices of its company. At these offices directors' meetings are held, the books, records, and accounts of the business of the corporation are kept, all of its general clerical work is performed, all vouchers and checks in payment of its bills, wages, and salaries are prepared and issued. All moneys earned in the operation of its railroad are there received and deposited in the banks of Los Angeles, and all disbursements are made by checks and drafts issued from these general offices in that city. In that city also is the purchasing department of the company, where its fuel oil and other supplies and material necessary for use in the operation of its railroad are purchased and transported from California into Nevada. The conduct and policy of the road is controlled from these California offices, though the physical operation of the road itself is of necessity intrusted to superintendents and their subordinates located in the state of Nevada.

Section 1 of the act of 1915 above referred to requires a filing by this corporation with the Secretary of State of a copy of its articles of incorporation, and exacts a fee for this filing. These were the papers and this the fee which petitioner tendered. Section 3 of the same act further provides that no corporation, domestic or foreign, "shall do or attempt to do any intrastate business within this state * * * without a state license therefor." Section 4 requires every corporation "now doing intrastate business within this state, or which shall hereafter engage in intrastate business in this state, to procure annually from the Secretary of State a license authorizing the transaction of such business in this state, and to pay therefor the license tax prescribed herein." This is the tax which petitioner has refused to pay, and this is the tax without the payment of which the Secretary of State has refused to accept for filing the tendered papers.

The one legal question presented is whether under these admitted facts the corporation petitioner was "doing intrastate business" within the meaning of our statute. We are fully satisfied that it was. The facts here admitted differentiate this case entirely from cases like General Conference of Free Baptists v. Berkey, 156 Cal. 466, 105 Pac. 411, where a single act by a religious incorporation in selling its land was held to be the mere exercise of power and not the transaction of business as contemplated by our law; and Caesar v. Capell (C. C.) 83 Fed. 403, where it was held that a foreign corporation which had not complied with the statutes of Tennessee by filing its charter could not successfully be charged with doing business in Tennessee in making a single loan of money to a citizen of that state. And equally do these facts differentiate this case from those like Bertin & Lepori v. Mattison, 69 Or. 470, 139 Pac. 330, where the mere taking of orders through a traveling salesman within the state, subject to the acceptance by the corporation at its home office, was held not to be the transaction of business within the meaning of the Oregon statute; and Fuller v. Allen (Okl.) 148 Pac. 1008, where but a single act of business had been done and it was declared that the phrase "doing business" as employed in the statute contemplated the "doing a series of acts to secure a livelihood, profit or pleasure"; and Cockburn v. Kinsley, 25 Colo. App. 89, 135 Pac. 1112, where a foreign corporation operated a mine in Mexico and borrowed money in Colorado to pay its landlord in Mexico, and all else that was done by the corporation in Colorado was the issuance of some stock to a nonresident and the causing to be printed by the treasurer of letter heads designating the main office of the corporation at a place in the state. More nearly akin to the facts in the present case are the Illinois cases, Bradbury v. Waukegan & Washington M. & S. Co., 113 Ill. App. 600, and Mandel v. Swan Land & Cattle Co., 154 Ill. 177, 40 N. E. 462, 27 L. R. A. 313, 45 Am. St. Rep. 124. In the first of these cases the court seems to construe its statute touching "doing business" as meaning the doing directly of the primary business for which the corporation was organized. Thus, if it be a manufacturing corporation, the manufacturing must be done within the state; if a mining corporation, the mining must be done within the state; if a railroad corporation, the railroad must be operated within the state, herein the court saying:

> "Opening an office in Waukegan and placing a safe and some office furniture therein for the convenience and use of the secretary and treasurer where he issued certificates of stock, kept the books, and the holdings of directors' meetings there, together with the other acts charged to have been done in Lake county, bear no resemblance to the powers and objects of this corporation, as set forth in the articles of incorporation. There is no pretense that the company owned any mining properties in this state, or that it was doing a mining or smelting business here. All of its mining properties were in the state of Washington and not in Illinois."

Similar in effect, though involving the consideration of an entirely different question, is the other Illinois case, where it is declared that:

> "The statute, by the term 'doing business,' has reference to the business for which the corporation was organized, and not to the form of its by-laws with reference to its relations to its own members, or a resort to the courts of this state to recover a contract liability."

In the case at bar the business transacted in this state was both continuous and vital to the well-being of the corporation. It could no more successfully operate its business without doing somewhere what it was doing in California than it could successfully operate its business without actually running its railroad. Much more closely in point are such familiar cases as People v. Horn Silver Mining Co., 105 N. Y. 77, 11 N. E. 155, and Baltic Mining Co. v. Massachusetts, and the S. S. White Dental Co. v. Massachusetts, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127, where are affirmed the decisions of the Supreme Court of Massachusetts in the same cases (207 Mass. 381, 93 N. E. 831; 212 Mass. 35, 98 N. E. 1056, Ann. Cas. 1913C, 805); while almost precisely in the point are Sleicher v. Pullman Co. (C. C.) 170 Fed. 365, where it is declared that a foreign railroad corporation which maintains offices in New York and there employs freight and passenger agents to solicit business, which also holds directors' meetings, disburses dividends, and keeps an office for the transfer of its stock there, with an assistant secretary, is doing some substantial business in the state, though that particular railroad, the Chicago, Burlington & Quincy, had no trackage within the state of New York, and Stegall v. American Pigment & Chemical Co., 150 Mo. App. 251, 130 S. W. 144, where a foreign corporation owned a manufacturing plant in Illinois, but the directors' meetings were held in Missouri, the executive management was there conducted and its funds kept, and it was held that such corporation was doing business in Missouri.

It is manifest that the Secretary of State was justified in his refusal to accept the proffered papers without payment of the license tax, and the writ is therefore discharged.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LORIGAN, J.; SLOSS, J.; MELVIN, J.; LAWLOR, J.

(174 Cal. 336)

LEWIS v. LEWIS. (S. F. 7850.)

(Supreme Court of California. Jan. 31, 1917.)

1. DIVORCE 🔑308—DECREE—POWER TO MODIFY.

Under Civ. Code, § 138, providing a court granting a divorce may modify its judgment at any time during the minority of children of the marriage, by providing for their custody, education and support, the judgment may be modified, though it did not expressly reserve power to do so.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 801, 802.]

2. DIVORCE 🔑308—CUSTODY AND SUPPORT OF CHILDREN—STATUTES.

Under Civ. Code, §§ 137, 138, 196, 199, 203, 206, as to custody and support of children, etc., when there has been a decree of divorce, vesting the custody of minor children in the mother, the father is under no obligation to provide for such children any support or education beyond that which may be directed by the court granting the divorce, either in its decree or by subsequent modification.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 801, 802.]

3. DIVORCE 🔑308—DUTY OF FATHER TO SUPPORT CHILD.

Civ. Code, §§ 196, 207, confining the declared duty of support of his or her child to the parent entitled to the child's custody, apply only in the absence of any order for the child's support in a divorce action, or for maintenance or control of the child without divorce under Civ. Code, §§ 137, 199.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 801, 802.]

4. DIVORCE 🔑309—DUTY OF DIVORCED FATHER TO SUPPORT CHILD NOT IN HIS CUSTODY.

Where a divorce decree gave a child's custody to her mother and made inadequate provision for her support and maintenance, the remedy of the child to compel her father to contribute adequately to her support was not by action by her guardian ad litem against the father, but by proceeding in the original divorce suit to modify the decree to provide for such support under Civ. Code, § 138, allowing such modification.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 803.]

5. DIVORCE 🔑309—SUPPORT OF CHILD—MODIFICATION OF DECREE—AGREEMENT.

The right of a child to have divorce decree modified under Civ. Code, § 138, to enforce its proper support by divorced father could not be barred by prior stipulation or agreement of the mother that she would not ask further allowance for the child, for the exercise of the statutory authority so to modify the decree could not be limited or abridged by the parties.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 803.]

6. DIVORCE 🔑309—SUPPORT OF CHILD—MODIFICATION OF DECREE—REPRESENTATION OF CHILD.

Such modification of the divorce decree in the interest of the child might be ordered on application of the mother herself, notwithstanding her prior agreement that the father should not be required to contribute further.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 803.]

7. DIVORCE 🔑309—SUPPORT OF CHILD—MODIFICATION OF DECREE—REPRESENTATION OF CHILD.

In case the child's mother should fail to act for her in such proceeding, the court's power might be invoked by a proper representative of the child or exercised by the court of its own motion.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 803.]

In Bank. Appeal from Superior Court, City and County of San Francisco; John E. Richards, Judge.

Action by Jane Ellen Lewis, a minor, by her guardian ad litem, against John B. Lewis. From judgment for plaintiff, defendant appeals. Reversed.

Herbert Choynski and James Raleigh Kelly, both of San Francisco, for appellant. C. W. Eastin, of San Francisco, for respondent.

SLOSS, J. The plaintiff is the minor daughter of the defendant John B. Lewis. Appearing by guardian, she brought this action to compel her father to contribute toward her support and education during her minority. Judgment was given, requiring the defendant to pay to the plaintiff, until the further order of the court, the sum of $15 per month, and also to pay $50 as counsel fees. The defendant appeals from the judgment. The record for review consists of the judgment roll alone.

The plaintiff is the issue of a marriage between John B. Lewis and Ruth A. Lewis. On July 3, 1911, Ruth A. Lewis obtained a final decree of divorce from the appellant herein. The decree awarded the "permanent and exclusive" custody and control of Jane Ellen Lewis, the plaintiff in this action, to the wife, Ruth A. Lewis. Prior to the making of the decree, the parties to the divorce suit had entered into an agreement which provided, among other things, that the wife should have the custody and control of the minor child, and that the husband should pay to the wife for the maintenance and support of herself and said minor child the sum of $1,050, in installments of $50 per month for five months, and $40 per month thereafter until the whole was paid. The wife waived all other claims against the husband or his estate. These payments had been made in full before the commencement of the present action. It is alleged and found that the plaintiff is without means, is unable by reason of her tender age to maintain, support, or educate herself, that her mother has not sufficient means or earning ability to enable her to adequately provide for the plaintiff, and that the defendant is well able to provide for her. The findings declare that in the judgment of divorce the court reserved to itself no authority to modify the terms of said judgment, and that said court "has now no jurisdiction to alter, modify, or vary the final judgment therein so as to make any other, further, or future provision for the maintenance, support, or education of the minor plaintiff herein in said action."

[1] The conclusion embodied in the language just quoted is not, as a matter of law, to be sustained. Since the decision in Harlan v. Harlan, 154 Cal. 341, 98 Pac. 32, there can be no doubt of the power of the court which has granted a divorce to modify its judgment, at any time during the minority of children of the marriage, by providing for the custody, education, and support of such children, even though the judgment may have contained no provision on the subject. No reservation in the decree itself is necessary to the exercise of this power. The authority of the court rests upon the express provisions of section 138 of the Civil Code, and was ample even before the amendment of 1905 to that section. Harlan v. Harlan, supra.

Section 196 of the Civil Code provides that:

> "The parent entitled to the custody of a child must give him support and education suitable to his circumstances. * * *"

Section 203 of the same Code declares that:

> "The abuse of parental authority is the subject of judicial cognizance in a civil action brought by the child, or by its relative within the third degree, or by the supervisors of the county where the child resides; and when the abuse is established, the child may be freed from the dominion of the parent, and the duty of support and education enforced."

Section 206 states that:

> "It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. * * *"

These are the sections upon which both parties have put the main stress of their argument, and it will not be necessary, for present purposes, to refer specifically to the many other sections of the Civil Code dealing with the subject of custody and support of children.

Under familiar rules of construction, the various statutory provisions are to be read together, and effect must be given to each, so far as this may fairly be done. Section 203 provides a remedy for parental abuse and for enforcing the duty of support and education. It does not, however, define the nature and extent of the duty thus to be enforced. Section 206 does declare or establish a duty or obligation. This duty runs in favor of adult children (Paxton v. Paxton, 150 Cal. 667, 89 Pac. 1083), but it may well be questioned whether the provision is intended to declare the duties of parents to their minor children. On the other hand, sections 203 and 196 are clearly limited in their application to minor children, as are numerous other sections like 136, 137, 138, 139, 199, and 207, all of which use the word "child" or "children" without the qualifying adjective "minor." See Anderson v. Anderson, 124 Cal. 48, 56 Pac. 630, 57 Pac. 81, 71 Am. St. Rep. 17. But it is not important to decide here whether the obligation defined in section 206 is one owing to minor children. As a general proposition, no one would doubt that parents are under an obligation to support their minor children. This duty rests on fundamental natural laws, and has always been recognized by the courts in the absence of any statute declaring it. Even if section 206 be taken as covering the case of minor children, its general terms are modified and controlled by the more specific provisions of section 196. And section 196, in its turn, is limited by the provisions of sections 137, 138, and 199, under which the court may give the custody of minor children to one of the spouses, and impose the burden of support on the other.

[2] Interpreting and applying the several provisions of the Code, the decisions of this court are clear to the effect that when there has been a decree of divorce, and such decree vests the custody of the minor children in the mother, the father is under no obligation to provide for such children any support or education beyond that which may be directed by the court which has granted the divorce, either in its decree or by subsequent modification. In Ex parte Miller, 109 Cal. 643, 648, 42 Pac. 428, 429, Temple, J., in a concurring opinion, used this language:

> "When a parent is deprived of the custody of his child, and, therefore, of the right to its services and earnings, * * * he is no longer liable for its support and education. This is true as a general proposition of law, and it is recognized by our Code. Section 196 of the Civil Code provides that a parent entitled to the custody of a child must give him support and education suitable to his circumstances, plainly implying that the parent does not owe that duty to a child when he is not entitled to its custody."

In Selfridge v. Paxton, 145 Cal. 713, 716, 79 Pac. 425, 426, the court quotes sections 196 and 207 of the Civil Code, and says:

> "By these sections the duty to support a child, and the liability to the third person for necessaries furnished it, are clearly confined to a parent 'entitled to the custody' of the child, and having it 'under his charge'; and no such liability attaches to a parent who has been deprived of such custody and charge."

[3] This does not mean that the natural duty of a father to provide for his minor child is, under our law, finally and absolutely terminated by an award of the custody of the child to the mother. Where such an award is made by a decree of divorce, or in an action for custody of children without divorce (Civ. Code, § 199), the court may, as we have already pointed out, provide at any time during the minority of the children for their support and education by the father who is deprived of their custody. That is what was meant, and all that was meant, by the statement in the opinion in Harlan v. Harlan, supra, that a decree of divorce "does not destroy the obligation of either parent toward the children." The obligation referred to is one to be enforced by the court which granted the divorce, and in the divorce action itself. In the absence of any order for the support and education of the children in the action for divorce, or for maintenance or control of children without divorce (sections 137, 199), the rule declared by section 196 remains, i. e., that the obligation to support the child rests only upon the parent entitled to its custody.

The distinction which we have indicated is well illustrated by two criminal cases recently decided in this court. In each the defendant had been charged, under section 270 of the Penal Code, with willfully omitting to furnish his minor child with necessary food, clothing, etc. In People v. Schlott, 162 Cal. 347, 122 Pac. 846, the custody of the child had been awarded to its mother by a decree in which she was granted a divorce from the defendant. The decree required the defendant to pay to his wife $50 per month for the support of herself and the child, and these payments the defendant had not made. The holding was that the decree of divorce imposed upon the defendant the obligation of supporting the child, although he had been deprived of its custody, and that his willful failure to comply with this obligation justified his conviction upon the criminal charge. In Matter of McMullin, 164 Cal. 504, 129 Pac. 773 (on habeas corpus), the petitioner had been held for trial for an alleged violation of the same section of the Penal Code. There the wife had obtained a divorce in the state of Nevada. The decree granted her the custody of the minor child, and required the petitioner to pay for its support. But since there had been no personal service of summons, the Nevada court had no jurisdiction to impose upon him the liability to make such payment. The result, as this court viewed it, was that the custody and control of the child had been given to the mother, without charging upon the father its support. "Under section 196 of the Civil Code," says the opinion, "this situation prima facie relieves the husband of the duty of support and casts it on the wife." The petitioner was discharged from custody.

[4-7] The authorities cited leave no avenue of escape from the conclusion that the judgment here appealed from cannot be sustained. The decree of divorce gave the custody of the plaintiff to the mother and made no provision for plaintiff's support, beyond a requirement for the payment by the defendant of sums which have been fully paid by him. The defendant is therefore under no legal obligation to support the plaintiff. The plaintiff is not, however, without remedy. The court which granted the divorce has full

power to modify its decree by making such orders as may be just and proper in view of the conditions shown to exist at the time application may be made to it. The agreement of the mother that she would not ask any allowance beyond that heretofore paid her cannot bar the right of the child to have an order for proper support. "The statute conferred the authority, and its exercise could not be limited or abridged by the parties." Wilson v. Wilson, 45 Cal. 399, 405. Any proper modification of the decree of divorce, in the interest of the child, might be ordered on the application of the mother herself, even though she had agreed that the father should not be required to contribute further. Wilson v. Wilson, supra. See, also, Parkhurst v. Parkhurst, 118 Cal. 18, 22, 50 Pac. 9; Black v. Black, 149 Cal. 224, 86 Pac. 505. The suggestion that the mother might fail to seek provision for the child in the divorce action does not seem to have a very direct bearing here, since the mother is the guardian representing the minor in this action. But if the mother should fail to pursue the remedy, we do not doubt that the child's interest is such that the power to make adequate provision for it may be invoked by a proper representative of the child itself, or may be exercised by the court of its own motion. Ex parte Gordan, 95 Cal. 374, 30 Pac. 561.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.; LAWLOR, J.

(174 Cal. 330)

EUCALYPTUS GROWERS ASS'N v. ORANGE COUNTY NURSERY & LAND CO.

SAME v. ORANGE COUNTY NURSERY & LAND CO. et al.

(L. A. 3881.)

(Supreme Court of California. Jan. 30, 1917.)

1. New Trial 🔑79—Grounds—Unsupported Findings—Support by Other Facts.

That the court's finding is not sustained by the evidence supports order granting new trial, unless there are other facts found, supported by evidence, on which the judgment of the trial court may rest without aid from the unsustained finding.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 165½.]

2. Contracts 🔑346(1)—Breach—Matter of Excuse—Pleading.

In an action for breach of contract plaintiff's failure to perform, nonexistence of or defects in subject-matter, and either a mutual mistake or a mistake of defendant's which was known or suspected at the time by plaintiff, were matters of defense, and, to be available to defendants, should have been set up in the answer.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1714, 1718.]

3. Appeal and Error 🔑173(1)—Preservation of Objections—Affirmative Defenses—Failure to Plead.

Excuses for nonperformance of contract not apparent on the face of the contract, nor embraced within the allegations of the complaint, if not set up in the answer, are not available on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079, 1093.]

Department 1. Appeal from Superior Court, Los Angeles County; Fred V. Wood, Judge.

Consolidated actions by the Eucalyptus Growers Association against the Orange County Nursery & Land Company and the American Surety Company. There was judgment for defendants, plaintiff moved for new trial, and from an order granting its motion defendants appeal. Order affirmed.

Williams, Goudge & Chandler, of Los Angeles, for appellants. Jones & Evans and Earl T. Miller, all of Los Angeles, for respondent.

SHAW, J. The two actions above entitled relate to the same contract and the same controversy. With the consent of the parties and by order of the court they were consolidated for the purposes of trial, findings, and judgment. The judgment being for the defendants, the plaintiff moved for a new trial. The motion was granted, and the defendants appeal from the order.

The object of the action was to recover damages alleged to have been caused to plaintiff by the failure of the defendant, Orange County Nursery & Land Company, to perform a contract with the plaintiff whereby it agreed to plant, irrigate and cultivate eucalyptus trees in parcels of not less than 80 acres at one time, on a certain tract of land belonging to the defendant. The American Surety Company is made a party defendant to the second action solely for the reason that it became surety for the nursery company on a bond in the sum of $9,500, executed by it to the plaintiff for the faithful performance of the contract. Otherwise the two actions are based on the same facts.

The contract sued on provided that the nursery company should plant 550,000 eucalyptus trees, at least six inches in height, on section 17, township 29 south, range 25 east, in Kern county, the same to be planted in parcels of not less than 80 acres each, one parcel to be completely planted before another was begun, to irrigate, cultivate, and care for such trees for one year from the time of planting, the irrigation to include the running of the water through the main and lateral ditches to be made by the plaintiff on the land, from the pumping plants to be installed thereon by the plaintiff, and that the nursery company would guarantee that there should be standing in good condition on the land so planted, at the end of one year from the planting thereof, an average of at least 817 trees per acre. The plaintiff thereby agreed to install the necessary pumping plants and machinery and dig the main and lateral ditches required for the irrigation of the trees, to plow the land, to level it so far as was necessary to render it practically irrigable from such main and lateral ditches, and to pay the Nursery Company at the rate of $30 per acre for each acre so planted and cultivated, for the planting and care thereof for said year.

The complaint alleged that the nursery company planted the trees on only 160 acres of said tract, that it then abandoned the contract and refused further performance, that it failed properly to care for or cultivate the trees planted, or to have standing and in good condition at the end of the year 817 trees per acre thereon, that not more than 30 acres had as many as 300 trees to the acre remaining alive, that when so abandoned the land was worth less than if no trees had been planted thereon, and that the plaintiff was damaged in the sum of $19,200, besides certain moneys expended by reason of the failure of said nursery company to fulfill said contract.

The answer admits the execution of the contract and the planting of the trees on 160 acres of the land, but denies the want of care on the part of the nursery company in the cultivation or irrigation thereof, and the other allegations as to its failure to perform and as to damages. As an affirmative defense it alleges that at the time the contract was made, and ever since, the 640-acre tract of land was so impregnated with alkali that it was unfit for the culture and raising of eucalyptus trees; that plaintiff then well knew said fact, but concealed the same from said defendants, and represented to said nursery company that a thorough expert examination of the soil had been procured by plaintiff, and that the same was suitable and fit for the raising and culture of eucalyptus trees; that after the Nursery Company began the irrigation of the trees so planted, and about September 1, 1909, the alkali in the soil killed the trees; and that this rendered the further planting of trees in said soil useless.

The court found that prior to the execution of the contract the plaintiff to induce the nursery company to execute the same, stated to said nursery company that said plaintiff "had had said land examined for alkali; that it was suitable for eucalyptus trees, and did not contain alkali in sufficient quantities to affect such trees"; that both parties in good faith believed that said land was suitable for such trees, and did not contain sufficient alkali to affect them, and they both acted on that belief; that in fact plaintiff had obtained no analysis of the soil, and had no information sufficient to warrant it in making said statements to the nursery company; that the land was so fully impregnated with alkali that it was impossible to grow eucalyptus trees thereon, as required of the nursery company by the contract.

[1] These findings tend to establish the defense that the contract had been procured by fraud on the part of the plaintiff. It may here be observed that the answer does not allege that the defendants believed these representations to be true, nor that they relied on them in executing the contract, and there is doubt if the fraud is well pleaded. In an opinion included in the transcript the court below stated that the new trial was granted on the ground that the evidence did not show that the above-quoted misrepresentation was made to induce execution of the contract. The defendants, as we understand their brief, concede that the statement in question was not made until after the contract was made, and hence that it did not induce its execution, and that the finding that it was made for that purpose is not sustained by the evidence. This would support the order granting the new trial, unless as defendants contend, there are other facts found which are supported by the evidence, upon which the judgment in their favor may rest, without aid from the finding as to fraud.

Giving the findings a liberal interpretation in favor of the defendants these facts are as follows: Both parties, when they executed the contract, believed that the soil was suitable for eucalyptus trees, and they knew nothing to the contrary. The contract was made by both parties on the faith of the assumed fact that eucalyptus trees would grow well on the land, if planted, irrigated, and cared for after the usual manner of good husbandry. In fact it was so full of alkali that such trees would not grow thereon, unless the alkali were eliminated from the soil. This could not be done except by grading the surface and then flooding it with a large body of water so as to dissolve the alkali and then to carry it away by allowing the water to run off. Under the terms of the contract, interpreted by the aid of surrounding circumstances and the subsequent conduct of the parties with reference to it, the plaintiff was to furnish pumping plants, including the wells, of capacity sufficient to obtain the water that would be required to enable the nursery company to carry out the contract. Plaintiff was also to do the leveling of the land necessary for that purpose. It did not level or grade the land so that it could be flooded to dissolve the alkali, nor did it install pumping plants that would supply the water to do the flooding. The water the pumps would raise was barely enough to moisten the soil of the 160 acres that was planted. With the means at hand, including everything that was to be done by the defendants, and without the other things aforesaid to be done and furnished by plaintiff, but which it did not do or furnish, it was impossible to grow eucalyptus trees on the land and have them standing in good condition at one year from the planting, or at all.

[2, 3] The defendants cite no authorities, nor do they clearly state their position. Apparently, as we surmise, they rely on one or more of three propositions:

(1) That where one party to a contract, by the failure to perform his part thereof, renders the subsequent performance by the second party impossible, the second party is excused from further performance, and is not liable in damages for any breach on his part thus brought about. Civ. Code, § 1511; Griffith v. Happersberger, 86 Cal. 613, 25 Pac. 137, 487; Houghton v. Steele, 58 Cal. 425; Antonelle v. Kennedy, etc., Co., 140 Cal. 309, 73 Pac. 966; Tuohy v. Moore, 133 Cal. 523, 65 Pac. 1107.

(2) Where parties contract with respect to a subject-matter, upon the assumption that it exists and is of the character necessary to the doing of the things agreed to be done upon it, and it turns out that it does not exist at all, or that it has not the qualities supposed and necessary, so that the doing of the thing contracted for is, in the real state of the case, impossible, neither party is bound to its performance. Thus, in Clifford v. Watts, L. R. 5 Com. P. 585, the defendant had leased plaintiff's land, believed to contain pipe clay, and had agreed to dig annually therefrom 1,000 tons of pipe clay. To a suit for the royalties upon the clay which defendant had agreed, but failed, to dig, the defendant pleaded that it was impossible to do so, for that the land did not contain so much, and that this was not known to him at the time of contracting. This was held to be a good defense. Willis, J., said:

> "I am not prepared to say that there may not be cases in which a man may have contracted to do something which in the present state of scientific knowledge may be wholly impossible, and yet he may have so contracted as to warrant the possibility of its performance by means of some new discovery, or be liable in damages for the nonperformance, and cannot set up the defense that the thing was impossible. But, before we arrive at such a conclusion, we must be satisfied, if no other reasonable construction suggests itself, that the party really did intend to warrant that to be possible which was impossible."

And Brett, J., said:

> "Here both parties might well have supposed that there was clay under the land. They agree on the assumption that it is there; and the covenant is applicable only if there be clay; it does not amount to a warranty on the part of the grantee that there was clay, or to an engagement to pay the royalty although it should turn out that there was none."

See, also, Mineral, etc., Co. v. Howard, 172 Cal. 291, 156 Pac. 458; Nordyke v. Kehlor, 155 Mo. 643, 56 S. W. 287, 78 Am. St. Rep. 600; Stewart v. Stone, 127 N. Y. 507, 28 N. E. 595, 14 L. R. A. 215; Dexter v. Norton, 47 N. Y. 65, 7 Am. Rep. 415.

(3) That the contract and guaranty was executed in consequence of a mistake as to the quality of the soil, either a mutual mistake, or a mistake of the nursery company which was known or suspected at the time by the plaintiff. Civ. Code, §§ 3399, 1577.

These propositions do not aid the defendants as the case now stands. Assuming them to be sound in law, which we need not decide, they fall within the category of excuses for nonperformance, and they are excuses not apparent on the face of the contract, nor embraced within the facts alleged in the complaint. They are therefore matters of defense, and, to be available to the defendants, they must be set up in the answer. The answers contain no allegations of the facts necessary to support either of these propositions. It follows that they cannot be advanced in support of this appeal, or as reasons why a new trial should not have been granted. The court below was correct in granting the new trial because of the failure to prove the only matter of defense which the defendants had attempted to plead.

Before proceeding with the new trial the defendants should have leave to amend their answers as they may be advised.

The order granting a new trial is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

(174 Cal. 308)

NORTHWESTERN PORTLAND CEMENT CO. v. ATLANTIC PORTLAND CEMENT CO. et al. (S. F. 7048.)

(Supreme Court of California. Jan. 29, 1917.)

1. Corporations 🔑123(11), 149 — Stock — Ownership—Pledge—Trustee—Existence —Evidence.

The affixing of the word "trustee" to the name of holder of shares of stock in a corporation does not, in and of itself, impart to any one dealing with such holder notice that he is not the owner of the stock, or at least that he has not authority to sell or hypothecate it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 539–546.]

2. Courts 🔑93(1) — Previous Decisions as Controlling—Rule of Property.

Where decisions have established the rule that the affixing of the word "trustee" to the name of the holder of shares of corporate stock does not impart notice that such holder has not authority to deal with the stock, they must be considered as establishing a rule of property, and a change of decision is precluded by the doctrine of stare decisis.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 336.]

3. Notice 🔑15 — Constructive Notice — Statute—Questions of Fact.

Whether a party has notice of "circumstances sufficient to put a prudent man upon inquiry as to a particular fact," and whether "by prosecuting such inquiry he might have learned such fact," which are elements of constructive notice as defined by Civ. Code, § 19, are questions of fact.

[Ed. Note.—For other cases, see Notice, Cent. Dig. § 41.]

4. APPEAL AND ERROR 🔑996 — REVIEW — FINDINGS.

Findings of ultimate facts are binding on appeal, not only when there is direct conflict regarding the probative facts, but when those facts are fairly susceptible to opposing inferences.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3908–3911.]

5. CORPORATIONS 🔑123(16)—STOCK—PLEDGE —TITLE—CONSTRUCTIVE NOTICE—EVIDENCE.

In an action involving beneficial title to corporate stock pledged with the defendant, evidence *held* to show that the defendant acted in good faith and in the reasonable belief that the pledgor, although described as trustee, was the actual owner of the stock and authorized to pledge it.

6. APPEAL AND ERROR 🔑1071(6)—HARMLESS ERROR—FINDINGS—CONFLICTING EQUITIES.

In an action involving the beneficial title to corporate stock, as the defendant's rights as the pledgee of the stock in good faith from the holder and apparent owner are superior to those of plaintiff, the owner of an undisclosed equity, failure of the court to find upon the issue of plaintiff's beneficial ownership is immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4239; Trial, Cent. Dig. §§ 940, 942.]

7. CORPORATIONS 🔑123(11) — STOCK TRANSFERRED AS PLEDGED—TITLE.

Although Civ. Code, § 2888, provides that a lien or a contract for a lien transfers no title to the property subject to the lien, the transfer of corporate stock in pledge does vest in the pledgee a "special property" in the stock pledged, which is a legal interest sufficient to invoke the rule protecting bona fide purchasers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 539–546.]

8. CORPORATIONS 🔑123(4)—STOCK TRANSFERRED AS PLEDGE—TITLE.

Although Civ. Code, § 324, provides that the transfer of shares of stock is not valid except as to the parties until it is entered upon the books of the corporation, the delivery of an indorsed certificate passes title, except as against purchasers or incumbrancers without notice, and a transfer upon the books of the corporation is not essential in the creation of a valid pledge.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491.]

9. ESTOPPEL 🔑75 — CLOTHING ANOTHER WITH APPARENT TITLE.

Where a pledgee took stock in good faith from the owner of the legal title, the beneficial owner of the stock who had permitted the pledgor to hold apparent title and power of disposition is estopped from asserting its title as against the pledgee, as the pledgee has the superior equity.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 192–195.]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Northwestern Portland Cement Company against the Atlantic Portland Cement Company and others. From a judgment for defendant American Bridge Company, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Morrison, Dunne & Brobeck, of San Francisco (Geo. J. Hatfield, of San Francisco, of counsel), for appellant. J. C. Campbell and Walter Shelton, both of San Francisco (J. C. Campbell and Weaver, Shelton & Levy, all of San Francisco, of counsel), for respondent.

SLOSS, J. The plaintiff brought this action to establish its ownership of, and to recover, 2,800 shares of the capital stock of Bellingham Bay & British Columbia Railroad Company, evidenced by certificate number 67. The action was dismissed as to all of the defendants except American Bridge Company of New York, which claimed to hold said certificate and shares as a pledge. Under stipulation of the parties, the 2,800 shares of stock were sold for $28,000, and the purchase price deposited in savings banks to abide the final outcome of this litigation. The trial resulted in a judgment that defendant American Bridge Company was entitled to the payment of the sums so deposited, with interest thereon. Plaintiff appeals from the judgment and from an order denying its motion for a new trial.

Prior to the transaction which led to this suit, William J. Dingee was the principal stockholder in, and the president of, several corporations engaged in the manufacture of cement. Among these were the Northwestern Portland Cement Company, the plaintiff, Atlantic Portland Cement Company, a California corporation, Atlantic Portland Cement Company, a Pennsylvania corporation, and Santa Cruz Portland Cement Company. Bellingham Bay & British Columbia Railroad Company was a corporation operating a line of railroad in the state of Washington. Twenty-eight hundred and eighty-one shares of its stock stood on the books of said railroad company in the name of "William J. Dingee, trustee," and certificates had been issued to him by that designation. In February, 1908, the Atlantic Portland Cement companies were indebted to the defendant American Bridge Company in the sum of $247,000, or thereabouts, a balance, due for labor and materials furnished to said Atlantic companies in the construction of their plant in Pennsylvania. Payment of this obligation had been guaranteed by William J. Dingee and I. J. Bachman. The bridge company was pressing for payment of the account, and on the 10th of February, 1908, an agreement was entered into, which provided that in consideration of the extension of time for the payment of said obligation, the Atlantic companies, Dingee, and Bachman agreed to turn over and deliver to the bridge company certain securities, consisting of bonds of various companies and 2,800 shares of the capital stock of Bellingham Bay & British Columbia Railroad Company. The securities were delivered in pursuance of this agreement, a certificate for 2,800 shares of stock in the railroad company having been issued in the name of "William J. Dingee, trustee," and indorsed by Dingee in that form.

The complaint alleged that the plaintiff was the real owner of said stock, and that Dingee held the same in trust for plaintiff, and had no real interest therein except as such trustee; that the bridge company, at the time of taking said certificate, had full knowledge and notice that said certificate and the shares of stock evidenced thereby were not owned by Dingee, that Dingee had no right or authority to deliver the same to the bridge company, and that the plaintiff was the owner of such stock. These allegations were denied by the answer. The court made no finding on the issue of plaintiff's ownership, but found that the bridge company had no knowledge or notice whatsoever of any ownership, equity, right, or claim in said certificate or shares by plaintiff, or by any person except Dingee, and had no knowledge or notice of any fact sufficient to put it on inquiry as to any right or claim of plaintiff or of any other person than said Dingee.

[1] The appellant's main attack is upon the finding that the bridge company took the stock in pledge without notice or means of knowledge of plaintiff's equitable claim. Whatever may be the law in other jurisdictions, it has long been settled in this state that the affixing of the word "trustee" to the name of the holder of shares of stock in a corporation does not, in and of itself, impart to any one dealing with such holder notice that he is not the owner of the stock, or, at least, that he has not authority to sell or hypothecate it. Brewster v. Sime, 42 Cal. 139; Thompson v. Toland, 48 Cal. 99; Fletcher v. Kidder, 163 Cal. 769, 127 Pac. 73.

[2] Even if we were inclined to question the soundness of these decisions, they must be considered as establishing a rule of property, on the faith of which, no doubt, many transactions have been entered into. Under these circumstances, a change of decision is precluded by the doctrine of stare decisis.

[3] It is, however, argued by the appellant that there were other circumstances which, together with the fact that the stock stood in the name of William J. Dingee, trustee, force the conclusion that the bridge company took with constructive notice of plaintiff's claims. It appears that the demand of the American Bridge Company against the Atlantic companies was long overdue. Mr. Connell, the treasurer of the bridge company, came to San Francisco to obtain payment or satisfactory security. Together with Mr. J. C. Campbell, attorney for the bridge company, he entered into negotiations with Mr. Dingee, who, apparently, was regarded as the person principally interested in the ownership and management of the several cement companies. Mr. Dingee owned certain real estate in Redwood City. Mr. Campbell, acting for the bridge company, demanded that Mr. Dingee give the bridge company a mortgage on this property. To this demand Mr. Dingee, under the advice of his counsel, refused to accede, taking the position that the recording of a mortgage on his property would seriously injure his credit and thus be detrimental to his interests. Mr. Campbell stating that, unless the mortgage were given, the bridge company would institute suit, Mr. Dingee said that he had other security which he could furnish. He thereupon offered to give to the bridge company, as collateral for its claim, the bonds above mentioned, together with the 2,800 shares of Bellingham Bay & British Columbia Railroad Company stock. This was accepted, and the agreement providing for the extension of payment and the pledge of these securities was entered into. The securities were delivered, and they were held thereafter by the bridge company as security for its claim, a large part of which remains unpaid. Mr. Dingee, at the time of offering these securities, requested Mr. Connell to say nothing about the fact of his having offered or given them. It is upon these facts, coupled with the further circumstance that the bridge company knew that Dingee was president of the plaintiff, Northwestern Company, and of various other cement companies, that the appellant makes its claim that the creditor took the security with notice. There is no suggestion that any officer or agent of the defendant was actually aware that plaintiff was interested in the stock. The testimony of those who took part in the transaction is that they assumed and believed that Dingee owned the shares, or that he had the right to pledge them. We need not here decide whether a trial court or a jury might have found that the circumstances were such as to put the bridge company upon inquiry. The finding was the other way. Whether a party has notice of "circumstances sufficient to put a prudent man upon inquiry as to a particular fact," and whether "by prosecuting such inquiry, he might have learned such fact" (Civ. Code, § 19), are themselves questions of fact to be determined by the jury or the trial court. Brewster v. Sime, supra; Thompson v. Toland, supra; Renton, Holmes & Co. v. Monnier, 77 Cal. 449, 456, 19 Pac. 820.

[4] Findings of ultimate facts are binding upon appeal, not only when there is a direct conflict regarding the probative facts, but when those facts are fairly susceptible to opposing inferences. The circumstances upon which the appellant relies, mainly, to show notice are the form of the certificate, the fact that Dingee was in financial difficulties, and that he requested that the transaction remain undisclosed. Certainly it cannot be said that these circumstances would necessarily raise a suspicion that Dingee was not the owner of the stock which he was asserting his right to pledge. In view of the holding in Brewster v. Sime, supra, it may well be doubted whether any weight whatever is to be attached to the form of the certificate, either alone or in connection with the other facts.

[5] But, granting that this circumstance may be regarded in connection with others, we find nothing in the whole transaction which would prevent the conclusion that the bridge company acted in entire good faith and in the belief, reasonable under the circumstances, that Dingee was the actual owner of the stock and authorized to pledge it. It is not unusual for a debtor to possess and furnish security for a claim, although he may be unable to pay it at maturity. Nor is a request for secrecy regarding the transaction necessarily inconsistent with an honest purpose on the debtor's part, or good faith on that of the creditor.

[6] Under the foregoing views, the failure of the court to find upon the issue of plaintiff's beneficial ownership (which is assigned as error) becomes immaterial. The defendant's rights depend upon its acquiring the stock in good faith from the holder and apparent owner, and such rights are superior to those of the owner of an undisclosed equity.

[7] The appellant makes the point that the rule protecting bona fide purchasers is applicable only where the later claimant has acquired a legal, and not a mere equitable, title. Dupont v. Wertheman, 10 Cal. 354, 368; Taylor v. Weston, 77 Cal. 534, 537, 20 Pac. 62. It is urged that the bridge company acquired no more than an equitable right in the shares of stock because: (a) It was only a pledgee; and (b), the transfer to it in pledge was not entered on the books of the corporation. On the first proposition it is said, and truly said, that a pledge does not transfer title to the property. Civ. Code, § 2888; Haber v. Brown, 101 Cal. 445, 452, 35 Pac. 1035. But it does vest in the pledgee a "special property" in the chattels pledged (Williams v. Ashe, 111 Cal. 180, 43 Pac. 595), and this is a legal interest (Wells v. Archer, 10 Serg. & R. [Pa.] 412, 13 Am. Dec. 682; Douglas v. People's Bank, 86 Ky. 176, 5 S. W. 420, 9 Am. St. Rep. 276).

[8] Nor is it correct to say that a legal title or right is not vested under a sale or pledge of stock by delivery of a certificate duly indorsed without entry in the corporate books. The provision of section 324 of the Civil Code is that shares of stock "may be transferred by indorsement by signature of the proprietor, his agent, attorney, or legal representative, and the delivery of the certificate; but such transfer is not valid, except as to the parties thereto, until the same is * * * entered upon the books of the corporation. * * *" The effect of this provision, as construed by this court, is analogous to that of the statutes with reference to the recording of instruments affecting real property. The delivery of the indorsed certificate passes title, but such title cannot be asserted against purchasers or incumbrancers who have no notice of the transfer. Ashton v. Zeila M. Co., 134 Cal. 408, 410, 66 Pac. 494. "It is not the law of this state, nor is it the law generally, that a transfer upon the books of the corporation is essential to the creation of a valid pledge." Spreckels v. Nevada Bank, 113 Cal. 272, 278, 45 Pac. 329, 331 [33 L. R. A. 459, 54 Am. St. Rep. 348]; Weston v. Bear River, etc., Co., 6 Cal. 425; People v. Elmore, 35 Cal. 653.

[9] But beyond all this, if we assume that defendant's rights are equitable merely, the equities of the parties are not equal. The defendant having taken the stock in good faith from the owner of the legal title, the appellant, which had permitted Dingee to hold the apparent title to, and power of disposition over, the shares, is estopped from asserting its title as against the defendant. Fowles v. National Bank of California, 167 Cal. 653, 140 Pac. 271; McNeil v. Tenth National Bank, 46 N. Y. 325, 7 Am. Rep. 341.

It may be added that in the various cases (Brewster v. Sime, supra; Thompson v. Toland, supra; Arnold v. Johnson, 66 Cal. 402, 5 Pac. 796; Fowles v. National Bank of California, supra), in which this court has upheld the right of a bona fide pledgee to hold stock as against the undisclosed beneficial owner, the pledge had apparently been accomplished by a mere delivery of the indorsed certificate without transfer upon the corporate books. It is true that the precise point here urged, i. e., that the pledgee was the holder of a mere equity, was not specifically considered, but the decision, in each case, amounted to a ruling that the delivery of the indorsed certificate was sufficient to vest the pledgee with a right which he could assert against one who claimed to be the real owner of the shares standing in the name of the pledgor.

The judgment and the order appealed from are affirmed.

We concur: SHAW, J.; LAWLOR, J.

(174 Cal. 286)

Ex parte BARMORE. (Cr. 2040.)

(Supreme Court of California. Jan. 27, 1917.)

1. Municipal Corporations 🔑589—Police Power—Regulation of Business.

Under the police power the legislative authority may restrict the use of the property or the conduct of business to the extent reasonably thought necessary to promote the public health, safety, or comfort, but arbitrary or oppressive restrictions having no reasonable adaptations to these ends will be condemned as in conflict with fundamental constitutional rights.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1308, 1319.]

2. Municipal Corporations 🔑63(1)—Police Power—Judicial Review.

The legislative determination that a given regulation of the use of property or the conduct of business is necessary in the public interest will be given great weight in any judicial inquiry into the validity of the enactment, and the courts will not interfere with the discretion of the lawmaking body unless it is plain that needless oppression is worked and constitutional rights invaded.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 155, 1384, 1879.]

3. Municipal Corporations ⟹611—Police Power—Regulation of Business.

Under Const. art. 11, § 11, giving the city of Los Angeles authority to make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws, an ordinance making it unlawful to solicit custom or patronage upon any boat or in any depot for any hotel or for the transportation of persons or baggage, etc., for hire was a valid exercise of the police power, since even lawful occupations are subject to reasonable regulations, and one of the recognized modes of regulation is by prescribing the places where such occupation may or may not be conducted.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1344–1349.]

4. Municipal Corporations ⟹589—Police Power—Question of Fact.

The question whether a limitation upon the conduct of a business has a reasonable relation to the accomplishment of a legitimate public purpose is largely one of fact which must be decided in view of the particular legislation and the circumstances to which it is applied.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1308, 1319.]

5. Constitutional Law ⟹154(1) — Police Power—Obligation of Contracts.

The exercise of the police power is neither abridged nor delayed by reason of existing contracts.

In Bank. Application of E. H. Barmore for writ of habeas corpus. Writ discharged, and petitioner remanded.

Gray, Barker & Bowen, of Los Angeles, for petitioner. Warren L. Williams and Erwin W. Widney, both of Los Angeles, for respondent. Henry T. Gage and W. I. Gilbert, both of Los Angeles, amici curiæ.

SLOSS, J. The petitioner is held in custody on a charge of violating an ordinance of the city of Los Angeles, and seeks his release by means of a writ of habeas corpus.

The ordinance is one "regulating the business of soliciting custom or patronage upon the public streets, boats, railway trains and depots, and providing for the issuance of permits therefor." The provision here in question is contained in section 9 of the ordinance, which, so far as it need be quoted, declares that:

"It shall be unlawful for any person to solicit custom or patronage upon any boat, * * * or in any depot, * * * for any hotel, * * * or for the transportation of persons or baggage, goods, wares, or merchandise for hire. * * *"

The petitioner, E. H. Barmore, is the president of the Los Angeles Transfer Company, a corporation, which has a contract with the Southern Pacific Railroad Company under which said transfer company and its agents are authorized to enter the cars and the depot of said railroad company to solicit custom and patronage. The complaint under which Barmore is held charges that he solicited custom and patronage for the transportation of persons and baggage in the Southern Pacific depot in the city of Los Angeles.

[1] The petitioner contends that section 9 of the ordinance is unreasonable and void, and this is the only question presented for decision. Under the direct grant of article 11, § 11, of the Constitution, the city of Los Angeles has authority to "make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." The nature, extent, and limitations of the police power have been so frequently and so exhaustively discussed by this court and others that a mere statement of a few well-settled principles will suffice. It is familiar law that under this power the legislative authority may restrict the use of property or the conduct of business to such extent as may reasonably be thought necessary to promote the public health, safety, or comfort. Arbitrary or oppressive restrictions, having no reasonable adaptations to these ends, will be condemned by the courts as in conflict with fundamental constitutional rights.

[2] But the legislative determination that a given regulation of the use of property or of the conduct of a business is necessary in the public interest will be given great weight in any judicial inquiry into the validity of the enactment, and the courts will not interfere with the discretion of the lawmaking body "except where the case be plain that needless oppression is worked and constitutional rights invaded." In re Smith, 143 Cal. 368, 372, 77 Pac. 180, 182.

[3] Section 9 of the ordinance under review is designed to regulate the business of transporting passengers or goods, by prohibiting solicitation of patronage therefor in certain public places, including railroad stations. The business is, no doubt, a legitimate and useful one. But even lawful occupations are subject to reasonable regulation, and one of the recognized modes of regulation is by prescribing the places where a given occupation may or may not be conducted. Ex parte Quong Wo, 161 Cal. 220, 118 Pac. 714. The comfort and convenience of the many persons who have occasion to pass through railroad stations are directly affected by the manner in which transfer facilities for themselves and their baggage are offered. In enacting this ordinance the city council may well have thought that active solicitation of patronage within depots would interfere unduly with the peaceable and convenient use of such depots by arriving and departing passengers. We cannot say that such a view is unreasonable, or that

the prohibition of such solicitation is not a proper means of promoting the comfort and convenience of the traveling public and protecting it from the annoyance of importunate requests for employment.

This court has not heretofore had occasion to pass upon restrictions of this precise kind. Similar ordinances and statutes have, however, come under judicial review elsewhere, and the decided weight of authority, particularly that of more recent date, supports the validity of such enactments. Emerson v. McNeil, 84 Ark. 552, 106 S. W. 479, 15 L. R. A. (N. S.) 715; Williams v. State, 85 Ark. 464, 108 S. W. 838, 26 L. R. A. (N. S.) 482, 122 Am. St. Rep. 47; Chillicothe v. Brown, 38 Mo. App. 609; Ladonia v. Poor, 73 Mo. App. 465; Seattle v. Hurst, 50 Wash. 424, 97 Pac. 454, 18 L. R. A. (N. S.) 169; Seattle T. & T. Co. v. City of Seattle, 86 Wash. 594, 150 Pac. 1134. The case of Williams v. State, just cited, was reviewed by the Supreme Court of the United States on writ of error. The judgment of the Supreme Court of Arkansas was affirmed. Williams v. Arkansas, 217 U. S. 79, 30 Sup. Ct. 493, 54 L. Ed. 673, 18 Ann. Cas. 865. The higher court quoted approvingly from the opinion of the state court, and a part of the passage quoted is appropriate for repetition here:

> "The Legislature clearly has the power to make regulation for the convenience and comfort of travelers on railroads, and this appears to be a reasonable regulation for their benefit. It prevents annoyance from the importunities of drummers. * * *
>
> " 'This statute is not an unreasonable restriction upon the privilege one should enjoy to solicit for his lawful business, which, it is rightly urged, is an incident to any business. It does not prevent any one from advertising his business or from soliciting patronage, except upon trains, etc. This privilege is denied him for the public good. It is a principle which underlies every reasonable exercise of the police power that private rights must yield to the common welfare.' " Williams v. Arkansas, 217 U. S. 89, 30 Sup. Ct. 495, 54 L. Ed. 673, 18 Ann. Cas. 865, quoting from Williams v. State, 85 Ark. 470, 108 S. W. 840, 26 L. R. A. (N. S.) 482, 122 Am. St. Rep. 47.

We think the sound view is that declared by the cases which we have cited, although there are a few decisions holding to the contrary. Napman v. People, 19 Mich. 352; Cosgrove v. Augusta, 103 Ga. 835, 31 S. E. 445, 42 L. R. A. 711, 68 Am. St. Rep. 149.

[4] The petitioner cites a number of cases in which this court has overthrown municipal ordinances or statutes which sought to prohibit the carrying on of business in a certain place or in a given manner. There is no occasion to review these cases in detail. They dealt with occupations and with restrictions bearing no resemblance to those here involved. The question whether a limitation upon the conduct of a business has a reasonable relation to the accomplishment of a legitimate public purpose is one that must be decided upon a view of the particular legislation and the circumstances to which it is applied. The question presented is largely one of fact.

[5] It is of no importance in this inquiry that the Los Angeles Transfer Company had a contract with the Southern Pacific Railroad Company under which its agents were authorized to solicit in the depot of the railroad company. If the city was authorized, in the exercise of its police power, to prohibit solicitation within the depot, its right to so legislate could, of course, not be limited by any contract made between private parties.

> "All contracts are subject to this power, the exercise of which is neither abridged nor delayed by reason of existing contracts." Seattle v. Hurst, supra.

See, also, Chillicothe v. Brown, supra.

The writ is discharged, and the petitioner remanded.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; LAWLOR, J.; HENSHAW, J.; LORIGAN, J.

(174 Cal. 282)

In re HUNTOON'S ESTATE. (S. F. 7473.)

(Supreme Court of California. Jan. 27, 1917.)

1. Executors and Administrators ⇨231—Mortgage Debt of Estate.

Where decedent's mortgage debt had not been presented as a claim against her estate, though it still remained a lien on the land, her executor was under no obligation to pay it out of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 804, 828, 829.]

2. Executors and Administrators ⇨295—Payment of Legacy.

Where the executor of a will had on hand about $25,000 of the estate in cash, though his own cash legacy of $10,000 should be paid out of it, another cash legatee was entitled to the immediate payment of $8,000 of her legacy, which would leave more than enough cash on hand to meet all probable expenses of administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1185–1197.]

3. Executors and Administrators ⇨314(8)—Valuation of Estate.

The valuation of a decedent's estate in the executor's inventory and appraisement was prima facie evidence of the value of the property on a legatee's petition for partial distribution.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1285.]

4. Executors and Administrators ⇨314(11)—Allowance to Legatee of Portion of Interest.

On petition for partial distribution by a residuary legatee, where the court was warranted in inferring from the evidence that it would be necessary to sell all of the property of the estate, and to make a final distribution of the residue in cash, it was proper to allow petitioner, who had been diligent in the assertion of her rights, a portion of her interest out of the idle cash on hand.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1290, 1291.]

Department 1. Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

In the matter of the estate of Laura M. N. Huntoon, deceased. Petition by Mary Emma Williams, a residuary legatee, asking for partial distribution to her of an amount on hand in cash, opposed by Ernest D. Woodman, as residuary legatee and devisee. From a decree distributing a sum to petitioner on account of her interest as residuary legatee, Woodman appeals. Decree affirmed.

Wilson & Wilson, of San Francisco, and Rolfe L. Thompson, of Santa Rosa, for appellant. James W. Oates, of Santa Rosa, for respondent.

SLOSS, J. Laura M. N. Huntoon died, leaving a will which was admitted to probate in the superior court of Sonoma county, and letters testamentary thereon were issued to Ernest D. Woodman. By her will the testatrix bequeathed to her sister, Mary Emma Williams, the respondent herein, the sum of $10,000. There was a bequest of the same amount to Ernest D. Woodman, a nephew of the testatrix, and the executor of her will. The residue of the estate was devised and bequeathed in undivided seventh parts, one part to said Mary Emma Williams, one to Ernest D. Woodman, and the others, respectively, to two brothers of the testatrix, to a niece, to the children of a deceased brother, and to the children of a deceased sister. Notice to creditors was published, and the time for presentation of claims expired without any claims having been presented against the estate. The executor filed an inventory and appraisement, which showed personal property valued at $74,726.16, and real estate valued at $42,344.28, a total of $117,070.44. Among the items of personal property were two deposits in savings banks, aggregating $11,467.72. Mrs. Williams claimed the ownership of these deposits as a gift from the decedent, and commenced action against the executor and the savings banks to recover said deposits. These actions are still pending on appeal. The money legacy of $10,000 to Mrs. Williams has been paid by order of court. The executor's first annual account was settled and allowed on June 8, 1914. It showed payments of $1,000 to the executor on account of his commissions, and of $1,000 to his attorneys on account of their fees.

On March 9, 1915, Mary E. Williams filed her petition, asking for partial distribution to her of the sum of something over $11,000, which, as she alleged, was on hand in cash, and could be distributed to her without loss or injury to the creditors of the estate. Woodman, appearing as residuary legatee and devisee, opposed the application. The court made its decree, reciting that the estate is of the value of over $100,000, and is but little indebted; that all claims have been paid; that the executor has in his hands the sum of $25,000 in cash that is not needed in the administration; that the interest of petitioner as a residuary legatee will be more than $8,000; that the estate is in litigation, and will not be ready to finally settle and distribute for considerable time; and that $8,000 can be paid out of the estate to the petitioner on account of her interest as residuary legatee without loss or injury to the creditors of said estate or to said estate. The decree accordingly distributed such sum of $8,000 to the petitioner on account of her interest as residuary legatee. From this decree Woodman appeals.

[1, 2] It appeared in evidence that a part of the personal property of the estate had been converted into cash. Certain shares of stock had been sold and some promissory notes collected. At the time of the hearing the executor had on hand about $25,000. It is contended that the court was not justified in finding that this sum of money was "not needed in the administration." The appellant claims that out of this sum his own cash legacy of $10,000 should be paid, and that there is a mortgage debt of $10,000 on a parcel of real property belonging to the estate. But the mortgage debt had not been presented as a claim, and, while it still remained a lien on the land, the executor was under no obligation to pay it out of the estate. In fact, he testified that in his judgment it would not be advisable to pay the mortgage. So far as the appellant's legacy is concerned, he has not applied for an order directing its payment. But assuming that it should be paid, there will still remain on hand the sum of $15,000, and the payment of $8,000 to the respondent will leave more than enough cash to meet all probable expenses of administration.

[3, 4] The appellant also contends that the finding that the estate is of the value of over $100,000 is not sustained by the evidence. But the inventory shows a value of over $100,000, after deducting the deposits in litigation. Furthermore, it was testified that the income of the estate during the two years prior to the filing of the petition for partial distribution had been about $5,000 per annum. It is true that the executor testified that the real property had depreciated in value. The valuation in the inventory was, however, prima facie evidence of the value of the property (Estate of Carver, 123 Cal. 102, 106, 55 Pac. 770), and even though some allowance were made for the decline in value of the real estate, the evidence still warranted a conclusion that the residue would amount to enough to make it proper to distribute to the petitioner the sum of $8,000 without affecting the shares of the other residuary legatees and devisees. Her ultimate interest will undoubtedly be worth considerably more than this sum, and we see no objection to the partial distribution to her on account. It does not appear that such distribution would be in any way injurious to other persons interested in the estate, as was the case in Estate of

Glenn, 153 Cal. 77, 94 Pac. 230. There might be some ground for objecting to the payment of one residuary legatee and devisee in cash, if the others would thereby be compelled to take their shares in undivided interests in real property. No one of the beneficiaries to whom the residue is given has a right superior to that of the others. But the court was warranted in inferring from the evidence here introduced that it would be necessary to sell all of the property and to make a final distribution of the residue in cash. This being so, it was not improper to allow the petitioner, who had been diligent in the assertion of her rights, a portion of her interest out of the idle cash on hand.

The decree is affirmed.

We concur: SHAW, J.; LAWLOR, J.

(174 Cal. 316)

RIVERSIDE LAND CO. v. JARVIS et al.

(L. A. 3780.)

(Supreme Court of California. Jan. 29, 1917.)

1. Waters and Water Courses ⇒249—Irrigation—Water Dedicated to Public Use.

Water dedicated to public use cannot lawfully be converted into a private use so as to create a private preferential right thereto for the benefit of a special parcel of land.

2. Waters and Water Courses ⇒252—Irrigation—Water Dedicated to Public Use—Conversion to Private Use.

The articles of incorporation and by-laws of a water company whose predecessors had dedicated the water to public use provided that certificates of its stock should express on their face the number of shares for which and the tract of land to which they should be attached, on the basis of two shares of stock to each acre of land, the tract being in the possession and ownership of the person to whom the certificates should be issued, and the by-laws provided that certificates of stock should be transferable only with the land to which they were attached, and that the party asking for a transfer of stock should present to the secretary his conveyance of the land before the issuance of the new certificate. *Held*, that the articles and by-laws did not create a private preferential right for the benefit of a special parcel of land in the water so dedicated.

3. Waters and Water Courses ⇒253—Irrigation—Private Rights—Appurtenances to Land.

Private rights in water dedicated to public use by a water company would be appurtenances to the land, entitling it to receive water from the system, and the service of the water to the land must have been continued by the company in any event, as after a sale, since it was the owner's right to have it so continued.

4. Waters and Water Courses ⇒249—Irrigation—Dedication of Water to Public Use—Diversion.

If a water right was a public right pertaining to land by reason of the fact that it was a part of the territory to which a public use for irrigation had attached, it was the duty of the water company, whose predecessors had dedicated the water to public use, to continue to supply to the land a reasonable proportion of the water so dedicated, and, whether dedicated to public use upon a class of lands not all contiguous, or upon all lands within a defined territory, such water could not lawfully be diverted to other lands by the agent in charge of the use, but could only be supplied to the land to which it was dedicated.

5. Waters and Water Courses ⇒234—Irrigation Company—Stock—Validity—Restraint on Alienation.

An agreement, between persons entitled to the first right to the use of water, to form a corporation to acquire the supply and distributing canals, and that the articles of incorporation shall provide that stock is to be issued only to the owners of the land entitled to the water, two shares of stock for each acre of land, that the stock shall be attached to such land and shall be transferable only with the land and upon the presentation of a conveyance thereof from the former holder, and that such stockholder shall have the first right to the water, is not unreasonable, so that the articles and by-laws made to carry the agreement into effect are not an unreasonable restraint on alienation of the stock, do not violate Civ. Code, § 324, as amended by St. 1895, p. 118, providing that shares of stock may be transferred by indorsement and delivery of the certificate, and are not contrary to the general policy of the law, in view of the amendment of 1895 to the section, providing that a corporation to sell or distribute water for irrigation or domestic use may declare in its by-laws that the water shall be distributed only to stockholders, that the stock shall be appurtenant to the land described in the certificate, shall only be transferred with such land, and shall pass with a conveyance thereof.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 321.]

6. Specific Performance ⇒70—Contract to Transfer Stock.

A suit for specific performance of a contract to transfer corporate stock may be maintained.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 203.]

7. Waters and Water Courses ⇒234—Corporations — Stockholder's Agreement — Construction.

The articles of incorporation, by-laws, and certificates of stock of a water company, organized to acquire a water supply and distributing canals, provided that certificates of stock should express on their face the number of shares for which and the tract of land to which they should be attached, on the basis of two shares of stock to each acre of land, the land being in the possession and ownership of the person to whom the certificates are to be issued, that certificates of stock should be transferable only with the land to which they were attached, that the party asking for a transfer of stock should present to the secretary his conveyance of the land before the issuance of the new certificate, and that the certificates were transferable only on the books of the company by indorsement on the certificates and their surrender. *Held* that, taken together, the articles, by-laws, and certificates of stock were in effect an agreement between the stockholder and the company that the stock should be transferable only with the land, and, conversely, that a transfer of the land by sale or foreclosure should pass to the grantee the right or equitable title to the stock.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 321.]

8. Waters and Water Courses ⇒234 — Contracts—Enforcement by Third Party.

The grantee of the land, becoming the equitable owner of the stock, may enforce the contract under Civ. Code, § 1559, providing that a contract made expressly for the benefit of a third person may be enforced by him.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 321.]

9. EXECUTORS AND ADMINISTRATORS ⟹315(5)—SUCCESSION OF HUSBAND TO WIFE'S PROPERTY—ACQUISITION OF RIGHTS.

Distribution to a husband, on the settlement of his wife's estate, of her shares in a water company gave him no right additional to those she possessed therein.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1306, 1307, 1310.]

10. WATERS AND WATER COURSES ⟹188(2), 232—OPERATIONS OF WATER COMPANY—OPERATION OF DISTINCT SYSTEM.

A water company may lawfully carry on at the same time two or more separate and distinct systems of public service in different places or for different uses in the same territory, as by operating an irrigation system and a pipe system to furnish water for domestic use, and its so doing cannot affect the rights of stockholders with regard to stock issued pursuant to charter and by-laws.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 287, 321, 322.]

In Bank. Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by the Riverside Land Company against Joseph Jarvis and the Riverside Water Company. From the judgment and an order denying its motion for new trial, plaintiff appeals. Judgment and order reversed.

Purington & Adair, of Riverside, for appellant. T. T. Porteous, McFarland & Irving and A. H. Winder, all of Riverside, for respondents.

SHAW, J. The plaintiff appeals from the judgment and from an order denying its motion for a new trial.

The object of the action is to obtain a judgment directing the defendant Riverside Water Company to transfer to the plaintiff 154 shares of the capital stock of said defendant water company. The certificates outstanding, representing these shares, are in the control and possession of the defendant Joseph Jarvis, and he refuses to deliver the same to the plaintiff, though requested so to do. The right which the plaintiff claims to these shares is based on the following facts:

The Riverside Water Company was organized as a corporation in 1885. By its articles of incorporation it was empowered to take, acquire, buy, own, sell, and lease water and water rights, ditches, canals, dams, reservoirs, and structures connected therewith "and all easements and rights in respect of water and the uses of water appurtenant to any lands in this state, together with all lands and rights of way necessary or proper for any of the purposes aforesaid, or for other purposes," to use the water or dispose of the same to others to be used, and to control, manage and use the ditches, canals and other works aforesaid. Subdivisions 4 and 6 of article 2 further describe the purposes of the corporation as follows:

"4. To furnish, sell, lease, give and supply water to all lands represented by stock of this corporation, and thereafter for use for mechanical, agricultural, irrigation and other purposes, in such manner and upon such terms as it may deem fit, or as may be prescribed by law."

"6. To make such by-laws, rules and regulations as it may deem proper and necessary for the management and preservation of its works, and for the use and distribution of the water under its control."

Article 8 is as follows:

"To issue certificates of stock of such form and device as the board of directors may direct, and such certificates shall express on their face the number of shares for which and the tract of land to which they shall be attached, upon the basis of two shares of stock to each acre of land, the said tract of land being in the possession and ownership of the person to whom the certificates are to be issued."

Articles 9 and 10 of the by-laws contain provisions of like effect as said article 8, and the further provision that certificates of stock should be "transferable only with the land to which they are attached," and that the party asking for a transfer of stock should present to the secretary his conveyance of the land before the issuance of the new certificate.

The certificates of stock here sought were issued by the Riverside Water Company while the aforesaid provisions were in force. Certificate 1038 for 100 shares was issued to Mary A. Jarvis, wife of Joseph Jarvis, on October 13, 1894. Certificate 1007 for 14 shares was issued to Mary A. Jarvis on May 19, 1894. Certificate 711 for 40 shares, only 20 of which are here claimed, was issued to Joseph Jarvis on May 7, 1889. Certificate 2292 for 80 shares, of which only 20 shares are here claimed, was issued to Joseph Jarvis on February 15, 1907. They were all of the same form. The following copy of the one last mentioned shows the form of all of them.

"No. 2292. 80 shares.

"Incorporated under the Laws of California, January 2, 1885.

"Riverside Water Company.

"Capital Stock. $240.000. 24,000 Shares. $10 Each.

"Riverside, County of Riverside, State of California, Feby. 15, 1907. This certifies that Joseph Jarvis is entitled to eighty shares of the capital stock of the Riverside Water Company, which are attached to the following described tracts of land situated in the city of Riverside, to wit: Lots 9, 13, 14 and 16 block 7, lands of the Riv. Land & Irrigation Co., containing 40 acres of land, and transferable only on the books of the company by indorsement hereon and surrender of this certificate."

At the time of the issuance of the certificates to Mary A. Jarvis and Joseph Jarvis, respectively, they each owned the tract of land to which the shares are therein respectively declared to be attached. After the issuance of said certificates both Mary A. and

Joseph Jarvis, by foreclosure proceedings and conveyances, were divested of the title to the 77 acres of the land here involved, and, through mesne conveyances, the plaintiff, on April 21, 1911, became the owner thereof. By virtue of this ownership, and under said articles of incorporation and by-laws, it claims to be the owner of the 154 shares of the stock declared by said certificates to be attached to the 77 acres of land. The certificates for these shares were retained by Jarvis and his wife, respectively, when their titles to the lands were divested, and they have never been in possession of the plaintiff. Mary A. Jarvis afterwards died, and the decree of final distribution of her estate purports to distribute the aforesaid certificates issued in her name to Joseph Jarvis. Thus the title to the land and the manual possession of the certificates have passed to different persons, plaintiff having the title to the land and the defendant Joseph Jarvis the possession of the certificates.

It will aid in the interpretation of these articles and by-laws to state briefly some conditions of fact and of law existing at the time of the incorporation of the company.

The Riverside water system had its origin in 1869. In that year the California Silk Center Association appropriated water from the Santa Ana river near San Bernardino, and carried it by canals and flumes to the plateau at Riverside, to be there used for the irrigation of farm lands. The system was thereafter owned and carried on successively by several other corporations. The Southern California Colony Association owned and operated it from September 15, 1870, to March 3, 1877; the Riverside Land & Irrigating Company from that date to July 26, 1879, and the Riverside Canal Company thereafter until June 1, 1885, when it was transferred to the Riverside Water Company. These companies appropriated more water and extended the system considerably from time to time. In some cases they sold to the respective landowners so-called water rights for their lands. By a water right we mean a contract by the water company with the landowner by which it agreed to furnish water to the land each year, forever, for its irrigation, either at a fixed annual rate or for a lump sum. In other cases the landowner did not buy such water right, but bought water from the company from year to year, as needed. The respective companies owned large tracts of land on the plateau under the flow of the canals. They sold and conveyed parcels of this land to farmers with a water right from the canal system attached thereto. In other instances they sold water rights for lands which the company had not sold to the owner. In still others they sold parcels of the land without a water right, but afterwards furnished water to irrigate the same as demanded. The lands here involved were of the latter class, except that the parcel described in certificate 1038 has never received any water. In the early part of this period a question arose concerning the permanency of the right of the landowners to the water thus furnished, where no water right agreements were executed, and to settle such question, at the instance of Mr. Satterwhite, member from San Bernardino, the Legislature, on April 3, 1876, enacted section 552 of the Civil Code, which reads as follows:

> "Whenever any corporation, organized under the laws of this state, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law. And whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation, has been furnished water by it with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation."

Under this section the landowners who had been furnished with water by said companies to irrigate lands which such companies had sold to them, or which were on the line and within the flow of the ditches of the system, became entitled to receive such water permanently for that purpose. As to the land sold by such companies the right would be an easement attached to the land sold. As to other lands so furnished it would be, at least, a right to the continued use of the water thereon.

The water system owned and operated by the Riverside Canal Company in 1885 had grown up and was operated under the conditions stated. A large area of land, devoted to orange culture, was irrigated and kept productive by the use of this water. The rights of the several landowners to the use of the water were of various origins; some had gained a private right by prescription, some had acquired a private right under a water right agreement, some had rights under section 552, and others no well-defined right except as beneficiaries of a public use. The board of supervisors of the county had fixed the rates to be charged for water for irrigation, and, so far as appears, the users and the company acquiesced therein, and the rates fixed were charged and paid. All the interested parties seemed to agree that the water of the system was devoted to public use, that the particular lands to which the water was furnished comprised the territory to which the water was dedicated, that the owners thereof were the beneficiaries of the use, and that the canal company was the administrator thereof, at least so far as the establishment of water rates was concerned. It is probable that they were mistaken in this as to a part of the water and particular tracts of land. As the landowners are not parties to the action, it would not be proper to decide the question, and we find it unnecessary to do so. It is sufficient for the purposes of the case to declare that the respective owners of land irrigated from the system had, while they owned the land, rights to the use of the water in control of the company, either private rights, or rights as members of the "public" to whose use the water was dedicated; that these rights were either appurtenant to the land as private rights, or they were attached to the land because of the dedication thereto for public use; that the private easements were burdens or servitudes upon the water system; that the public use was a burden on the system as to the remainder of the water; and that it was not within the power of the company, without the consent of the users, to divest the private rights or to shift the public use to other lands. This is a correct statement of the law as we conceive it to be.

The Riverside Water Company was organized by the persons who were at the time receiving and using the water of the system thus owned by the Riverside Canal Company. The latter company also owned a large body of vacant land which it held for sale. The water users desired to separate the ownership and control of the water system from the ownership of the land. They, therefore, formed two corporations, the Riverside Land Company, plaintiff herein, to acquire the land of the canal company and deal in land, and the Riverside Water Company, to acquire the said water system and operate the same. One of the chief objects, with regard to the water company, was to get all the persons who owned land within the flow of the canals and who had been using water therefrom to irrigate such lands, to become stockholders in the new water company in proportion to the area irrigated, and to provide some method by which the control of that company would be kept in the hands of those who rightfully used the water. It was mainly for the latter purpose that the above provisions were framed and inserted in the articles and by-laws.

The water company was accordingly formed, and it thereupon acquired said water system by conveyance from the Riverside Canal Company on July 1, 1885. All but a very few (all but two, Jarvis testified), of the previous water users become stockholders of the water company in pursuance of this plan. Thereafter the water company continued the distribution of the water as before. It conceded that the right of the few users who did not take stock was not divested by that fact, and it has continued the service to them at the established rates.

The water company in its answer joins in the prayer of the complaint. The active defense is made by Jarvis. He claims that the stock belongs to him, although he does not own the land to which it is declared to be attached, nor any other land. On his behalf it is contended: (1) That the water was dedicated to public use, and that the provision that the stock should be attached to the lands described in the certificate therefor constituted an attempt to give that land a preferential right to receive a part of the water so dedicated, to convert, to that extent, the public use into a private right, which, under the principles laid down in Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404, 29 L. R. A. (N. S.) 213, Southern P. Co. v. Spring V. W. Co., 173 Cal. ——, 159 Pac. 865, and other decisions of this court, may not be done. (2) That the provisions of the articles and by-laws of the water company, to the effect that its stock should only be transferred with the land to which it was declared to be attached, constitute an unreasonable restraint on alienation, which is beyond the power of the corporation, and that the provisions are consequently void. (3) That the articles, by-laws, and certificate of stock do not constitute a contract between the corporation and the stockholder whereby the stockholder agrees that a transfer of the land described in the certificate shall operate as a transfer of the right to the shares represented by the certificate, or that the stock shall be transferred only with said land.

[1] 1. That water dedicated to public use cannot lawfully be converted into a private use so as to create a private preferential right thereto for the benefit of a specific parcel of land is a well-established proposition, and is laid down in the cases referred to.

[2] But we do not think that this is the effect of the articles and by-laws of the company. So far as the validity of a provision that a conveyance of the land carries to the grantee a right to the stock which "represents" the land, as the articles put it, is concerned, it is immaterial whether the right of the owner to receive water for the land, at the time the water company acquired the system, was a public right or a private right.

[3] As to the private rights, if any, they would be appurtenances to the land, entitling it to receive water from the system, and the service of that water to that land must have been continued by the company, in any event, since it was the owner's right to have it so continued. In such a case a sale of the land after the acquisition of the system by the company would carry the right to the water as an appurtenance. There would obviously be no conversion of a public right into a private right, but the private right would continue as before.

[4] If the right was a public right pertaining to the land by reason of the fact that it was a part of the territory to which the public use for irrigation had attached, as must have been the case if it was at that time lawfully receiving the water dedicated to public use, then it would be the duty of the water company to continue to supply to that land a reasonable proportion of the water so dedicated to the public use. Whether dedicated to public use upon a class of

lands not all contiguous, or upon all lands within a defined territory, such water could not lawfully be diverted to other lands by the agent in charge of the use, but must be supplied to the land to which it is dedicated. Fellows v. Los Angeles, 151 Cal. 64, 90 Pac. 137; Hewitt v. San Jacinto, etc., Dist., 124 Cal. 186, 56 Pac. 893; South Pasadena v. Pasadena, etc., Co., 152 Cal. 587, 93 Pac. 490; Del Mar, etc., Co. v. Eshleman, 167 Cal. 666, 140 Pac. 591, 948. It would be to the interest of the landowner benefited by such a public use to have a voice in the control of the company in charge of the use, as well as to the interest of those having a private right. It would therefore be to the interest of all the shareholders, under the plan devised, and, consequently, to the interest of the company, that none but users of the water, entitled as beneficiaries, should have stock of the company, or a voice in its control. The continuance of the service, under these circumstances, would not be a conversion of a public use into a private use but would be a mere continuance of a public use already existing. In such a case it would be entirely reasonable to provide that a sale of the land so beneficially entitled should carry the stock which is evidence for the owner of the land of his right to participate in the use of the water and in the control of the corporate agent in charge of the use. Such corporate agent would remain subject to the regulation and control of the public authorities thereafter, as before, notwithstanding the arrangement that stock therein would pass with the land to which it was declared to be attached.

It may be that the 50 acres represented by certificate 1038, which was never supplied with water, is not now entitled to any unless there should be a surplus in the control of the company after supplying all lands which have heretofore lawfully received water. The issues in this case do not require us to decide the question as to the right to water. We are concerned only with the right to the stock, and that right is not affected by the fact, if it be a fact, that the company has no water to furnish to that particular parcel of land.

2. There are decisions holding that restrictions upon the sale or transfer of corporate stock which are unreasonable cannot be imposed by provisions in its articles or by-laws. A provision that the transferee of stock should vote for every increase of capital stock proposed by the directors has been held to be unreasonable and void. McNulta v. Bank, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203. Of a by-law which required 30 days' previous notice of a proposed transfer and of the price thereof, and gave the company or other stockholders the preferred right to buy it at that price, the court said that it was an unreasonable restraint upon alienation "when invoked by the company." Bloede Co. v. Bloede, 84 Md. 129, 34 Atl. 1127, 33 L. R. A. 107, 57 Am. St. Rep. 373. The decision in New England Tr. Co. v. Abbott, 162 Mass. 152, 38 N. E. 432, 27 L. R. A. 271, seems to be opposed to the last-named case, and to hold that such contracts are valid. And a provision in the articles that stock should not be transferred until all debts of the holder to the corporation were paid, although inconsistent with the general law giving the right to transfer property, has been held to be valid, and not contrary to public policy nor in contravention of express law. Gibbs v. Long Island, etc., Co., 83 Hun, 92, 31 N. Y. Supp. 406; Mechanics' Bank v. Merchants' Bank, 45 Mo. 516, 100 Am. Dec. 388; St. Louis I. Co. v. Goodfellow, 9 Mo. 149. In Lum v. American, etc., Co., 165 Cal. 661, 133 Pac. 303, Ann. Cas. 1915A, 816, a provision in the articles, and stated in the certificates, that the paid-up capital stock should not be assessed was declared to constitute a valid contract between the corporation and its stockholders. The court said:

> "A corporation may enter into an agreement * * * to do or to refrain from doing something when such action * * * is not contrary to express law, or to public policy. * * * Such contracts may even go so far as to provide for a surrender by one of the parties of some privilege otherwise granted by law."

[5] An agreement between persons who are entitled to the first right to the use of a certain supply of water to form a corporation to acquire such supply and distributing canals, and that the articles of incorporation shall provide that stock is to be issued only to the owners of land entitled to the water, 2 shares of stock for each acre of land, that the stock shall be attached to such land, and shall be transferable only with the land and upon the presentation of a conveyance thereof from the former holder, and that such stockholders shall have the first right to the water cannot be said to be unreasonable. If not, the articles and by-laws made in pursuance of and to carry into effect such agreement are not unreasonable. On the contrary, it is founded on prudence and reason, designed, as it would obviously be, to keep the control of the distributing company in the hands of those entitled to the use of the water. The beneficial effects in this case are shown by the fact that the water company has kept the rates down to the sum required to provide for expenses of distribution and maintenance, and has not attempted to make profits in any other manner.

That it is not contrary to the general policy of the law is shown by the amendment of 1895 (St. 1895, p. 118) to section 324 of the Civil Code, providing, in substance, that a corporation organized to sell or distribute water for irrigation or domestic use may declare in its by-laws that the water shall be distributed only to stockholders, that the stock shall be appurtenant to the land described in the certificate, shall only be transferred with such land, and shall pass with a conveyance thereof, a plan not essentially different from that adopted by the incorporators of the Riverside Water Company. It does not violate the provision of section 324 that shares of stock "may be transferred by indorsement" and "delivery of the certificate." This language does not forbid the making of agreements to transfer, nor the making of contracts, good between the parties, that a certificate shall pass with the transfer of certain other property. Corporate stock would be transferable without such provision. Civ. Code, § 1044. The provision merely prescribes a mode by which the transfer may be made. It does not prohibit a transfer by other methods, nor declare that, when made in another manner, a transfer may not be enforced by the party entitled to the shares.

[6] Specific performance lies in such cases. Feckheimer v. National Exch. Bank, 79 Va. 83; New England T. Co. v. Abbott, supra. The articles and by-laws of this company do purport to prevent a lawful transfer, except with the land, without the consent of the corporation. But the agreement not to transfer the stock except with the land is voluntarily made by the person taking the stock. As it is not unreasonable or immoral, nor expressly forbidden, it is a contract which a person may lawfully make concerning his property and which may be enforced against him.

[7, 8] **3.** The articles, by-laws, and certificate constitute the evidence of the contract between the parties. Taken together, they are, in effect, an agreement between the stockholder and the company that the stock shall be transferable only with the land, and, conversely, that a transfer of the land shall pass to the grantee thereof the right to the stock, that is, the equitable title thereto. Respondent admits that it was an agreement on the part of the stockholder that the stock should be transferable only with the land. Its language to that effect is too clear for dispute. This being so, it must follow, either that a transfer of the land carries the equitable title to the stock, or that the ownership thereof will forever remain in the original holder of the certificate, which seems absurd. But the agreement went further, and provided that the stock should be "attached" to the land. It is not provided that it shall be detached by a sale of the land. The plain intent is that it shall remain attached, and that the ownership thereof shall follow the ownership of the land to which the water must be furnished. If it is to remain attached after the land is conveyed, it must pass with the land. This is the natural effect and the clear meaning of the provision. It is a contract made by the landowner for the benefit of the company, the other stockholders, and also of the grantee of the land. The grantee becomes the owner of the equitable title to the stock, and he may enforce the contract made for his benefit. Civ. Code, § 1559.

[9] The distribution of the shares, issued to Mrs. Jarvis, to her husband upon the settlement of her estate gave him no right additional to those she possessed therein. The obligation may be enforced against him as to all the shares.

[10] After the water company had acquired the water, canals, and works of the canal company, it also acquired another water supply and system of pipes installed to furnish water for domestic uses to the inhabitants of the city of Riverside. It has ever since operated said domestic system, furnishing water therefrom to all persons without regard to their ownership of land or stock. The court found these facts, as we suppose, in support of its theory of the case that if the water company was engaged in public service of water, the land could not be attached to its stock. The two water systems were wholly separate and distinct, and the water furnished for domestic use was obtained from a source not acquired from the canal company. A water company may lawfully carry on at the same time two or more separate and distinct systems of public service in different places, or for different uses in the same territory. The fact that this company was also engaged in the public service of selling and distributing water for domestic use in Riverside does not affect the reciprocal rights and obligations of the stockholders and the company with regard to the stock issued in pursuance of the articles and by-laws. The finding is immaterial to the case.

The finding that the water company had allowed persons to vote as stockholders and to act as directors who did not own stock attached to land owned by them is not sustained except by evidence to the effect that in some instances where the land was conveyed the stock was not at once brought in by the parties for transfer to the grantee, and in the meantime the original stockholder appeared on the books to own the stock, and was permitted to vote the same; no objection being made by the grantee. These facts are also of no importance to the questions decided.

For the reasons we have given, we are of the opinion that the court below erred in holding that the certificates of stock were held by Jarvis free of any claims of the plaintiff. It is unnecessary to declare that the certificates are appurtenant to the parcels of land described. It is sufficient for the plaintiff's purpose that the conveyance of the land, either directly, or upon foreclosure, creates an implied contract by the grantor, or former owner, to yield up the certificate to the grantee and that plaintiff is entitled to enforce such agreement and have the certificates transferred on the books of the company.

The judgment and order are reversed.

We concur: ANGELLOTTI, C. J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.; HENSHAW, J.; LAWLOR, J.

(174 Cal. 315)

WESTERN INDEMNITY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (L. A. 5098.)

(Supreme Court of California. Jan. 29, 1917. Rehearing Denied Feb. 26, 1917.)

1. MASTER AND SERVANT 🔑404—WORKMEN'S COMPENSATION ACT—EVIDENCE—DECLARATIONS.

Declarations of the deceased employé relating directly to his injury were competent under Workmen's Compensation, Insurance, and Safety Act (St. 1913, p. 313) § 77a, as amended in 1915 (St. 1915, p. 1102), permitting such hearsay evidence in an action under that act.

2. MASTER AND SERVANT 🔑347—WORKMEN'S COMPENSATION ACT—CONSTITUTIONALITY.

The provisions of Workmen's Compensation, Insurance, and Safety Act, § 77a, as amended in 1915, are not opposed to any constitutional provision.

In Bank. Application by Western Indemnity Company and another for writ of review against the Industrial Accident Commission of the State of California and another. Application denied.

Duke Stone, of Los Angeles, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

PER CURIAM. [1] The hearsay testimony complained of relative to the statements of the deceased employé relating directly to his injury was competent under the provisions of section 77a of the Workmen's Compensation, Insurance, and Safety Act, as amended in 1915 (St. 1915, p. 1102).

[2] We are satisfied that such provisions cannot be held invalid as opposed to any provision of our Constitution.

The application for a writ of review is denied.

(174 Cal. 290)

In re HUMPHREY. (Cr. 1964.)

(Supreme Court of California. Jan. 27, 1917.)

1. ATTORNEY AND CLIENT 🔑38—DISBARMENT—"MORAL TURPITUDE."

The publication by an attorney by a circular misrepresenting the facts of an action to recover money, and concluding with the statement that the judge "used his judicial office to enable said bank to keep that money," such accusation being without foundation, was the willful making of a false charge, which, since it could not, under Civ. Code, § 47, subd. 3, as to privileged publications, be justified because the judge was at that time a candidate for reelection to a judicial office, nor as a mere conclusion from facts stated, amounted to moral turpitude within Code Civ. Proc. § 287, subd. 5, authorizing disbarment therefor; "moral turpitude" being misconduct by an attorney in reference to his duties and obligations as such attorney—conduct, in fact, contrary to justice, honesty, modesty, or good morals.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 51, 61.

For other definitions, see Words and Phrases, First and Second Series, Moral Turpitude.]

2. ATTORNEY AND CLIENT 🔑38—DISBARMENT—CRITICISMS OF COURT.

While attorneys have the widest latitude in differing with, and criticizing the opinions of, the courts, yet when they resort to misrepresentation and unwarranted assaults upon the courts whose officers they are, they violate their duty and obligation.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 51, 61.]

3. ATTORNEY AND CLIENT 🔑38—DUTY OF ATTORNEYS.

An attorney is required at all times to strictly observe the principles of truth, honesty, and fairness, especially in criticisms of the court, to the end that the public confidence in the due administration of justice be upheld, and the dignity and usefulness of the courts be maintained.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 51, 61.]

In Bank. Appeal from Superior Court, San Diego County; J. P. Wood, Judge.

William Humphrey, an attorney, was suspended for two years from practicing, and appeals from such judgment. Affirmed.

Wm. Humphrey, of San Diego, in pro. per. E. H. Lamme and Dempster McKee, both of San Diego, for respondent.

LAWLOR, J. The appeal herein was decided by the District Court of Appeal for the Second District. An application was made to this court for a hearing. It was granted for the reason that we entertained some doubt whether the misconduct of the appellant amounted to "moral turpitude," within the meaning of subdivision 5, § 287, of the Code of Civil Procedure. Upon a consideration of that question we have reached the conclusion that the District Court correctly disposed of it. The opinion, which is written by Mr. Presiding Justice Conrey, is, in part, as follows:

"In this proceeding respondent was tried before the superior court upon an accusation preferred against him by the Bar Association of San Diego. The court found that the allegations of the accusation were true, and that the conduct of the respondent in the premises constituted an act of moral turpitude. Thereupon it was ordered and adjudged that, for a period of two years, his name be stricken from the roll of attorneys and counselors at law, and that for that period he be precluded from practicing as such attorney and counselor at law in any court of this state. From that judgment the respondent prosecutes this appeal.

"In October, 1914, Hon. W. R. Guy, a judge of the superior court in and for the county of San Diego, was a candidate for re-election. Respondent caused to be printed and published a circular or card containing an article prepared under a heading, 'W. R. Guy's Conduct as Judge Disclosed.' Then followed a purported statement of proceedings had and judgments rendered by Judge Guy in two cases. In the first case, following a purported statement of the facts, the circular closed as follows: 'Do you want that kind of a man for Juvenile Judge? What will be the effect on young lawyers who look to the Judge for example? Answer with your votes November 3d.' In the second case, following a purported statement of facts, the circular closed as follows: 'Any person who has the intelligence of a common monkey knows that said fund could not become the property of the Justice of the Peace, or the bank, or any other person without the consent of the owner. Observe that the money was released from custody of the Justice and the bank notified of it and a request made for its return by the owner. Judge Guy used his judicial office to enable said bank to keep that money and also refused a new trial and refused to allow any other Judge to try the case. Do you want that kind of a man for Judge of Juveniles? What example will be set to the young who look upon a Judge of a Superior Court as some great personage? Answer with your votes November 3d.'

"Answering the accusation, respondent admits that he published the circulars or cards in question, and asserts that they contain only the truth. He denies that the cards were printed wrongfully or unlawfully or maliciously, or with any other thought than to properly advise voters at the election. Appellant has brought up with his appeal a bill of exceptions, showing the proceedings at the trial upon this accusation against him, and including the evidence upon which the court below has based its finding that the publication made by respondent was false and malicious and involved moral turpitude on the part of the publisher. Bearing in mind the rule that the findings of the superior court upon matters of fact are not subject to review where they have any substantial support in the evidence, we will briefly compare the charges printed by the respondent concerning the two cases above mentioned with the facts as they occurred in the trial of those cases.

"As to the first case, we find that the statement of facts in the circular of respondent is as follows: 'The administrator of David A. Smith brought action against an attorney-at-law to recover $350.00. The facts stated by the administrator and admitted by demurrer of said attorney were: That said defendant was the attorney and confidential advisor of said Smith. That while said Smith was in a dying condition, under the effect of opiates and incapable of transacting business or comprehending the nature thereof, said attorney, in conspiracy with a confidential nurse of said Smith, induced said Smith to deliver to said attorney $350.00, which sum said attorney and said nurse falsely pretended to said Smith was for the defense to an action which would be commenced against said nurse. That said false representations were made to said Smith for the purpose of obtaining said sum without consideration and that no consideration was received by said Smith for said money. That said administrator demanded of said attorney the return of said sum but no part of it was ever returned.' The real title of the above-mentioned case was O. K. Bullard, Administrator, v. L. E. Dadmun. The first count in that complaint contains a statement of facts which evidently is the statement of facts referred to in the circular, although there are differences between the two statements of facts. For instance, although the complaint alleges that Dadmun was an attorney at law, it does not allege that he was the attorney of said Smith; and, although the complaint says that Dadmun had the confidence of decedent, and that decedent relied upon his representations, it does not say or show in any manner that Dadmun was 'confidential advisor' of Smith, or engaged to advise him at all about the affairs of said Smith. The second count of the complaint is pleaded as a common count for money had and received by defendant for the use of the decedent. A demurrer, both general and special with respect to each count of the complaint, was filed by the defendant Dadmun and came on for argument before Judge Guy, who sustained the demurrer. The court did not refuse to the plaintiff the right to further amend his complaint, but the plaintiff, who was represented by Mr. Humphrey, elected to stand on said amended complaint. Thereupon the court, as was necessary under its ruling on the demurrer, ordered dismissal of the action.

"We are not called upon to say whether the order sustaining the demurrer was or was not legally correct. It is sufficient to say that debatable questions were presented; that the judge in the performance of his official duty rendered his decision thereon; and that there is absolutely nothing to show, or tending to show, that the conduct of the judge therein was such as to call for the suggestion or intimation that this conduct showed him to be the kind of a man whose incumbency in the judicial office would have injurious effect 'on young lawyers who look to the judge for example.'

"But while the portion of respondent's published article which referred to the Smith Case does not appear to have been justifiable in so far as it was intended as a reflection upon the character of the judge, we are inclined to the opinion that it would not alone be sufficient to show moral turpitude on the part of the publisher or constitute cause for disbarment. As to that case the respondent avoided the use of language necessarily charging the judge with a willful misuse of his office.

"This leads us to the next case described in said published circular, concerning which the circular reads as follows: 'Here's Another Case: The undisputed evidence in a case tried in Judge Guy's court July 8th, 1913, was as follows: A defendant under arrest in Justice Court deposited $25 for bail, which case came before the Justice of the Peace of National Township. Said Justice deposited in his name as Justice of the Peace said fund with the People's National Bank of National City, and told said bank that said fund was left with him as bail money and also told said bank from whom he received said fund. Said Justice died shortly thereafter. The successor, Justice Sherman, set said case for trial and on the hearing thereof Feb. 4th, 1913, dismissed the case, made an order releasing said bail money and notified said bank in writing of such release and dismissal. Said defendant delivered to said bank in person said written notice, requested payment to him of said bail money; said bank refused payment. Said defendant, after waiting four days, brought suit and obtained judgment in the Justice's court for said money. Said bank appealed. Judge Guy tried the case on appeal and on the above undisputed evidence gave judgment for said bank with costs of both trials. Said bank by Guy's decision got the money and said defendant who owned the money lost it with cost of two trials.' Then followed the language which we have quoted heretofore, beginning with the words, 'Any person who has the intelligence of a common monkey,' etc. The evidence shows that William Humphrey, being under arrest in a justice's court, deposited $25 for bail, which sum was deposited in bank in an account which the justice kept in his own name as justice of the peace; that the justice died while the action against Humphrey was pending; that the case was later tried by another justice, and the court made an order dismissing the action against Humphrey and ordering that his bail money be released. Thereupon the respondent filed his action against the bank to recover from it the sum of $25, thereby attempting to establish direct responsibility of the bank to him as owner of that sum. Judgment having been rendered in favor of Humphrey and against the bank in the justice's court where the case was tried, the bank appealed to the superior court, and the case came on for trial before Judge Guy. That judge appears to have reached the conclusion that the plaintiff in that action had no cause of action against the bank, and that his claim should have been presented to the administrator of the estate of the deceased justice. Here again we are not called upon to determine whether the judgment rendered by Judge Guy was legally right, although we do not observe in it any ground for criticism. For present purposes, it is, however, sufficient to say that the conduct of Judge Guy in rendering the judgment which he did render in that case, as shown by the record here produced, is not subject to the slightest criticism which could in any way affect his character as a judge. Nevertheless, the respondent took it upon himself to publish a statement purporting to set forth the facts of that case and accompanied such statement with a distinctly libelous charge which, in our opinion, amounted to a statement that Judge Guy, with full knowledge that plaintiff Humphrey was entitled to a judgment in his favor, had 'used his judicial office to enable said bank to keep that money.' In other words, the respondent being then and there an attorney at law and under an obligation and sworn duty 'to maintain the respect due to the courts of justice and judicial officers' (Code Civ. Proc. § 282), wantonly charged that a judge of the superior court before whom he was practicing had knowingly misused his judicial office for the purpose of bringing financial gain to a litigant. * * *"

[1] The making of such a charge, under the circumstances here existing, was manifestly the willful making of a false charge, and cannot be justified as a privileged publication under the claimed excuse that the subject of attack was at that time a candidate for reelection to a judicial office. Civ. Code, § 47, subd. 3.

[2, 3] It is contended by the respondent, in his petition for a hearing by this court, that he "had the undoubted right to state his conclusions; others could draw their conclusions as to whether the respondent or Judge Guy's conclusions were the more logical, reasonable, or honest." But the concluding statements of the circular are obviously charges, at least by innuendo, against the integrity and fitness of the judge, and must be presumed to have been so intended. "While attorneys have the widest latitude in differing with, and criticizing the opinions of, the courts, yet when they resort to misrepresentation and unwarranted assaults upon the courts whose officers they are, they violate their duty and obligation." 6 C. J. 594, § 54. Moral turpitude is misconduct by an attorney in reference to his duties and obligations as such atttorney—conduct, in fact, which is contrary to justice, honesty, modesty, or good morals. Bouvier Law Dict. See In re Coffey, 123 Cal. 522, 56 Pac. 448. "An attorney," it has been stated, "is guilty of misconduct whenever he so acts as to be unworthy of the trust and confidence involved in his official oath, and is found to be wanting in that honesty and integrity which must characterize members of the bar in the performance of their professional duties." 2 Thornton on Attorneys at Law (Ed. 1914) § 774. We are aware that there is a line of authorities which place no limit to the criticism members of the bar may make regarding the capacity, impartiality, or integrity of the courts, even though it extends to the deliberate publication by an attorney capable of correct reasoning of baseless insinuations against the intelligence and integrity of the highest courts. See State Board, etc., v. Hart, 104 Minn. 88, 116 N. W. 212, 17 L. R. A. (N. S.) 585, 15 Ann. Cas. 197, and note; Ex parte Steinman, 95 Pa. 220, 40 Am. Rep. 637. In the first case mentioned it was observed, for instance:

> "It may be (although we do not so decide) that a libelous publication by an attorney, directed against a judicial officer, could be so vile and base and of such a nature as to justify the disbarment of its author."

Yet the false charges made by the attorney in that case were of a graver character than those made by the respondent here. But, in our view, the better rule is that which requires of those who are permitted to enjoy the privilege of practicing law the strictest observance at all times of the principles of truth, honesty, and fairness, especially in their criticism of the courts, to the end that the public confidence in the due administration of justice be upheld, and the dignity and usefulness of the courts be maintained. In re Collins, 147 Cal. 8, 19, 81 Pac. 220; 2 Thornton, etc., c. XXIX; 2 R. C. L. pp. 1089, 1092. In the case entitled In re Thatcher, 80 Ohio St. 492, 89 N. E. 39–90, and 2d (C. C. & D. C.) 190 Fed. 969–1015, affirmed 212 Fed. 801, 129 C. C. A. 255, rehearing denied 219 Fed. 173, 135 C. C. A. 71, whose facts, in many respects, parallel those shown here, the Supreme Court of Ohio and the federal court thoroughly considered the authorities and reached conclusions in accord with our own. As remarked in the Ohio case:

> "As an attorney, or as a citizen, he had the right to criticize the judgments and conduct of the judges in a decent and respectful manner; but no man has a right at any time to degrade and intimidate a public officer, and bring his office into contempt, by the publication of libelous matter imputing to him impeachable offenses, and the fact that the officer is a candidate for re-election does not remove the ban."

And again:

> "Nobody knows better than a lawyer that, while judicious criticism is a necessary and effective means when used to keep the judges mindful of their duties and to prevent the selection of inefficient judges when judges are chosen by the people, yet, when carried beyond the limit of truth and fairness, nothing is more certain to destroy the judicial balance of timid judges and to effectually impair the impartial administration of justice."

See, also, Ex parte Wall, 107 U. S. 265–325, 2 Sup. Ct. 569, 27 L. Ed. 552. It is our opinion that the trial court was warranted in finding that the publication of said articles constituted moral turpitude.

Judgment affirmed.

We concur: SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.; SHAW, J.

(32 Cal. App. 386)

LININGER v. BOTSFORD et al. (Civ. 1839.)

(District Court of Appeal, First District, California. Dec. 26, 1916.)

1. CORPORATIONS 🔑239 — STOCKHOLDERS — LIABILITY.

Const. art. 12, § 3, and Civ. Code, § 322, providing that each stockholder shall be liable for all corporate debts and liabilities contracted or incurred while he was a stockholder, in proportion to his holding, applies to liabilities for torts resulting in personal injury.

2. CORPORATIONS 🔑245 — STOCKHOLDER'S LIABILITY—DEATH OF STOCKHOLDER.

Liability of stockholder under Const. art. 12, § 3, and Civ. Code, § 322, for debts and liabilities of corporation contracted or incurred while he was a stockholder, survives his death, as to liability of corporation for tort resulting in personal injury; the cause of action not being penal.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1020, 1155½.]

3. CORPORATIONS 🔑235 — STOCKHOLDER'S LIABILITY—"SUBSCRIBED" STOCK.

Within Const. art. 12, § 3, and Civ. Code, § 322, making a stockholder liable for debts and liabilities of the corporation in proportion to his holding of its "subscribed" capital, those shares of the N. company owned by C., another corporation, all of whose stock is owned by the N. company, may be treated as not subscribed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1382, 1383.

For other definitions, see Words and Phrases, First and Second Series, Subscribe.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Harriett Lininger against Monimia L. Botsford and others. From an adverse judgment, plaintiff appeals. Reversed and remanded.

Clarence N. Riggins, of Napa, and R. H. Cross, of San Francisco, for appellant. Chickering & Gregory, of San Francisco, for respondents Frederick P. Cutting, Alfred D. Cutler, and William H. Chickering, as executors of the last will and testament of Francis Cutting, deceased, F. G. Noyes, and A. C. Wier. Trippet, Chapman & Biby, of Los Angeles, and John T. York, of Napa, for respondent Monimia L. Botsford, as executrix of the last will and testament of William Botsford, deceased. Guy C. Earl, of San Francisco, and John T. York, of Napa, for respondent James Irvine. Trask, Norton & Brown, of Los Angeles, and John T. York, of Napa, for respondent H. Prenzlauer. John T. York, of Napa, for respondents Frank C. Bolt, C. E. Crary, C. B. Jones, Mark G. Jones, Elizabeth Perry, Price Estate Co., a corporation, Jaro Van Schmidt, Geo. Mitchell, Mamie B. Wood, Charles M. Wood, and Elizabeth Perry, as trustees of the last will and testament of W. H. Perry, deceased, and Mamie B. Wood, Florence Johnson, and Charles F. Perry, as beneficiaries of said trust. Chickering & Gregory, of San Francisco, for respondents Monimia L. Botsford, as executrix of the last will and testament of William F. Botsford, deceased, James Irvine, H. Prenzlauer, Frank C. Bolt, C. E. Crary, C. B. Jones, Mark G. Jones, Elizabeth Perry, Price Estate Co., a corporation, Jaro Van Schmidt, George Mitchell, Mamie B. Wood, Charles M. Wood, and Elizabeth Perry, as trustees under the last will and testament of W. H. Perry, deceased, and Mamie B. Wood, Florence Johnson, and Charles F. Perry, as beneficiaries of said trust. Frank J. Solinsky, of San Francisco, for respondent H. R. McGuinn.

KERRIGAN, J. This action was brought by plaintiff against the defendants as stockholders in the San Francisco, Vallejo & Napa Valley Railroad (hereinafter referred to as the Napa Valley Company), for damages for personal injuries sustained by her in a collision between one of the cars of said company and the automobile in which she was riding. The defendants demurred to the third amended complaint, and moved to strike out certain parts thereof. The demurrer was sustained and the motion granted, and upon the refusal of plaintiff to further amend her complaint, judgment was entered for defendants, from which judgment plaintiff prosecutes this appeal.

The questions involved in the appeal are as follows: (1) Whether or not a stockholder's statutory liability extends to the payment of damages for personal injuries; (2) if so, does such liability survive? and (3) in such an action can the stockholders of a corporation be held directly liable on stock in such corporation held by another corporation virtually all of whose capital stock in turn is held and owned by the former company.

At the outset we desire to say that in the solution of these questions we have been afforded little or no assistance by the numerous counsel for the respondents, none of them having filed a brief, although requested so to do; and it would seem that they have practically abandoned the contentions that they urged in the trial court.

[1] With reference to the first question, the Civil Code and the Constitution of this state provide, in substance, that each stockholder of a corporation shall be liable for such proportion of all its debts and liabilities contracted or incurred during the time he was such stockholder as the amount of stock owned by him bears to the subscribed capital stock of the corporation. Const., art. 12, § 3; Civ. Code, § 322.

In different jurisdictions where this character of legislation exists the statutes are not uniform with regard to the character of debts or liabilities as to which this stockholders' liability is imposed. In some it is limited to debts of the corporation, and the preponderance of authority perhaps in such cases is that liabilities ex delicto are excluded (Avery v. McClure, 22 L. R. A. [N. S.] 256, note; 7 Ruling Case Law, 375, 376), but see Rider v. Fritchey, 49 Ohio St. 285, 30 N.

E. 692, 15 L. R. A. 513. However this may be, our constitutional and statutory provisions do not so limit the liability. In express terms they include debts and liabilities, and its language, in our opinion, is broad enough to embrace involuntary obligations imposed upon corporations for negligent or tortious acts, and is too plain to warrant the court in holding that it does not include liability for wrongful acts not arising from contract. In this state the word "liability" has been held to apply to the obligation arising from the commission of torts as well as from breaches of contract. Miller & Lux v. Kern County Land Co., 134 Cal. 586, 66 Pac. 856. The provisions here involved are remedial in character, and should receive a liberal construction, one which will include within its scope as well a demand for damages for a tort as a claim for a debt arising upon contract. Rider v. Fritchey, supra. We conclude, therefore, that the language of the Constitution and Code plainly covers liability on the part of a stockholder for claims against the corporation for damages consequent upon torts of this character. Kelly v. Clark, 21 Mont. 291, 53 Pac. 959, 42 L. R. A. 621, 69 Am. St. Rep. 668; Buttner v. Adams, 236 Fed. 105, 149 C. C. A. 315 (U. S. Ct. of Appeals, Ninth Cir.), decided September 5, 1916.

[2] As to the second question, it has been said that whether a cause of action against a stockholder for a tortious act of the corporation survives depends upon its nature. Accordingly many cases can be found to the effect that a cause of action which is penal in character does not survive the wrongdoer's death; and therefore a cause of action against a stockholder for such tort, being penal in its nature, does not survive the stockholder's death. 1 Ruling Case Law, 44. But we are not here concerned with the question of the liability of a stockholder in actions purely penal. The cause of action here involved is not of such a character, but is in the nature of a contractual obligation, and, being so, it does not die with the stockholder, but survives, and may be enforced against his estate. Major v. Walker, 23 Cal. App. 465, 138 Pac. 360; 10 Cyc. 668, 684, 719; 1 Corp. Jur. § 410; Cochran v. Wiechers, 119 N. Y. 399, 23 N. E. 803, 7 L. R. A. 553; Flash v. Conn., 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966; Buttner v. Adams, supra.

[3] Finally, as to the third point, as before stated, the action was brought against defendants as stockholders in the Napa Valley Company. It is alleged in the complaint that at the time of the commencement of the action there was subscribed some 12,500 shares in said company, of which 5,000 were owned by the Vallejo, Benecia & Napa Valley Railway Company, another corporation, virtually all the stock of which (4,986 out of a total issue of 5,000 shares) was owned by the Napa Valley Company. In other words, the substance of the allegations in this particular is that the Napa Valley Company owned 40 per cent. of its own stock then outstanding, holding the same through the Benicia Company, a subsidiary corporation. The record does not disclose under what conditions or for what purpose the stock was so held. The action of the trial court in sustaining the demurrer, so far as it relates to the question now being considered, and granting the motion to strike out parts of the third amended complaint, was based upon the theory that in pleading facts showing that the Benicia Company was the holder of 40 per cent. of the stock of the Napa Valley Company, the remaining stockholders of the latter company were thus shown to hold only 60 per cent. of its subscribed capital stock, and that the liability of each stockholder must be calculated accordingly, which would bring the sum recoverable from certain of the defendants below the amount requisite to give jurisdiction to the superior court; and, further, that the pleading of facts, showing that the Napa Valley Company owned stock in the Benicia Company, showed a liability on the part of the defendants, on account of such stock holding by the Napa Valley Company, separate and distinct from their liability upon the 60 per cent. of the stock not held by the Benicia Company; and that consequently the complaint improperly united two causes of action.

It is conceded by plaintiff that if the stock standing in the name of the Benicia Company is to be regarded as subscribed capital stock of the Napa Valley Company, the stockholders' liability upon which cannot be charged directly to the remaining stockholders of the latter company, the amount that can be recovered in this action against certain of the defendants is less than $400, and that therefore as to them the trial court was without jurisdiction.

It must be conceded that as to the 40 per cent. of the stock of the Napa Valley Company held by the Benicia Company the ultimate stockholder's liability thereon rests upon the holders of the remaining 60 per cent.; for the liability of the Benicia Company as a stockholder of the Napa Valley Company is in its turn a liability of the Napa Valley Company by reason of its ownership of the capital stock of the Benicia Company, and that liability correspondingly is a statutory liability of the defendants as stockholders of the Napa Valley Company.

Both by the Constitution and section 322 of the Civil Code the proportionate amount of a stockholder's liability is based upon the amount of the subscribed capital stock; and it will not be denied that if the 40 per cent. of the stock of the Napa Valley Company held by the Benicia Company still remained in the treasury of the Napa Valley Company, it would not be subscribed capital stock, and the whole stockholders' liability to creditors would be that incident to the remaining 60 per cent. It must also be conceded that since the ownership of this 40 per cent. rests in the Napa Valley Company by reason of its ownership of the stock of the Benicia Company, the situation of that 40 per cent. is logically and legally the same as if it were mere unissued treasury stock. For that reason—and also upon the well-recognized legal principles: (1) That courts look to the substance rather than to the form; and (2) that they regard with disfavor a multiplicity of actions for the purpose of attaining a single end—we see no reason why the plaintiff could not, by pleading all the facts of the situation, directly charge the defendants here as the ultimate owners of all the subscribed capital stock of the Napa Valley Company; nor why she should be compelled to split her demand into two parts, one of 60 per cent. and the other of 40 per cent., when the individuals liable for the 60 per cent. are ultimately liable for the 40 per cent. also.

There are cases holding that where one person or one corporation owns all the stock of another corporation, the separate entity of the latter cannot be ignored, and the stockholder or holding corporation held liable for its debts. 2 Cook on Corporations (5th Ed.) §§ 663, 664, and cases cited. But these cases deal with obligations of the corporation where it was sought to hold what might be termed the "equitable" debtors where no constitutional or statutory liability had been imposed upon them for the corporation's debts. In this state such liability is direct and primary; and an action lies directly against the stockholders, and need not be based upon a judgment against the corporation. Western Pacific v. Godfrey, 166 Cal. 346, 136 Pac. 284, Ann. Cas. 1915B, 825; Eva v. Andersen, 166 Cal. 420, 137 Pac. 16. Here the action is against the ultimate stockholders of the corporation whose liability is primary, and is conditional or contingent only upon the fact that there must be a subsisting debt or liability of the corporation. It seems to us that it makes no difference through what channel the ownership of the stock may be traced, whether through a holding company or an individual. It is here alleged that the Benicia Company owns 40 per cent. of the stock of the Napa Valley Company, which in turn owns virtually the entire stock of the Benicia Company, and that the defendants are the owners of the remaining 60 per cent. of the Napa Valley Company's stock, which, as we have seen, is the only stock which can be truly designated as subscribed capital stock.

We are of the opinion, therefore, that the plaintiff had the right to sue the defendants directly as the only persons charged with the statutory liability sought to be reached; that the 60 per cent. of the stock of the Napa Valley Company held by them was for the purpose of computing the stockholders' liability, or, at least, might, at the option of the plaintiff, be regarded as the only subscribed capital stock, and was chargeable with the total debts and liabilities of the issuing corporation, and that while it was proper for plaintiff to plead all the facts by which the ownership of stock by the two corporations in one another was disclosed, the setting forth of those facts did not, as claimed by respondents, constitute an improper joining of two causes of action, and that therefore the trial court erred in sustaining the demurrer to the third amended complaint and in striking out portions thereof.

For the reasons given, the judgment is reversed, and the cause remanded to the trial court, with instructions to overrule the demurrers, deny the motion to strike out, and permit the defendants to answer.

We concur: LENNON, P. J.; RICHARDS, J.

(32 Cal. App. 405)

CALLAHAN v. DANZIGER. (Civ. 2066.)

(District Court of Appeal, Second District, California. Dec. 27, 1916.)

1. PARTNERSHIP 🔑55—SUFFICIENCY OF EVIDENCE.

Evidence in a suit for services *held* to sustain a finding that defendants were partners.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 75, 78, 79, 81.]

2. WITNESSES 🔑400(1) — CONTRADICTING OWN WITNESS.

Under Code Civ. Proc. § 2049, while one may not impeach his witness by evidence of bad character, he may contradict him by other evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1268.]

3. PARTNERSHIP 🔑49—EVIDENCE TO ESTABLISH.

To establish partnership of defendants in an action for services, letters from one to another of defendants and their actions in any regard connected with the affairs of the enterprise are admissible.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 67–74.]

4. JUDGMENT 🔑17(4)—PART OF DEFENDANTS SERVED.

By provision of Code Civ. Proc. § 414, where action is against several jointly or severally liable on contract, plaintiff may proceed against those served as if they were the only defendants.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 27, 422.]

5. MINES AND MINERALS 🔑97—"MINING PARTNERSHIP."

A partnership engaged in exploring prospective oil territory is not a "mining partnership," defined by Civ. Code, § 2511, as existing when two or more who own a mining claim for purpose of working it and extracting the mineral actually engage in working it.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 222.

For other definitions, see Words and Phrases, First and Second Series, Mining Partnership.]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by W. H. Callahan against J. M.

Danziger and others. Judgment for plaintiff, and the named defendant appeals. Affirmed.

See, also, 172 Cal. 738, 158 Pac. 760.

Geo. E. Whitaker, of Bakersfield, for appellant. E. F. Brittan and Rowen Irwin, both of Bakersfield, for respondent.

JAMES, J. Plaintiff, the respondent here, sued appellant, Danziger, E. A. Wiltsee, J. M. Kent, and the Lost Hills Syndicate, the latter being alleged to be, upon the information and belief of the plaintiff, a corporation. The suit was to recover $1,170.73 for services performed and money paid out on account of the defendants. Service was made upon this appellant and Kent, who answered in the case, and upon trial being had before a jury a verdict was rendered in favor of the plaintiff for the amount prayed for, upon which verdict judgment was thereafter entered. This appeal is taken by Danziger from the judgment and from an order denying his motion for a new trial.

[1] It is urged, under the contention principally argued on behalf of the appellant, that the evidence was insufficient to support the judgment. A recovery was had under the claim that the individual defendants were copartners. The business in which it appears they were engaged was that of exploring prospective oil territory. The plaintiff did not show that the Lost Hills Syndicate was a corporation, but the evidence offered went principally in the direction of establishing a copartnership existing between Kent, Danziger and Wiltsee. Defendants Kent and Danziger, being the only two who appeared at the trial, were not very specific in defining the relations existing between the three, which fact may be accounted for by the loose method of doing business which was followed in the handling of their enterprise. At the outset it may be said that, in our opinion, the facts and circumstances shown in evidence were amply sufficient to authorize a conclusion to be drawn that the relation of general partners did exist between Kent, Wiltsee, and Danziger. Plaintiff testified that Wiltsee, Danziger, and Kent composed the Lost Hills Syndicate; that he, the plaintiff, went into the Lost Hills for the persons named in October, 1910; that he was to receive $5 a day and board as superintendent for all their work in that locality; that he continued in that employment until December 18, 1911, at which time he was informed by Kent that Danziger would be no longer responsible for any debts of the concern, and that Kent was going to cease activities also. He testified to the different amounts of money which he had paid out, which, together with balance of wages claimed to be due, made up the total sum sued for. Kent appeared to be the man most accessible to Callahan, and it was mainly through Kent that Callahan received remittances. He also received remittances through Wiltsee, and in some of the letters written by Wiltsee along in the year 1911, when money appeared to be short, Wiltsee assured Callahan that he would be personally responsible for the reimbursement and payment of the plaintiff. Callahan also testified that just after he started work in 1910 Danziger was on the ground, and that he (Callahan) told Danziger that it was a little tedious working there, as many of the men carried guns, to which Danziger replied:

> "Go right on, Mr. Callahan, pay no attention; I am behind you."

One letter only was received by Callahan from Danziger, and that was in November, 1911, when Callahan testified he wrote to Danziger regarding the action of some strangers who were cutting timber on the ground, and Danziger replied to him, giving advice about the matter. Danziger in his testimony claimed that this was a matter of friendly advice only, and that he was not writing to Callahan as a person interested otherwise. It appeared without dispute that at various times during the year 1911 drilling rigs were furnished for use on the property in charge of Callahan, and that Danziger paid for several or all of these. About the middle of the year 1911 Danziger wrote to Kent that he would not pay any more money, saying:

> "I thought I made it clear to you the last time I talked to you that I was not going to put up any more money on this account. I talked with Wiltsee some time ago, and he said he would take care of all matters from then on, and I will give up my interest there before I will put up another cent, so you will have to look to Wiltsee, who gives you your orders for the salary and other bills due. I regret very much taking this position, but I am away ahead of Wiltsee in putting up money, and I would put up more if I was in a financial position to do so, but I am not, so that ends the matter."

Kent, when called on behalf of the plaintiff, in the course of his testimony said that shortly after he received this letter from Danziger he informed Callahan of Danziger's declaration that he would not be responsible for any more bills. Callahan testified that the conversation to which Kent referred occurred in December, and that he immediately thereafter quit the employ of the concern and made an attachment to secure his debt. Appellant did testify that his arrangement was that he was to furnish money for rigs, indicating that that was to be the extent of his liability. But, taking the history of all of the transactions as illustrated by the testimony and letters, it seems a logical inference that the individual defendants were operating under a plan of copartnership. In the letter of Danziger to which we have last referred he said that he was then ahead of Wiltsee in putting up money, indicating that each man was to furnish an equal amount of capital. We are not here permitted to sit as a trial court and judge of the weight of the testimony, and cannot concern ourselves beyond determining that there was some evidence to sustain the verdict and judgment.

[2] It is argued on behalf of the appellant that Callahan could not enforce a claim against Danziger after the date in July, 1911, when Danziger wrote to Kent that he had put up more money than Wiltsee and would not longer be responsible for any of the debts; that, as plaintiff's own witness Kent testified that he communicated this information to Callahan immediately after receiving that letter, the plaintiff is bound by the testimony; and that Callahan's statement that the conversation in which this notice was given to him occurred in December must be disregarded. This is not the true rule applicable to the matter. Section 2049, Code of Civil Procedure, provides that a party producing a witness may contradict the witness by other evidence. In Norwood v. Kenfield, 30 Cal. 393, it is said:

> "A party calling a witness is not precluded from proving the truth of any particular fact by any other competent evidence in direct contradiction to what such witness may have testified; and this not only where it appears that the witness was innocently mistaken, but even where the evidence may collaterally have the effect of showing that he was generally unworthy of belief. This is one of the exceptions to the general rule that a party cannot impeach his own witness. 1 Greenl. Ev., § 443."

Danziger in fact did continue to participate in the adjustment of matters connected with the so-called syndicate down to the end of the year 1911, all of his actions showing a continued interest in the enterprise.

[3] All of the letters to Kent from Danziger and the actions of Danziger in any regard connected with the affairs of the syndicate were properly admitted in evidence. Other letters written by Wiltsee or Wiltsee's agent may not have been strictly admissible, but under the rule of the Constitution we do not think that any error predicated upon the ruling of the trial court in allowing the evidence can be said to have worked a miscarriage of justice.

[4] We think, too, that it was proper for the court to allow the trial to proceed as against the two defendants. There was no claim that any service had been made upon the so-called corporation syndicate, and all of the proof tended to show that no such corporation existed; that the so-called "syndicate" consisted merely of Kent, Wiltsee, and Danziger, who were associated together in the way that has been described. Section 414 of the Code of Civil Procedure provides that, where an action is against two or more defendants jointly or severally liable, the plaintiff is permitted to proceed against such of the defendants as have been served in the same manner as if they were the only defendants. The instructions of the court seem to have fairly stated the law applicable to the condition of fact illustrated by the evidence.

[5] The partnership, as it must be assumed the jury found to exist, was not a mining partnership as defined by section 2511, Civil Code, where the members are associated together for the purpose of working a mining claim, but in its very nature was of general scope.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

(32 Cal. App. 378)

MEYER v. JONES et al. (Civ. 1853.)

(District Court of Appeal, First District, California. Dec. 20, 1916.)

1. JUDGMENT ⟹844 — ASSIGNMENT — OPERATION AND EFFECT.

Sureties on an undertaking for the release of an attachment, a judgment thereunder having been assigned to plaintiff, without assignment of any right or benefit of the undertaking, are liable to the plaintiff thereon, the undertaking being an incident of the judgment and by assignment passing with it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1541–1546.]

2. ATTACHMENT ⟹337—DISCHARGE OF SURETIES ON BOND.

A stipulation that no appeal shall be taken does not release sureties on an undertaking for the release of an attachment, where sureties have, by terms of the bond, agreed to pay on demand the amount of whatever judgment may be rendered; the party to the action being under no obligation to take an appeal from the judgment of the trial court.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1213–1222.]

Appeal from Superior Court, Alameda County; W. H. Donahue, Judge.

Action by Sophia Meyer against C. W. Jones and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Peck, Bunker & Cole and Henry G. Tardy, all of Oakland, for appellants. Clinton G. Dodge, of San Francisco, for respondent.

PER CURIAM. In this case the defendants executed an undertaking in the sum of $460 for the release of an attachment which had been levied on the property of the C. L. Decker Company in an action in which that company was defendant, and the plaintiff's assignor, Samuel Meyer, was plaintiff, and in which judgment went in favor of plaintiff. In the trial of that action it was stipulated by the parties thereto in open court that the judgment to be rendered therein should be final. Judgment was duly rendered, and no motion for a new trial was made nor any appeal taken, and at the time of the commencement of the present suit the judgment therein was final. Subsequent to its entry Samuel Meyer, without having made any demand for payment of the same, assigned it to the plaintiff herein, who three days later notified the C. L. Decker Company of the assignment. She also caused a writ of execution to be issued, which was returned unsatisfied, whereupon she demanded of the defendants herein payment of the judgment, together with interest and costs, and upon their failure to comply with such demand commenced this action against them upon their bond.

[1] While the judgment was assigned to the plaintiff, there was no assignment of any right or benefit accruing from the defendants' undertaking; and the appellant now contends that the plaintiff acquired no rights under the bond by virtue of their assignment of the judgment. We cannot agree with this contention. We are of the opinion that the undertaking was an incident to the judgment, and that the assignment of the latter entitled the assignee to maintain this action on the bond against the sureties. Heisen v. Smith, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39; King v. Miller, 53 Or. 53, 59, 97 Pac. 544.

It is stated in 4 Cyc., at page 72, that the claim upon which a judgment is founded and all the remedies carried by it pass by an assignment of the judgment as an incident thereto. In Schlieman v. Bowlin, 36 Minn. 198, 30 N. W. 879, the assignment of a judgment in replevin was held to operate as an assignment of the bond given to obtain a return of the property. See, also, 2 Freeman on Judgments, § 431; Ullmann v. Kline, 87 Ill. 268; notes to Com. Use of Vicars v. Wampler, 1 L. R. A. (N. S.) 149. In the present case the contract of the sureties cannot be regarded as giving the assignee a collateral right of action. It was given as security for the debt, which was the foundation of the original action, and it was an incident of the judgment.

[2] Nor do we think that the stipulation that no appeal should be taken, and that the judgment to be rendered by the trial court should be accepted as final, operated to release the sureties on the undertaking. By the terms of the bond the defendants contracted to pay on demand the amount of whatever judgment might be rendered in the action. A party to an action is under no obligation to take an appeal from the judgment of the trial court, which may well be accepted as an authoritative determination of the questions involved therein; and, in the absence of fraud or collusion, the mere fact that the right to move for a new trial or to appeal has been waived in no way affects the liability of the sureties upon an undertaking such as the one here involved. It will not be denied that a surety may stand upon the exact terms of his contract; but we are unable to perceive that the demand made upon the surety in this case is outside the obligation of his contract. All he is asked to do is to pay the amount of the judgment recovered against the defendant in the action in which the bond was given, and which is the precise extent of his undertaking.

In Preston v. Hood, 64 Cal. 405, 1 Pac. 487, it was held that sureties on a bond given to prevent the levy of an attachment are not released by the entry of a judgment by consent with execution stayed for 60 days. In Jaffray v. Smith, 106 Ala. 112, 17 South. 218, it was held that an agreement between counsel, representing parties to several suits by which the result of the several suits was made to depend upon and follow the issue of one of them, which only was actually tried, was not an unauthorized modification of the contract of suretyship, and therefore did not discharge the sureties. Other authorities tending to support this position are Train v. Gold, 5 Pick. (Mass.) 380; Cunningham v. Howell, 23 N. C. 9; First Nat. Bank v. Eureka Lumber Co., 123 N. C. 24, 31 S. E. 348; 32 Cyc. 191.

The judgment is affirmed.

(32 Cal. App. 409)

McCLAY et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 2165.)

(District Court of Appeal, Second District, California. Dec. 27, 1916.)

CERTIORARI ⚿5(1)—ERRONEOUS JUDGMENT—REVIEW.

Though it is error for the superior court on appeal, even though it has jurisdiction of the subject-matter of the action and has acquired jurisdiction of the person of the wife, to issue process for the husband, living with the wife, and to enter a judgment against her, but a judgment so entered cannot be annulled in a proceeding by writ of review, the court not acting in excess of its jurisdiction, and such writ being reviewable only on appeal, and not at all where no further appeal is permitted by law.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 5.]

Writ of review to inquire into the validity of a judgment entered by the Superior Court in and for Los Angeles County and John W. Shenk and another, Judges, against Margaret E. McClay and C. E. McClay, petitioners. Judgment affirmed.

Hyman Schwartz, of Los Angeles, for petitioners. Schauer & Schauer and B. Rey Schauer, all of Los Angeles, for respondents.

CONREY, P. J. A writ of review was issued herein for the purpose of inquiring into the validity of a judgment rendered by the superior court against the petitioner Margaret E. McClay. The action was commenced in a justice's court to recover against Mrs. McClay and one Lloyd as sureties upon an undertaking executed by them. One C. E. McClay, husband of Margaret E. McClay, was named as a defendant in the amended complaint filed in the justice's court, but the summons was not served upon him. Judgment having been rendered in favor of Mrs. McClay, the plaintiff appealed to the superior court. In both courts Mrs. McClay insisted that the action could not proceed against her until her husband was brought before the court by sufficient process. The superior court allowed an amendment to the complaint and caused an alias summons to issue, which summons, with a copy of the complaint as amended, was served upon C. E. McClay. The latter made a special appearance and moved to quash the service of summons and the summons on the ground that the superior court had no jurisdiction over him. That motion was denied, and thereafter judgment was entered, as above stated, against Mrs. McClay.

The action being against the wife of C. E. McClay to recover on her express contract, the judgment against her is a judgment enforceable only against the separate property of the wife. Terry v. Superior Court, 110 Cal. 85, 42 Pac. 464. The husband is not in his own right interested in the action. The judgment is not against him and effects no property right belonging to him.

Doubtless it is erroneous to enter judgment against a wife who is living with her husband, without making the husband a party defendant and causing service of summons to be made upon him. McDonald v. Porsh, 136 Cal. 301, 68 Pac. 817; Horsburgh v. Murasky, 169 Cal. 500, 147 Pac. 147. Assuming for the purposes of this case that the appellate jurisdiction of the superior court was not sufficient to authorize it to cause service of summons to be made upon C. E. McClay, who was not before the court from which the appeal was taken, it does not follow that on account of that error the judgment against defendant Margaret E. McClay is void. For the court had jurisdiction of the subject-matter of the action, and it had acquired personal jurisdiction over Mrs. McClay, against whom judgment was rendered. See Emery v. Kipp, 154 Cal. 83, 97 Pac. 17, 19 L. R. A. (N. S.) 983, 129 Am. St. Rep. 141, 16 Ann. Cas. 792; Bogart v. Woodruff, 96 Cal. 609, 31 Pac. 618. Where the husband and wife are sued together, "the wife may defend for her own right," although the husband may defend for her. Code Civ. Proc. § 371. The process by which jurisdiction of the person is acquired is separate and independent as to each defendant, even though the defendants be husband and wife. Where the plaintiff has failed to have summons served upon the husband, the wife is entitled to have the prosecution of the action abate until the husband has been brought in; and if the proceeding as against him be too long neglected she may have the action dismissed, as was done in Horsburgh v. Murasky, supra. But if judgment be entered against her alone, notwithstanding her objection thereto, the error is reviewable only by appeal, and not at all where no further appeal is permitted by law. As the court did not act in excess of its jurisdiction, its judgment will not be annulled in a proceeding by writ of review. Code Civ. Proc. sec. 1068.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

(32 Cal. App. 392)

DONOVAN v. BOARD OF POLICE COM'RS OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 1685.)

(District Court of Appeal, First District, California. Dec. 27, 1916.)

1. Certiorari 🔑49 — Proceedings — Issuance of Writ—Matters for Review.

On petition for writ of certiorari to review the determination of the board of police commissioners of a city and county, the clerk of the defendant board made no return accompanied by a transcript of the proceedings sought to be reviewed as required by Code Civ. Proc. § 1070, and the writ applied for was never allowed, nor did the court grant an order to show cause why it should not be allowed as permitted by section 1069. Uncertified excerpts from the proceedings before the board were received in evidence, and defendants in due course appeared by a purported answer to the petition, which admitted some and denied others of its allegations. *Held*, that the court was without jurisdiction to proceed to a final hearing and determination of the only questions justiciable under Code Civ. Proc. §§ 1068, 1074, which were, Did the defendant board exceed its jurisdiction in making the order complained of, and did it regularly pursue the authority conferred?

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 129, 130, 137, 147–149.]

2. Certiorari 🔑44 — Writ — Issuance — Evidence.

While the final hearing and determination in certiorari is had upon the writ itself and the return thereto, nevertheless, on an application for the issuance of a writ of certiorari, the court may, in its discretion, consider evidence without the record in determining whether the writ should be issued.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 98–107.]

3. Certiorari 🔑44—Hearing—Evidence.

That defendants filed a purported answer to a writ of certiorari does not deprive the court of the right, in determining whether the writ should be issued, to consider evidence outside the record.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 98–107.]

4. Certiorari 🔑53—Pleadings—Answer.

An answer in the sense used with reference to ordinary civil proceedings has no place in certiorari, but the defendant should make return stating the rulings and proceedings, the return constituting not only an answer but evidence.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 134–136.]

5. Certiorari 🔑57 — Proceedings — Petition.

As the final hearing in certiorari is upon the writ and the return, the petition upon which the writ is issued serves no function after the issuance.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 145.]

6. Certiorari 🔑40—Return—Necessity.

The required return or its equivalent is an indispensable prerequisite to a final hearing in certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 129, 130, 137, 147–149.]

7. Certiorari 🔑49 — Proceedings — Answer.

Where the petition for a writ of certiorari was not accompanied by a certified copy of the proceedings sought to be reviewed, and defendants filed no return, but only a purported answer, admitting some and denying others of the averments of the petition, the case cannot be treated as one in which the court had jurisdiction on the theory of a return or its equivalent, notwithstanding that the issuance of a writ of certiorari may be waived by stipulation of the parties, or impliedly by an appearance in anticipation of its issuance; there being no certified copy of the proceedings sought to be reviewed or agreed statement of facts.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 129, 130, 137, 147–149.]

8. Certiorari 🔑9 — Issuance — Right to Writ.

The writ of certiorari is not one of right, and does not issue as of course, but only in the sound discretion of the tribunal to which application is made.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 15, 16.]

9. Certiorari 🔑70(4) — Petition — Dismissal.

In view of Code Civ. Proc. § 1077, declaring that a copy of the judgment filed by the clerk, entered upon or attached to the writ and returned, shall constitute the judgment roll in certiorari, a judgment of dismissal in certiorari will be treated as a dismissal of the application and not of the writ; no return having been made and the judgment roll not showing the issuance and existence of a writ.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 201, 202.]

10. Certiorari 🔑41—Defenses—"Laches."

A petition for certiorari, being addressed to the sound discretion of the court, is very similar to an injunction, and laches, which is the neglect or omission to assert a right which, taken in connection with lapse of time more or less great and other circumstances causes a prejudice to an adverse party barring relief, may be asserted as a defense to an application for certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 59.

For other definitions, see Words and Phrases, First and Second Series, Laches.]

11. Municipal Corporations 🔑185(13) — Public Officers—Policemen—"Laches."

While mere delay short of that prescribed by the statute of limitations will not, in itself, constitute laches, barring relief, nevertheless, a 14 months' delay by a police sergeant in seeking certiorari to review his dismissal by the board of police commissioners must be deemed laches barring relief, for it is the duty of a public servant, wrongfully removed, to promptly seek reinstatement to protect a municipality from paying double salaries, etc.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 505–507.]

12. Certiorari 🔑68—Matters Reviewable—Weight of Evidence.

The weight of the evidence in any given case is never rightfully reviewed on certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 180–182.]

13. Municipal Corporations 🔑185(13) — Policeman—Dismissal.

In proceedings to review the dismissal of a police sergeant, evidence to the effect that the sergeant, though knowing that robbery was being perpetrated, gave his revolver to another, and allowed such other to interfere and kill the robber warranted dismissal on the ground that the sergeant was guilty of conduct unbecoming an officer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 505–507.]

14. Municipal Corporations 🔑185(13) — Police Officers — Punishment — Review —Discretion of Lower Court.

Where the punishment of a police officer for unbecoming conduct was a matter within the discretion of the board of police commissioners, its determination will not be reviewed on certiorari.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 505–507.]

15. Municipal Corporations 🔑185(1)—Police — Police Commissioners — Authority of.

San Francisco Charter, c. 3, § 1, subdiv. 2, declares that the board of police commissioners shall have power to prescribe penalties for violations of any of the rules of the department, and chapter 7, § 2, declares that any member of the department guilty of any offense or violations of the rules and regulations shall be liable to punishment by reprimand or by fine to be fixed by the commissioners or by dismissal. Rule 21, § 46, adopted for the regulations of the department, declares that any conduct unbecoming an officer or offense against the rules and regulations shall subject the offender to such penalty as, in the judgment of the board, may be proper. *Held*, that it is unnecessary that the board prescribe a particular penalty for the violation of each separate rule, although it is given the power to do so, hence the board may order dismissal of an officer for unbecoming conduct, though no such penalty had been previously prescribed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 492, 493.]

16. Municipal Corporations 🔑185(3)—Police — Proceedings for Punishment — Waiver of Irregularities.

Though the charter of a municipality declared that no member of the police department should be subject to punishment for any breach of duty or misconduct except after trial upon a verified complaint, the defective verification of the complaint may be waived by proceeding to trial thereon without objection.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 495.]

17. Municipal Corporations 🔑185(13) — Review of Removal of Police—Record—Evidence.

Where, on certiorari to review an order of police commissioners dismissing an officer, the record contained no objections by the officer to the verification of the complaint upon which proceedings were had and such objections, had they been made, should have appeared of record, extraneous evidence to show that the objections were made is inadmissible.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 505–507.]

18. Municipal Corporations 🔑185(13) — Certiorari Proceedings — Evidence — Admissibility.

On certiorari to review an order of the board of police commissioners dismissing an officer, evidence showing the prejudice of one of the commissioners cannot be received, such matter not appearing in the record below, even though the officer did not, until after hearing, discover the prejudice of the commissioner.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 505–507.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Certiorari by James T. Donovan, to review an order of the Board of Police Commissioners of the City and County of San Francisco and others. From a judgment and order of dismissal, petitioner appeals. Affirmed.

J. J. Dunne, of San Francisco, for appellant. Percy V. Long, City Atty., and Harry G. McKannay, Asst. City Atty., both of San Francisco, for respondents.

LENNON, P. J. In the court below the plaintiff in this proceeding sought a writ of certiorari reviewing and annulling an order of the defendants, sitting as the board of police commissioners of the city and county of San Francisco, whereby the plaintiff was dismissed from the police department of the city and county after a trial upon charges preferred against him, which were in effect (1) neglect of duty in failing to discover and suppress a gambling resort existing and operating in the district assigned to him for patrol as a sergeant of police; and (2) neglect of duty in failing to initiate immediate and effective measures for the arrest of a person actually engaged in the commission of a crime, a felony, coupled with conduct unbecoming an officer of the department in voluntarily delivering his revolver to a stranger, who was present at or near the place where said felony was being committed, and who, armed with the defendant's revolver thus abandoned to him, attacked the criminal, and shot and killed him.

Plaintiff's second amended petition for the writ prayed that the defendants be commanded to certify fully to the court below a transcript of the record and proceedings made and had, including the testimony taken, in the matter of his dismissal, and that "upon said certification of said record and proceedings the same be reviewed," and that the judgment or order for the plaintiff's dismissal be thereupon annulled and vacated.

[1] The record before us does not disclose that the clerk of the defendant board made the return accompanied by a transcript of the proceedings sought to be reviewed, as required by section 1070 of the Code of Civil Procedure; in fact the record fails to show that the writ applied for was ever allowed and issued, or that in lieu thereof the court below granted an order to show cause why it should not be allowed, as provided and permitted by section 1069 of the same Code. True, uncertified excerpts from the proceedings had upon the trial of the plaintiff before the board were offered and received in evidence upon the hearing in the court below, but such detached and unauthenticated portions of the record assailed cannot be considered a full or any return in the sense required by the statute. The defendants, however, in due course appeared in the proceeding by a purported answer to the plaintiff's petition for the writ, wherein they admitted some and denied the other allegations of the petition, and at the same time pleaded laches on the part of the plaintiff as a ground for the denial of the writ.

Confronted by this condition of the record, we are constrained to hold that the court below was without jurisdiction to proceed, as indicated by its findings and judgment, to a final hearing and determination of the only questions which could be litigated upon the hearing of the writ, viz. (1) Did the defendants, as the board of police commissioners, exceed their jurisdiction when making the order complained of? and (2) Did they, in the matter before them, regularly pursue the authority conferred upon them? Code Civ. Proc. §§ 1068, 1074; Miller v. Board of Supervisors, 25 Cal. 93.

[2] There is a decided difference between the hearing and determination of an application for the issuance of a writ of certiorari, and the final hearing and determination had upon the writ itself and the return made thereto. In the first case no particular procedure is prescribed; and it is the usual course to allow the writ, or to grant an order to show cause why it should not issue, if the petition upon its face discloses merit. However, the court to whom the petition is addressed may, it seems, in the exercise of its discretion, and for the purpose of determining whether or not, despite the irregularities complained of, injustice may be done by the issuance of the writ, resort to evidence from without the record sought to be reviewed (Harris on Certiorari, § 15; White v. Commissioners, 70 Me. 317, 326; Smith v. County Commissioners, 42 Me. 395, 400; In re Westbath, 36 Me. 74; Stevens v. Commissioners, 97 Me. 121, 53 Atl. 985; Hewett v. County Commissioners, 85 Me. 308, 27 Atl. 179); and in so far as the record before us shows, virtually that is what the court below did in the present case.

[3] The fact that the defendants saw fit to make and file an answer to the plaintiff's petition, unaccompanied by a return of the record, does not alter the situation.

[4] An answer in the sense usually understood in civil pleading is neither necessary nor proper upon a final hearing in certiorari, for the issue ultimately involved therein is presented by and determined from the writ itself and the return made thereto. "Upon certiorari the terms 'answer' and 'return' are sometimes inaccurately used interchangeably. Strictly speaking, the lower tribunal or board should not answer, but should make return, stating its ruling and proceedings, as the return to the writ constitutes an answer as well as evidence." 4 Standard

Cyclopedia of Procedure, 935; Stumpf v. Board, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350; Lowell v. Commissioners, 146 Mass. 403, 16 N. E. 8; Tewksbury v. Commissioners, 117 Mass. 563; Woodin, Adm'r, v. Phœnix, 41 Mich. 655, 2 N. W. 923, 32 Am. Rep. 172.

[5, 6] The only purpose of the petition is to procure the issuance of the writ; and when it has served that purpose, it has ceased to be a factor in the proceedings. Taylor v. Bissell, 1 Minn. 225 (Gil. 186). This is so because the settled general rule in certiorari is that the trial and judgment therein must be had solely upon an inspection of the record of the proceedings assailed, and not upon any ulterior issue of fact. Tewksbury v. Commissioners, supra; Gerdes v. Champion, 108 Ill. 137; McManus v. McDonough, 4 Ill. App. 180; Roe v. Superior Court, 60 Cal. 93; Harris on Certiorari, §§ 120–130. Clearly, therefore, the required return or its equivalent is an indispensable prerequisite to a final hearing in certiorari. Leroy v. Mayor, 20 John. (N. Y.) 430, 11 Am. Dec. 289; Ex parte Dugan, 69 U. S. (2 Wall.) 134, 17 L. Ed. 871; McManus v. McDonough, supra.

[7] We are not unmindful of the many cases which might be cited tending to support the proposition that the issuance of the writ may be waived by stipulation of the parties, or impliedly by an appearance in anticipation of its issuance and then proceeding to a hearing without objection. We are also aware that it has been held that the return may be made upon an agreed statement of facts, and that when a transcript of the record of the proceedings assailed is attached to and made a part of the petition for the writ, the parties may, either expressly or impliedly, waive the formal return. Of course when this is done there can be no need for the writ nor any necessity for a formal return. While the appearance of the defendants in the present case may be construed as a waiver of the issuance of the writ, nevertheless the petition for the writ was not accompanied by a certified copy of the proceedings sought to be reviewed; and that the purported hearing and judgment upon the ultimate merits of the controversy were not had upon an agreed statement of facts of the case is indicated by an inspection of the record as a whole, and particularly by a ruling of the trial court which, in the face of objection, permitted in evidence "subject to its being verified" an excerpt from the proceedings assailed, which had been made by counsel for the plaintiff and which, in so far as the record shows, was not subsequently verified. Consequently it cannot be said that the proceedings had in the court below were based upon the required return or its equivalent; and, that being so, there is no escape from the conclusion that the court was without jurisdiction to fully and finally review the validity of the proceedings attacked. Code Civ. Proc. 1070, 1075; McKay v. Jones, 30 Ark. 148; Phillips v. Desha, 58 Ark. 250, 24 S. W. 249; Marshall v. Ramsauer, 30 Ark. 532; Dicus v. Bright, 23 Ark. 107; Deans v. Wilcoxon, 18 Fla. 531; People v. McCraney, 21 How. Prac. (N. Y.) 149; Derton v. Boyd, 21 Ark. 264; Rightor v. Gray, 23 Ark. 228; Stemble v. Hewling, 2 Ohio St. 229; Vance v. Goudy, Wright (Ohio) 307; Brownwell v. Skinner, Id. 682; Walker v. Dist. of Columbia, 6 Mackey (17 D. C.) 352.

Stripped of the purported findings, conclusions of law, and final formal judgment which, as we have shown, the court below was without jurisdiction to make, the record shows, as we have previously indicated, no more than a mere hearing of the plaintiff's petition, presumably upon notice, as is permitted by section 1069 of the Code of Civil Procedure, for the issuance of the writ.

[8, 9] The writ of certiorari is not one of right, and therefore does not issue as of course, but only in the exercise of a sound judicial discretion; and, construing the so-called judgment as tantamount to a denial of the petition for the writ, it must stand affirmed if it can be said that the court below was justified in refusing the writ for the reason, among others, as declared in its so-called conclusions of law, that the plaintiff had "not established grounds for the issuance of the writ." Incidentally it may be noted in passing that this conclusion of law strengthens the idea that the proceedings had in the court below were in limine, and involved but the single question of the propriety of issuing the writ; and our conclusion in that behalf is further fortified by the fact that the judgment roll certified to us does not exhibit, as required by section 1077 of the Code of Civil Procedure, the issuance and existence of a writ and a return. The requirement of the Code in this behalf rests doubtless upon the theory that, inasmuch as the return to the writ is the basis of the judgment reviewed by the court, it should appear as a part of the record on appeal. McManus v. McDonough, supra.

This brings us to a consideration of the question of whether or not, upon the showing made upon the hearing of the application for the writ, the court below was justified in refusing it.

[10, 11] In this connection we note at the outset that the petition on its face discloses that the plaintiff was guilty of laches in seeking redress through the medium of certiorari. A petition for a writ of certiorari is addressed to the discretion of the court or judge to whom the application is made, and therefore is very much akin to a prayer for an injunction in equity (Harris on Certiorari, § 2); and "Laches is defined as such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates

as a bar in a court of equity." Cahill v. Sup. Ct., 145 Cal. 42, 46, 78 Pac. 467, 469. It appears from the petition in the present case that the plaintiff was dismissed from the police department by an order of the defendants on the 9th day of February, 1911, and the indorsements on the petition show that it was not filed in the court below until the 18th day of June, 1912, more than 14 months after the order of dismissal. In the absence of a showing sufficient to excuse this delay it certainly constituted laches. While it is true, as counsel for the plaintiff contends, that mere lapse of time short of that prescribed by a statute of limitations in any given similar case will not, in itself, suffice to constitute laches so as to bar a remedy, nevertheless, if in addition it appears from all the circumstances of the case that prejudice must, or from the very nature of the case may, be reasonably expected to result, the remedy will be denied (Cahill v. Sup. Ct., supra; Cook v. Ceas, 147 Cal. 614, 82 Pac. 370; McGibbon v. Smith, 172 Cal. 70, 155 Pac. 460); and, whenever public inconvenience might result from the annulment of the proceedings sought to be reviewed the rule of laches relative to applications for the writ is applied and enforced with particular strictness (4 Standard Ency. of Law and Proc. 912). As was stated in the case of Murphy v. Keller, 61 App. Div. 145, 70 N. Y. Supp. 405:

> "In all proceedings of this character, where a person removed from office is entitled to receive from the public compensation for the services he performs, if he intends to insist that his removal was illegal, or that the law entitles him to be reinstated, his application for reinstatement should be promptly made, so as to protect the city from the necessity of paying two persons for the same services."

It would be contrary to common knowledge of the needs of the police department of a great city, and the well-known practice of the appointing powers to fill vacancies created in such department, to suppose that the defendants in the present case allowed the vacancy created by the dismissal of the plaintiff to long remain unfilled; and therefore it may fairly be said that the particular circumstances of the case as disclosed by the petition for the writ show with sufficient certainty that prejudice as a result of the plaintiff's laches would follow the granting of the writ.

This opinion might with propriety, and in strictness should, end here with an affirmance of the judgment (Knorp v. Board of Police Com'rs, 161 Pac. 12); but a due recognition of the labor and research evidently expended by the very able counsel for the petitioner in the preparation of most excellent briefs in support of the points made for a reversal constrains us to say that, even if the record before us justified the assumption that the proceedings in the court below were had upon an inspection of the record, or its equivalent, of the proceedings sought to be reviewed, nevertheless we are of the opinion that the plaintiff was not entitled upon the showing made to the relief prayed for.

[12, 13] One of the allegations of the plaintiff's petition was that the evidence received by the defendants sitting as the board of police commissioners upon the trial of the plaintiff did not justify the finding of his guilt of the charges preferred against him, nor warrant the punishment of dismissal meted out to him. In support of this phase of the controversy there was offered and read in evidence in the court below a purported, but nevertheless unauthenticated, transcript of the testimony taken at the trial of the plaintiff, which showed, in substance, that on and prior to the 27th day of January, 1911, the plaintiff was a duly appointed and acting sergeant of police in the police department of the city and county of San Francisco. On that date one Gustav Postler "held up" the Saratoga Club, a gambling house in said city. Postler was accompanied to the scene of the robbery by his son Paul, a boy of about 15 years of age, who, however, was unaware of the unlawful mission of his father. Leaving the boy in a buggy in which they had driven to the scene, Postler entered the elevator of the building, and was taken to the floor where the rooms of the club were situated. Shortly thereafter the son observed three men attempted to leave the building by means of a fire escape, one of whom, E. L. Kripp, succeeded in reaching the sidewalk. Upon observing the action of the men upon the fire escape young Postler informed the plaintiff, who was standing in front of the premises, that there was trouble in the building, and pointed out Kripp as a man who had left the building by means of the fire escape. When questioned by plaintiff Kripp informed him that some one was trying to rob the place upstairs, whereupon he requested Kripp to guard the elevator until the plaintiff obtained assistance. Kripp thereupon asked plaintiff for his pistol. Plaintiff complied with this request, and immediately left for assistance. Returning, he learned from young Postler in the presence of Kripp that the man attempting the robbery upstairs was the boy's father. Kripp requested the boy to go upstairs with him. This young Postler did, and, upon meeting his father, he asked him not to shoot and to give back the money which he had taken from the keeper of the game. The father did not answer his son, but requested Kripp to go to the door of the rooms, and then, according to the testimony of the boy, Kripp turned and fired a shot at the elder Postler, which was followed by several other shots; and when the smoke of battle cleared away Postler, the elder, was found dead. At the time young Postler and Kripp entered the elevator plaintiff was present, but did not ascend with them because, as he explained, the elevator operator refused him permission to do so. However, upon plaintiff's order Police Officer O'Connell, who had been summoned by plaintiff, ascended to the gambling rooms by means of the stairway, and it was not until he had reported the elder Postler dead that the plaintiff went to the scene of the robbery and killing.

The weight of the evidence in any given case is never rightfully reviewed upon certiorari; but, apart from this, we are satisfied that the circumstances above narrated show something more than a mere mistake of judgment which any police officer is likely to make when confronted with a sudden and wholly unexpected emergency, and therefore we cannot agree with the contention of counsel for plaintiff that the evidence did not show him to have been guilty of conduct unbecoming an officer, nor warrant the extreme penalty of his dismissal.

[14] Moreover, the fixing of the penalty was a matter within the discretion of the board, which, when exercised within the jurisdiction conferred upon it by the charter of the municipality, will not be disturbed upon certiorari.

[15] The contention that the defendants were without jurisdiction to order the dismissal of the plaintiff because no penalty had been previously prescribed for the violation of the particular rule which he was charged with violating is elaborately argued; but it is fully and effectively answered, we think, by the provisions of the charter and the rules of the board. Thus, subdivision 2, of section 1, of chapter 3, of the charter provides that the board shall have power to prescribe penalties for the violation of any of the rules of the department; and section 2 of chapter 7 provides that:

> "Any member of the department guilty of any offense or violation of the rules and regulations shall be liable to punishment by reprimand, or by fine to be fixed by the commissioners, or by dismissal from the department."

Section 46 of rule 21, enacted and adopted for the regulation of the department, provides that:

> "Any conduct unbecoming an officer, and offenses against the rules and regulations of the department, shall subject the offender to such penalty as in the judgment of the board may be proper under the law."

Reading this rule in conjunction with the charter provisions above referred to, we have no doubt that under it the offense charged against the plaintiff might, in the judgment of the board, be punished by reprimand, a fine, or by dismissal, and it was not necessary that a particular penalty should be prescribed for the violation of each separate rule of the department, although under the charter the board was given power to do so; nor was it essential to the jurisdiction of the board to inflict punishment for a violation of the rules of the department that it should have expressly prescribed a penalty according to the gravity of the offense. The wide latitude allowed to the defendants in the matter of fixing punishment does not, as counsel for the plaintiff in effect contend, operate to render the rule of the board in that behalf unjust, unreasonable, and oppressive, and therefore void, for, as was said in the case of Cleu v. Board of Police Commissioners, 3 Cal. App. 174, 84 Pac. 672:

> "A wide discretion must be lodged in the board in determining what conduct on the part of members of the department is injurious to the efficiency of the department. * * * It must be presumed that the board, in enforcing such a rule, will act in good faith for the welfare of the service, and not for purposes of oppression."

[16, 17] One of the provisions of the charter is that no member of the department shall be subject to punishment for any breach of duty or misconduct except after a trial upon a verified complaint; and because the complaint filed against the plaintiff in the present case was verified before the chief of police, who, it is claimed, is not one of the officers authorized by law to administer oaths, it was urged in the court below, and it is urged here, that the board was without jurisdiction to try the plaintiff. Conceding that the chief of police was not authorized to take the verification to the complaint, and granting that an improper verification is no verification, and therefore a quasi jurisdictional defect, nevertheless it is a defect which may be waived by proceeding, as did the plaintiff in the present case, to a hearing without objection. True, upon the hearing had in the court below plaintiff produced several witnesses who testified that, before proceeding to trial upon the charge preferred against him, the plaintiff by his attorney made the objection that the complaint was not properly verified; but as against this testimony it was an admitted fact in the case that the record of the proceedings before the board was silent on that subject; and the secretary and stenographer of the defendants both testified that if such an objection had been made, they would have heard it, and both would have noted it and made it a permanent part of the record of the proceedings.

Aside from the fact that the court below should not have permitted evidence from without the record as to a fact which, if it existed, should have been made a part of the record, we are satisfied that the evidence sustains the court's finding that the plaintiff waived the defect in the verification by failing to object thereto.

[18] The final ground urged for the issuance of the writ is to be found in the allegation of the plaintiff's petition, which, in effect, avers that one of the commissioners who sat in judgment upon the plaintiff had, prior to the latter's trial, expressed to a fellow commissioner a determination to "break" the plaintiff "because he was a rich man," and because of the fact that the newspapers were condemning the commission for its past favorable attitude towards policemen charged with violation of the rules of the department. Upon the hearing had in the court below this allegation of the petition was fully supported by uncontradicted testimony,

which, upon the whole, tended strongly to show that the commissioner in question was so far prejudiced against the plaintiff and his cause as to be utterly disqualified to sit in judgment upon him. The court below, nevertheless, made its finding to the effect that the commissioner in question was neither prejudiced nor disqualified by reason of his expressed determination to "break" the plaintiff; and it is now insisted that a finding in keeping with the evidence would have warranted and required a judgment in plaintiff's favor, annulling the order of his dismissal, upon the theory that he was not accorded the fair and impartial trial expressly guaranteed him by the charter.

The weakness of this contention is to be found in the circumstance that the disqualification of the commissioner in question is not made to appear upon the face of the record of the proceedings sought to be reviewed; and, as we have previously pointed out, in certiorari the reviewing court is confined to an inspection of the record assailed (Ross v. Sup. Court, supra), and it will not look beyond the record nor hear anything out of it. True the prejudice of the commissioner in question was not known to the plaintiff until a year after his dismissal, and consequently could not have been taken advantage of at the trial before the commission so as to make it appear of record in the proceedings. Nevertheless the fact remains that it does not appear of record, and cannot be made to appear of record save and except by evidence outside of it. Therefore, even conceding that a prejudiced judge participated in the trial of the plaintiff, nevertheless the latter's remedy, if any, is not to be found in certiorari. White v. Commonwealth, 70 Me. 317, 326; Walker v. Dist. of Columbia, 6 Mackey (17 D. C.) 352.

The judgment and order appealed from are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(174 Cal. 346)

NORTH PACIFIC S. S. CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (S. F. 7398.)

(Supreme Court of California. Feb. 3, 1917. Rehearing Denied March 5, 1917.)

1. Courts 🔑489(1) — Jurisdiction — Maritime Accidents—Admiralty.

By Const. U. S. art. 3, § 2, par. 1, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and such jurisdiction is exclusive in federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1325.]

2. Admiralty 🔑1—Jurisdiction—Enlargement or Abridgment.

Since jurisdiction of federal courts in admiralty rests on the Constitution, it cannot be enlarged or abridged by Congress, nor by the states.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 1–17.]

3. Admiralty 🔑1 — "Jurisdiction" — Enlargement or Abridgment.

"Jurisdiction," as used in cases holding that federal admiralty jurisdiction cannot be enlarged or abridged, means only general jurisdiction over cases of admiralty cognizance, and does not preclude creation of new rights and remedies in maritime matters by the states, enforceable in state courts or by Congress.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 1–17.

For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

4. Admiralty 🔑1 — Jurisdiction — Enlargement or Abridgment.

In view of Judiciary Act Sept. 24, 1789, c. 20, 1 Stat. 73, granting admiralty jurisdiction to the federal District Court and saving to suitors common-law remedies where common law was competent to give a remedy, while the state Legislatures cannot in terms enlarge the jurisdiction of admiralty, they may pass laws creating new rights over matters within the jurisdiction of admiralty, and may enforce those rights in the state courts, upon the theory that Congress has been remiss in its failure to pass similar enactments covering the same subject-matter.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 1–17.]

5. Admiralty 🔑2—Jurisdiction—Common-Law Remedies.

Assuming that Workmen's Compensation Act (St. 1913, p. 279) comes within the scope of a remedy afforded by the common law, it is entitled to efficacy by all tribunals, and Admiralty must respect it if it is within the saving clause of the Judiciary Act, even though it creates a new right and a new remedy therefor.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 18–28.]

6. Admiralty 🔑2 — Jurisdiction — "Common-Law Remedy."

Since "common-law remedy," as employed in Judiciary Act, means any remedy with or without action or jury which is a substitute for a suit at law, whereby a liability is imposed after due process of law, the Workmen's Compensation Act is within its saving clause, although the common law knew no right of action for a death without tort; the language of the judiciary act not being limited to remedies at common law then existing, but including rights and remedies subsequently created by statute.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 18–28.

For other definitions, see Words and Phrases, Second Series, Common-Law Remedy.]

7. Admiralty 🔑2 — Jurisdiction — "Common-Law Remedy."

Touching torts committed on the high seas, a state may create on behalf of the injured person, his heirs or representatives, new rights and new remedies, and provide for the maintenance of those rights and the enforcement of those remedies in her own courts, without the slightest regard to admiralty, under the construction which has been put upon the saving clause of the Judiciary Act.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 18–28.]

8. Commerce 🔑80 — Powers of States — Workmen's Compensation Acts.

Workmen's Compensation Act, giving seamen a right to compensation, is not an unwarranted interference with foreign commerce.

9. Master and Servant 🔑394—Workmen's Compensation—Seamen.

Workmen's Compensation Act, as applied to seamen, limiting the right to compensation to proceedings under the provisions of the act itself, imports no more than that, if a seaman is injured and seeks recovery in personam, he can proceed only under the act before the Accident Commisssion.

10. Master and Servant 🔑347 — Courts —"Common-Law Remedy."

Rev. St. §§ 4283, 4289 (U. S. Comp. St. 1913, §§ 8021, 8027), limiting liability of vessel owner for damages occurring without his privity to the amount of his interest in the vessel and her freight, create no irreconcilable conflict with Workmen's Compensation Act, since, giving them full force, it would result only that the Accident Commission would be in duty bound to limit its award to the amount of the federal limitation.

In Bank. Application by George Rose for workmen's compensation, opposed by the North Pacific Steamship Company, employer. On writ of review on petition of the employer to review an award by the Industrial Commission. Writ discharged, and award affirmed.

H. W. Glensor, Courtney L. Moore, and Chas. H. Sooy, all of San Francisco, for petitioner. F. R. Wall, of San Francisco, for applicant George Rose. Christopher M. Bradley, of San Francisco, for respondents.

HENSHAW, J. The respondent the Industrial Accident Commission of the state of California assumed jurisdiction and made its award in the case of a seaman in the employ of the petitioner, who was injured while his vessel, owned by citizens of this state, was upon the high seas. Application for a writ of review was granted by this court. This application was based upon the contentions that the United States District Courts, under their admiralty and maritime jurisdiction, were alone empowered to deal with the question, and that the Industrial Compensation Act of California (St. 1913, p. 279), in so far as it was sought to apply it to seamen, was an unconstitutional usurpation of that jurisdiction. This statement of the controversy demonstrates that the question is one peculiarly of federal cognizance, and that the final arbiter in resolving and answering it is the Supreme Court of the United States. For this reason, and being advised that the identical question was sub judice in that tribunal, the decision of this case was postponed to await and to follow the decision of that court. Its decision, however, has been so long delayed that we have deemed it inexpedient longer to postpone our own decision, though it is with reluctance that we take up the consideration thus in advance of its final disposition by the one court whose interpretation will be all-controlling. So to the end that, if we do err, the flaws in our reasoning may readily be detected, we have thought it best to endure the just accusation of prolixity in here setting forth our views at some length.

[1] The Constitution of the United States (article 3, § 2, par. 1) declares that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." The controversy which had arisen in England in the not unsuccessful efforts of the common-law courts to throttle the courts of admiralty was familiar to the framers of that Constitution. Equally familiar to the jurist is the construction put by the courts of the United States upon this language. Thus in the leading case of De Lovio v. Boit et al., 7 Fed. Cas. 417, Fed. Cas. No. 3,776, Judge Story, going over the whole question of admiralty jurisdiction, concludes his review by declaring that he was "without the slightest hesitation ready to pronounce that the delegation of cognizance of 'all civil cases of admiralty and maritime jurisdiction' to the courts of the United States comprehends all maritime contracts, torts, and injuries." As admiralty and maritime jurisdiction then has to do with all things touching mariners and their ships while seafaring, there can be no hesitation in saying that the injury of this seaman upon the high seas presents a case within the cognizance of admiralty. Insurance Co. v. Dunham, 11 Wall. 1, 20 L. Ed. 90; Benedict, Admiralty, § 182 et seq. Whether or not admiralty would or could decree an award for this injury, not founded upon tort, presents an entirely different question.

Moreover, it is so well settled as scarcely to need the citation of authority that this jurisdiction is exclusive in the federal courts. The Hine v. Trevor, 4 Wall. 555, 18 L. Ed. 451; The Eagle, 75 U. S. (8 Wall.) 15, 19 L. Ed. 365; Rev. St. U. S. § 563, subd. 8.

[2] The next fact to be noted is that the jurisdiction of the federal courts in admiralty rests upon the Constitution, and that such jurisdiction is not dependent upon and cannot be enlarged or abridged by Congress. Watts v. Camors, 115 U. S. 353, 6 Sup. Ct. 91, 29 L. Ed. 406; The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345; The Blackheath, 195 U. S. 361, 25 Sup. Ct. 46, 49 L. Ed. 236; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; The Chusan, Fed. Cas. No. 2,717; 2 Story, 455. Nor yet has any state of the United States the power to enlarge or diminish the admiralty jurisdiction of the federal courts. The Rumbell, supra; Steamboat Orleans v. Phœbus, 11 Pet. 175, 9 L. Ed. 677; The Lottawanna, supra; Butler v. Boston & Savannah S. Co., 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017; Workman v. Mayor of N. Y., etc., 179 U. S. 552, 29 Sup. Ct. 212, 45 L. Ed. 314; The Chusan, supra; The Manhasset (D. C.) 18 Fed. 918; Cornell Steamboat Co. v. Fallon, 179 Fed. 293, 102 C. C. A. 345.

[3] It becomes necessary here to consider briefly what is meant by the word "jurisdiction" as employed in all these cases, holding that neither Congress nor the Legislature of any state has the power to enlarge or abridge the admiralty jurisdiction of the federal courts. It seems manifest from the adjudications that "jurisdiction," as the word is thus employed, means that general jurisdiction over all cases of admiralty and maritime cognizance, and that the decisions are to be understood as declaring only that neither Congress nor the Legislatures of the states can strip the courts of admiralty of any part of the jurisdiction which was theirs under the substantive law of admiralty at the time the Constitution was adopted. Equally manifest is it that the decisions do not mean that the national Congress may not create new rights and new remedies within the scope of this general jurisdiction, and equally true is it that the state Legislatures may in some instances, at least, create rights and remedies having clearly to do with maritime affairs, which rights and remedies may be enforced in the state's tribunals, without regard either to their acceptance in admiralty or to the fact that they seemingly trench upon the admiralty jurisdiction reserved to the federal courts.

[4] All of this arises under the language of the Judiciary Act of Congress of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 73), by which act the granting of admiralty jurisdiction to the district court was accompanied by a "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." But as the states have thus surrendered all of their admiralty jurisdiction, as the exclusive jurisdiction of all of these questions and cases is still in the federal courts (The Hine v. Trevor, supra; Town of Pelham v. The B. F. Woolsey [D. C.] 3 Fed. 457), and as only such remedies as are or may be afforded by the common law are made available to suitors, it would appear that a state could neither create a new right in admiralty nor enforce any

remedy which it may have provided for that right, until recognition in admiralty and by admiralty of the existence of that right; or, in other words, until its adoption by admiralty as a part of its substantive law. But, to the contrary, it seems that such reasoning is wholly fallacious. Thus, where the state statute gave a right of action for recovery for damages for the death of a sailor occasioned by tort while on the high seas, it is held that a recovery may be had under this statute both in the state courts and in the federal courts, and this notwithstanding the fact that such a case is one of "admiralty and maritime jurisdiction," and that admiralty, in this respect running current with the common law, gave no right of action for such a death. Steamboat Co. v. Chace, 16 Wall. 522, 21 L. Ed. 369; Sherlock v. Alling, 93 U. S. 99, 23 L. Ed. 819; Fisher v. Boutelle Trans. & Towing Co. (D. C.) 162 Fed. 994; International Nav. Co. v. Lindstrom, 123 Fed. 475, 60 C. C. A. 649; The Harrisburg, 119 U. S. 213, 7 Sup. Ct. 140, 30 L. Ed. 358; The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264; Aurora Shipping Co. v. Boyce, 191 Fed. 966, 112 C. C. A. 372.

In International Nav. Co. v. Lindstrom, supra, it is said by the Circuit Court of Appeals of the Second District:

> "The territorial sovereignty of a state extends to a vessel of the state when it is upon the high seas, the vessel being deemed a part of the territory of the state to which it belongs; and it follows that a state statute which creates a liability or authorizes a recovery for the consequences of a tortious act operates as efficiently upon a vessel of the state when the vessel is beyond its boundaries as it does when it is physically within the state."

The reasoning of the Circuit Court of Appeals was that as a matter of comity the court in admiralty would take cognizance of and give effect to a right created by a state. And this extremely elastic power of the courts of admiralty so to do is further emphasized in The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264. There a Delaware statute made provision for recovery by the heirs or representatives for death resulting on the high seas arising from tort. The pronouncement of the Supreme Court of the United States, speaking through Mr. Justice Holmes, is that until Congress acts on the subject a state may legislate in regard to the duties and liabilities of its citizens and corporations while on the high seas. The reasoning is that:

> The saving clause of the judiciary act "'saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it,' leaves open the common-law jurisdiction of the state courts over torts committed at sea." "And," so proceeds the opinion, "as the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the state might not make changes by its other mouthpiece, the Legislature."

While touching the inherent power of the admiralty courts to enlarge the scope of their activities by adopting and applying new rights and new remedies created by state courts, it is said:

> "Being valid, it [the state law] created an obligatio, a personal liability of the owner of the Hamilton to the claimants. Slater v. Mexican National R. R. Co., 194 U. S. 120 [24 Sup. Ct. 581, 48 L. Ed. 900]. This, of course, the admiralty would not disregard, but would respect the right when brought before it in any legitimate way. * * * The liability would be recognized in all. Nor would there be produced any lamentable lack of uniformity. Courts constantly enforce rights arising from and depending upon other laws than those governing the local transactions of the jurisdiction in which they sit."

If we are successful in following this reasoning, it means that, while the state Legislature cannot in terms enlarge the jurisdiction of admiralty, they may pass laws creating new rights over matters within the jurisdiction of admiralty, and may enforce those rights in the state courts, upon the theory that Congress has been remiss in its failure to pass similar enactments covering the same subject-matter. And, furthermore, since these state statutes are thus valid, it is within the power, and seemingly it is the duty, of admiralty to enlarge its own jurisdiction by acquiescing in and taking cognizance of the rights and remedies thus created by the state Legislatures. At the foundation of this reasoning there would appear to lie the premise that, if a state legislates in advance of Congress, it is to be concluded that Congress, through inadvertence or negligence, has failed to pass like legislation, and therefore what might otherwise appear to be the reasonable assumption, viz. that Congress, after consideration, had declined or refused to legislate under the conviction that existing laws were adequate, is, of course, denied a consideration. And finally, it is to be noted that the earlier utterances of the Supreme Court declaring that one of the potent reasons why exclusive jurisdiction and control of all these questions was vested in admiralty was to preserve symmetry and uniformity in its jurisprudence, as pointed out in the Chusan Case, supra, and with great vigor and clearness by Mr. Justice White in Workman v. Mayor of New York, etc., supra, where he said:

> "The practical destruction of a uniform maritime law which must arise from this premise is made manifest when it is considered that, if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief

for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing to-morrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent."

It is to be noted, we repeat, that this asymmetry and lack of uniformity we are now told would not be "lamentable."

[5] With this law and reasoning before us, we may make our more or less successful endeavor to strike at the heart of the matter before us. Our Workmen's Compensation Act is an economic and sociological development in legislation. It creates a right of compensation to the workman without regard to the question whether his injury was occasioned by tort. This law we have declared to be valid. Western Indemnity Co. v. Pillsbury, 170 Cal. 688, 151 Pac. 398. Congress has been remiss in its failure to enter and cover this field of legislation. Assuming for the moment that the remedy of our state law comes within the scope and purview of a "remedy afforded by the common law," there is created and imposed a new obligatio—a personal liability upon the part of the owner of the vessel. Admiralty will respect this right when brought before it. But, whether it does or not, it is entitled to efficacy as well as respect by all state tribunals, and admiralty itself is under the compulsion to respect it if the state statute, even though it creates a new right and a new remedy therefor, is within the saving clause of the Judiciary Act, and to that question we now come.

[6] Of course, at the time of the adoption of our Constitution and of the passage of the Judiciary Act the common law knew no right of action for a death, even when it was occasioned by tort, and, of course, it knew of no action for injury or death not occasioned by tort and had no remedy for either. Neither did admiralty. Futhermore, except in the broadest sense, acts of Parliament form no part of the common law, and very frequently are in derogation of it. Nevertheless the language of the Judiciary Act is not limited to the remedies at common law then existing, and did and does include rights and remedies which might subsequently be created by statute. In Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. Ed. 921, this matter is considered at some length. There a bill in equity had been brought in a state court to foreclose a common-law lien upon a raft. This bill in equity was held not to be an invasion of the exclusive admiralty jurisdiction of the District Courts, but to be a proceeding to enforce a common-law remedy within the saving clause, and it is said:

> "The real question is whether the proceeding taken is within the exception 'of saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it.' It was certainly not a common-law action, but a suit in equity. But it will be noticed that the reservation is not of an action at common law, but of a common-law remedy; and a remedy does not necessarily imply an action. A remedy is defined by Bouvier as 'the means employed to enforce a right, or redress an injury.' While, as stated by him, remedies for nonfulfillment of contracts are generally by action, they are by no means universally so. Thus a landlord has at common law a remedy by distress for his rent—a right also given to him for the purpose of exacting compensation for damages resulting from the trespass of cattle. A bailee of property has a remedy for work done upon such property, or for expenses incurred in keeping it, by detention of possession. An innkeeper has a similar remedy upon the goods of his guests to the amount of his charges for their entertainment; and a carrier has a like lien upon the thing carried. There is also a common-law remedy for nuisances by abatement; a right upon the part of the person assaulted to resist the assailant, even to his death; a right of recaption of goods stolen or unlawfully taken; and a public right against disturbers of the peace by compelling them to give sureties for their good behavior. All these remedies are independent of an action.
>
> "Some of the cases already cited recognize the distinction between a common-law action and a common-law remedy. Thus in The Moses Taylor, 4 Wall. 411, 431, 18 L. Ed. 397, it is said of the saving clause of the Judiciary Act: 'It is not a remedy in the common-law courts which is saved, but a common-law remedy.' To same effect is Moran v. Sturges, 154 U. S. 256, 276 [14 Sup. Ct. 1019, 38 L. Ed. 981]."

Without further quotation, reference may be made to Col. Mid. Ry. Co. v. Jones (C. C.) 29 Fed. 193, which case is quoted with approval by the United States Supreme Court in Searl v. School Dist. No. 2, 124 U. S. at page 200, 8 Sup. Ct. 460, 31 L. Ed. 415. The substance of these decisions seems to be that a common-law remedy as employed in the Judiciary Act means any remedy, with or without action or jury, which is a substitute for a suit at law, whereby a liability is imposed after due process of law.

[7] In brief, the decisions of the Supreme Court of the United States leave no room for doubt but that touching torts committed on the high seas a state may create on behalf of the injured person, his heirs or representatives, new rights and new remedies, and provide for the maintenance of those rights and the enforcement of those remedies in her own courts, without the slightest regard to admiralty, under the construction which has been put upon the saving clause of the Judiciary Act, aided by the further reasoning and conclusion that the exclusive jurisdiction of admiralty has reference only (so far as concerns this question) to a direct libel in rem against the vessel itself. And where the suitor does not seek this particular form of relief, but prosecutes his action in personam, he may have resort to the courts of the state, without the slightest regard to the jurisdiction of admiralty. Aurora Shipping Co. v. Boyce, supra; The Osceola, 189 U. S. 172, 23 Sup. Ct. 483, 47 L. Ed. 760; Taylor v. Carryl, 61 U. S. (20 How.) 583, 15 L. Ed. 1028; Knapp et al. v. McCaffrey, supra; Rounds et al. v. Cloverport, etc., Co., 237 U. S. 303, 35 Sup. Ct. 596, 59 L. Ed. 966. That due process of law is provided for in our Workmen's Compensation Act we have already decided. So also have we decided that the imposition of liability upon an employer to compensate his employé for injuries received by the latter in the course of employment, without negligence or fault upon the part of the employer, does no violence to the employer's rights under the Constitution of the United States or of this state. Western Indemnity Co. v. Pillsbury, supra. It is unquestioned that Congress has not legislated upon this subject-matter so far as concerns men who go down in ships to the seas.

[8] We perceive no force in petitioner's contention that in its operation the state act is an unwarranted interference with the foreign commerce of the nation, and upon this we are quite in accord with The City of Norwalk (D. C.) 55 Fed. 103; Jensen v. Southern Pacific Co., 215 N. Y. 514, 109 N. E. 601, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276, and Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 Atl. 375, L. R. A. 1916A, 436.

[9] In conclusion a word should be said of the decisions of two of the courts of last resort of two maritime states which have treated of this question as bearing on their acts for the compensation of workmen. In the Matter of Walker v. Clyde S. S. Co., 215 N. Y. 529, 109 N. E. 604, Ann. Cas. 1916B, 87, the Court of Appeals of that state held, as we hold here, that the remedy provided by the Workmen's Compensation Act is a remedy within the meaning of the saving clause of the federal Judiciary Act, and, being in no sense a proceeding in rem, may exist concurrently with the right to proceed in admiralty. In State ex rel. Jarvis v. Daggett, 87 Wash. 253, 151 Pac. 648, L. R. A. 1916A, 446, the Supreme Court of that state expressed a contrary view, holding that its Compensation Act was not meant to apply to maritime injuries and torts. It based its conclusion upon two features of the Washington act, which are likewise found in the California statute. One of these was the provision abolishing all other remedies and limiting the right to compensation to proceedings under the provisions of the act itself. But concerning this matter we think it sufficient to say that the similar language of our own act will not be construed as designed to exclude admiralty from a jurisdiction which it possesses, but merely to limit suitors in the tribunals of the state to the forum provided for the determination of these questions, viz. the Industrial Accident Commission. So understood, the language imports no more than a declaration that, if a suitor shall seek redress in personam for such an injury before a state tribunal, he must go before the Accident Commission and the Accident Commission alone.

[10] The second branch of reasoning under which the Supreme Court of Washington concluded that its law was not designed, or, if designed, could not have any effect upon such maritime cases, was because the law provided a recovery different from that provided by the United States statutes. Revised Statutes of the United States, §§ 4283 and 4289 (U. S. Comp. St. 1913, §§ 8021, 8027), limits the liability of the owner of any vessel to damages or injuries which occur without his privity or knowledge to "the amount or value of the interest of such owner in such vessel, and her freight then pending." But the federal statutes create no irreconcilable conflict with our own Compensation Act, since, giving them full force, it would result only that the Accident Commission would be in duty bound to limit its award so that it would not exceed the ascertained value of the interest of the owner, and our Workmen's Compensation Act will therefore be read as though the federal statutes were embodied in it.

We have not overlooked petitioner's argument based upon its construction of the decision of the United States Supreme Court in The Osceola, 189 U. S. 175, 23 Sup. Ct. 483, 47 L. Ed. 760, supported by the opinion of the District Court in the case of Schuede v. Zenith S. S. Co. (D. C.) 216 Fed. 566. But we find ourselves unable to accept the broad view which petitioner takes of the meaning of the Supreme Court opinion in the Osceola Case, and we are constrained to reach a conclusion different from that of the District Court in the Schuede Case. Our endeavor has been to make fast to the safe anchor buoys set out in its decisions by the Supreme Court of the United States. If we shall have mistaken these, and shall have made attachment to mere flotsam, then in truth we will have drifted with these litigants into chartless seas; but in this possibility we are consoled by the reflection that there is still at their call the safe pilotage of the Supreme Court of the United States to bring them to a secure haven.

The writ is discharged, and the award appealed from is affirmed.

We concur: ANGELLOTI, C. J.; LORIGAN, J.; SHAW, J.; SLOSS, J.; MELVIN, J.; LAWLOR, J.

174 Cal. 357

NORTH PACIFIC S. S. CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (S. F. 7537.)

(Supreme Court of California. Feb. 3, 1917. Rehearing Denied March 5, 1917.)

MASTER AND SERVANT ⚿361—WORKMEN'S COMPENSATION ACT—RIGHT TO AWARD—"MARITIME OCCUPATION."

The occupation of a stevedore is in its essence maritime and subject to the same rules applicable to seamen.

In Bank. Application by the North Pacific Steamship Company for writ of review to review an award of the Industrial Accident

Commission in favor of Lewis Falvik. Writ discharged, and award affirmed.

H. W. Glensor, Courtney L. Moore, and Chas. H. Sooy, all of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

PER CURIAM. Review to annul an award of respondents granted to one Lewis Falvik, employed as a stevedore in discharging cargo from the steamship Yucatan at San Pedro, Cal. This case differs from North Pacific Steamship Co. v. Industrial Accident Commission (S. F. No. 7398) 163 Pac. 199, this day decided, in no essential particular. In the latter case the injured man was a seaman. In the present case the occupation, that of a stevedore, was in its essence maritime. Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157; The Canada (D. C.) 7 Fed. 119; Benedict, Admiralty (4th Ed.) par. 207.

Upon the authority of North Pacific Steamship Co. v. Industrial Accident Commission (S. F. 7398) the writ is discharged, and the award affirmed.

(174 Cal. 390)

STEAMSHIP BOWDOIN CO. v. PILLSBURY et al., Industrial Accident Commission. (S. F. 7512.)

(Supreme Court of California. Feb. 7, 1917. Rehearing Denied March 9, 1917.)

In Bank. Application by one Sievers for workmen's compensation, opposed by the Steamship Bowdoin Company. On certiorari by the employer to review an award of the Industrial Accident Commission in favor of the servant. Award affirmed.

Ira A. Campbell and McCutchen, Olney & Willard, all of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco (F. R. Wall, of San Francisco, of counsel), for respondents.

PER CURIAM. Certiorari to review an award of the Industrial Accident Commission allowing compensation to one Sievers. Sievers was a seaman on the steamer Bowdoin, which was owned by the petitioner for the writ. He received his injuries on said vessel while it was lying in the harbor of Eureka, in this state.

The contention of the petitioner is that the Industrial Accident Commission has no jurisdiction to award compensation for injuries to seamen upon navigable waters. The recent decisions of this court in the two cases entitled North Pacific Steamship Company v. Industrial Accident Commission (S. F. No. 7398 and S. F. No. 7537) 163 Pac. 199, 203, preclude the sustaining of this claim.

The award is affirmed.

(174 Cal. 389)

ALASKA PACIFIC S. S. CO. v. PILLSBURY et al., State Industrial Acc. Commission (two cases). (S. F. 7507, 7527.)

(Supreme Court of California. Feb. 7, 1917. Rehearing Denied March 9, 1917.)

In Bank. Two actions, each certiorari to review an award by A. J. Pillsbury and others, as the Industrial Accident Commission, brought by the Alaska Pacific Steamship Company. Award affirmed.

Ira A. Campbell and McCutchen, Olney & Willard, all of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco (F. R. Wall, of San Francisco, of counsel), for respondents.

PER CURIAM. In the above-entitled proceedings writs of certiorari were issued to review an award of the Industrial Accident Commission allowing compensation to a stevedore injured while working on a vessel lying in navigable waters in this state. The only point made against the awards is that which was considered by this court in North Pacific Steamship Company v. Industrial Accident Commission, 163 Pac. 199, decided February 3, 1917, and on the authority of that case, the proceedings of the commission must be upheld.

The award is affirmed.

(174 Cal. 363)

RUDELL v. COLLINS. (L. A. 3874.)

(Supreme Court of California. Feb. 5, 1917.)

1. TAXATION 🔑679(5) — TAX SALE — PURCHASE BY STATE—RESALE—NOTICE.

Under Pol. Code, § 3897, providing for sale of land conveyed to the state for nonpayment of taxes, the mailing of the notice of sale prescribed, where the post office address of the party to whom the land was last assessed is known, is a prerequisite to the authority of the tax collector to make the sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1361, 1362.]

2. TAXATION 🔑679(5) — TAX SALE — PURCHASE BY STATE — RESALE — NOTICE—TIME FOR MAILING.

The mailing of the notice of sale of land conveyed to the state for nonpayment of taxes to the party to whom the land was last assessed, required by Pol. Code, § 3897, must be at or before the commencement of the period of three weeks before the sale during which the notice must be published or posted.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1361, 1362.]

3. TAXATION 🔑760—TAX DEEDS—VALIDITY.

Under Pol. Code, § 3897, requiring the mailing of the notice of a sale of land conveyed to the state for nonpayment of taxes, where the post office address of the party to whom the land was last assessed is known, and section 3898, requiring the tax collector to execute a deed to the purchaser at such sale, reciting the facts necessary to authorize sale and conveyance, a tax deed, which did not recite either that notice was mailed or that it was not required to be mailed, was void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1509.]

4. TAXATION 🔑788(3)—TAX TITLE—PROOF.

In an action to quiet title, where plaintiff claims under a deed of land conveyed to the state for nonpayment of taxes, and produced no evidence of the validity of the sale, except that the tax collector did not know the address of the person to whom the property was last assessed, the deed, which was not made in conformity with the requirements of Pol. Code, § 3898, could not operate as prima facie evidence of compliance with the various conditions precedent to the sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1559.]

Department 1. Appeal from Superior Court, San Bernardino County; W. D. Thomas, Judge.

Action by Bertha Rudell against W. T. Collins. From a judgment for defendant, dismissing the action, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Arthur A. Weber, of Santa Monica, for appellant. Allison & Dickson, of San Bernardino, for respondent.

SLOSS, J. Action to quiet title. The plaintiff claims under a tax sale and deed. The court gave judgment dismissing the action, upon payment by the defendant to the plaintiff of the amount bid at the tax sale. The plaintiff appeals from the judgment and from an order denying her motion for a new trial.

On August 8, 1911, the property was conveyed to the state of California for nonpayment of taxes levied in the year 1905. A deed was made by the tax collector of San Bernardino county to plaintiff's predecessor on January 22, 1912. This instrument recited, among other things the due publication of a notice of sale to take place on the 22d day of January, 1912, and that the tax collector did, on the 12th day of January, 1912, "mail a copy of said notice, postage thereon prepaid and registered to the party to whom the land was last assessed next before such sale at his last known post-office address, Redlands, Cal."

[1, 2] Under section 3897 of the Political Code, the mailing of the notice, where the postoffice address of the party to whom the land was last assessed is known, is a prerequisite to the authority of the tax collector to make the sale. Smith v. Furlong, 160 Cal. 522, 117 Pac. 527; Campbell v. Moran, 161 Cal. 325, 119 Pac. 89; Smith v. Boston, 161 Cal. 341, 119 Pac. 91; Wright v. Anglo-Californian Bank, 161 Cal. 500, 119 Pac. 651; Krotzer v. Douglas, 163 Cal. 49, 124 Pac. 722; Prior to its amendment in 1913 (Stats. 1913, p. 559), the section did not, in terms, prescribe the time when such copy must be mailed. But we have held that, under a fair construction of the earlier provision, the mailing must take place at least three weeks before the sale; i. e., at or before the commencement of the period during which notice must be published or posted. Healton v. Morrison, 162 Cal. 668, 124 Pac. 240. The recital in the deed here is of a mailing only ten days before the sale. This was insufficient, if any mailing was required.

[3] The appellant contends, however, that the evidence introduced by her shows that the post office address of the person to whom the property was last assessed was not, either constructively or in fact, known to the tax collector, and that, therefore, no mailing was necessary. Section 3898 of the Political Code, as it read at the time of the deed to plaintiff's grantor, provided that the deed from the tax collector to the purchaser should recite "the fact necessary to authorize such sale and conveyance." The mailing of a copy of the notice was one of the facts necessary to authorize the sale (Smith v. Furlong, supra), unless such mailing were excused by the fact that the address was not known. It would seem, therefore, that the deed was required to recite either a mailing in compliance with the statute, or the existence of the fact which made such mailing unnecessary; i. e., that the address was not known to the tax collector. A deed which did not contain one or the other of these recitals was not the deed required by section 3898, and did not, accordingly, convey title to the purchaser. This view has been intimated by this court in several decisions. Buck v. Canty, 162 Cal. 226, 236, 121 Pac. 924; Canty v. Staley, 162 Cal. 379, 123 Pac. 252; Davis v. Peck, 165 Cal. 353, 355, 132 Pac. 438; Strauss v. Canty, 169 Cal. 101, 145 Pac. 1012. In none of these cases, however, was a determination of the point absolutely necessary. The extent of the actual decision was that, if the deed did not contain a recital showing either that notice had been mailed or that mailing was not required, the party claiming under the tax sale must, at least, produce evidence outside the deed to show that the required step had been taken, or that it was excused. In each instance, the purchaser had failed to meet this burden, and the judgment against him could be, and was, affirmed without a definite ruling on the validity of the deed itself. Now that the point is directly presented for decision, we feel compelled to hold that, under the statutes in force prior to 1913, a deed, which did not recite either that notice was mailed or that is was not required to be mailed, was void.

[4] The appellant makes the further point that the delivery of the deed was not necessary to complete the sale by the tax collector. Assuming the validity of the point (see Young v. Patterson, 9 Cal. App. 469, 99 Pac. 552), it cannot avail here. The plaintiff offered no evidence touching the validity of the sale, except to show that the tax collector did not know the address of the person to whom the property was last assessed. There was no effort to prove the various other conditions precedent to a sale. The plaintiff relied upon the effect of the deed itself as prima facie evidence that the preliminary steps recited in the deed had been taken. But it is only a deed made in conformity with the requirements of section 3898 which can operate as prima facie evidence, and this, as we have seen, was not such a deed. There was, therefore, no evidence that a valid or indeed any, sale had taken place.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

174 Cal. 366

In re ALDERSLEY'S ESTATE. (Sac. 2464.)

(Supreme Court of California. Feb. 5, 1917. Rehearing Denied March 5, 1917.)

1. Trusts 🔑11(2) — Validity — Purposes — Remainder Over.

A provision in a trust deed for conveyance of the land by the trustees after the termination of the life estate, not being authorized by Civ. Code, § 857, enumerating the purposes for which express trusts could be created, was void.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 9.]

2. Trusts 🔑52—Validity—Conveyance of Remainder Over.

If a trust deed provided that the remainder over after a life estate vest in the trustees in their individual capacity, a provision for conveyance, although not valid, would be regarded as merely an assurance of title.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 72.]

3. Trusts 🔑132—Trust Deeds—Construction.

Where a deed, after employing words of absolute conveyance, clearly restricts the fee conveyed to the grantees to and for the purposes of the trusts, a provision for conveyance of the remainder over after a life estate, not being valid as a trust, cannot be construed as a direct grant to the persons indicated.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 176.]

4. Trusts 🔑191(1)—Trust Deed—Power of Sale.

A power of sale in a trust deed, "whenever the trustees deem it advisable or if it becomes necessary," cannot be construed to restrict a sale for the purpose of carrying out the provisions of another paragraph, referring to the distribution of the principal, which was invalid.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 243.]

5. Trusts 🔑276—Sale of Trust Property—Use of Consideration.

Where the terms of a trust deed authorized the trustees to use the "rents, issues and profits" of the land in the performance of their duties, upon a sale of the land under power of sale in the deed, the trustees must preserve the principle of the consideration received, but may utilize the interest on such consideration in lieu of such rents, etc.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 394, 395.]

6. Trusts 🔑325—Sale of Trust Property—Use of Consideration—Presumption.

Where a portion of the consideration of the sale of land held in trust was used for the maintenance of the owner of the equitable life estate and a portion of the reversion, unless the contrary be shown, it will be presumed that the money was paid solely from his share of the moneys held in trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 483–485.]

7. Executors and Administrators 🔑510(9)—Presentment of Claims—Presumption.

In the absence of evidence to the contrary, it will be presumed that a deceased administratrix presented claims for payments made for medical attendance, costs of burial, and other funeral expenses paid by her before appointment, within the time limited in the notice to creditors, as provided in Code Civ. Proc. § 1493, and the ruling allowing such claims cannot be disturbed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2250.]

8. Executors and Administrators 🔑213—Claims—Proof.

It was error to allow claims against the estate of a decedent which the claimant offered no evidence to support and admitted were barred.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 749–753.]

9. Executors and Administrators 🔑215—Allowance for Monument.

It is no objection to a charge against an estate for a monument for the deceased that it was also intended to serve as a monument for the grave of another.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 756.]

10. Executors and Administrators 🔑485—Attorney's Fees—Calculation.

The attorney for an administratrix who did not fully administer upon the property is not entitled to full commissions, and his fees should be based upon the amount of the estate when the account is fully settled, and not on the amount accounted for.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2068.]

In Bank. Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

In the matter of the estate of James Aldersley, deceased. From an order settling the first and final account of Ellen Williams, deceased administratrix of the estate, the contestants Elbert Aldersley, succeeding administrator of the estate, and others, appeal. Order reversed.

Clarence N. Riggins, of Napa, and George F. Jones, of Oroville, for appellants. Carleton Gray, of Oroville, for respondent.

LAWLOR, J. This is an appeal from an order settling the first and final account of Ellen Williams, as administratrix of the estate of James Aldersley, deceased. She died pending probate, and Elbert Aldersley succeeded her as administrator of the said estate, while her daughter, Julia A. McCloud, became her administratrix and legal representative. The case turns upon the validity of certain trust deeds, and the distribution to be made of the moneys received from the sale of the trust property.

John Aldersley was the father of four children, all of whom were living at the time of his death. In 1882 he conveyed a certain parcel of land, known as tract No. 1, to three of his children—Ellen Williams, Edwin and William K. Aldersley—in trust for the benefit and use of his son James, who is the decedent in this estate. On June 10, 1889, John Aldersley made a second conveyance of another parcel of land designated herein as tract No. 2 to the said grantees, also in trust for the benefit and use of said James. On December 4, 1891, John Aldersley died intestate, leaving his four children as heirs, his wife having predeceased him. Thereafter, on February 13, 1892, James Aldersley, who in

1884 had received a patent from the United States government to a certain homestead, designated herein as tract No. 3, conveyed the land to the same grantees on like terms of trust as the other deeds. Thus the two brothers and the sister held the three parcels of land, which were as a matter of fact contiguous tracts, aggregating 440 acres, all in trust for the benefit and use of their brother James. The three conveyances by which this result was accomplished were substantially identical in form, the provisions pertinent to the consideration of the questions raised by this appeal reading as follows:

> "* * * That said party of the first part, in consideration, * * * does grant, bargain, convey and confirm unto said parties of the second part or the survivors of them, their heirs and assigns forever: All that certain tract of land situate, lying and being * * * in the county of Butte, state of California. * * * To have and to hold the above granted premises together with the appurtenances and every part thereof unto said parties of the second part, their survivors and assigns forever in fee, upon trust, nevertheless, and to and for the uses, interests, and purposes hereinafter limited, described and declared, that is to say:
>
> "First: To receive the rents, issues and profits of said premises, and apply the same to and for the use, purpose, support and maintenance of said James Aldersley for and during the term of his natural life.
>
> "Second: After the death of James Aldersley to convey the said premises by deed to said parties of the second part or their survivors or survivor, living at the death of said James Aldersley, their heirs and assigns.
>
> "Third: In case the said parties of the second part deem it advisable, or if it becomes necessary to sell the said before described premises any time prior to the decease of said James Aldersley, said parties of the second part or the survivor, shall have full power and right to sell and convey said premises upon such terms and price as they may deem best and for the interest of their trust. * * *"

William K. Aldersley died on February 15, 1906, leaving four children, who are the contestants herein. Elbert Aldersley, already mentioned as the administrator of the estate of James Aldersley, is one of these children. Thereafter, in pursuance of the terms of the trusts, Ellen Williams and Edwin Aldersley took charge of the property. Julia A. McCloud testified as to this fact as follows:

> "James Aldersley was a cripple, and Ellen Williams and Edwin Aldersley were his sister and brother. They always cared for him and if he had any affairs, they attended to them. Ellen Williams and James Aldersley had lived upon this property all of my life, * * * and Edwin Aldersley was with them part of the time."

On June 26, 1909, the three tracts of land were conveyed to Julia A. McCloud in consideration of $1,400 in cash and her promissory note secured by mortgage for $1,750. It was stated in the deeds from the trustees that the transfer was made because it was deemed "advisable and necessary for all persons interested in said property to sell all of the said real property." The conveyances were effected in one transaction by four separate grant, bargain, and sale deeds, each naming Julia A. McCloud as the grantee in fee, to wit: A deed of tracts Nos. 1 and 2 by Edwin Aldersley and Ellen Williams, trustees; a deed of tract No. 3 by Edwin Aldersley and Ellen Williams, trustees; a deed of tracts Nos. 1, 2, and 3 by Edwin Aldersley and Ellen Williams individually; and a deed of tracts Nos. 1, 2, and 3 by James Aldersley, individually. After Julia A. McCloud took possession of the property, the trustees and James ceased to live thereon. James died intestate on April 25, 1913.

This brings us to the administration of the estate of James Aldersley resulting in the present appeal. Ellen Williams, as we have noted, was appointed the administratrix. On April 30, 1914, she filed her first and final account. Although on the face of the three deeds of trust it would appear that James' interest in the trust res had terminated, it is set forth in the account that he had died possessed of an estate worth $2,433, consisting of the sum of $1,009 cash in bank, and $1,400 balance unpaid on the note of Julia A. McCloud which was mentioned in the last paragraph, and $24 interest thereon. In the evidence it appears that this sum is the balance remaining on hand from the $3,150 received from the sale of the three tracts. It is stated in the account that the administratrix had paid out in cash in satisfaction of the various claims against the estate the entire sum of $2,433. Several of these claims were contested, as we shall presently note in greater detail. But on May 17, 1914, before the account was settled, Ellen Williams died.

As already stated, Elbert Aldersley, one of the contestants, was then appointed administrator of James Aldersley's estate, and Julia A. McCloud became administratrix of her mother's estate. The latter was also substituted in her mother's place as her legal representative in order that the account could be determined. Before the exceptions to the account could be heard, Julia A. McCloud filed a second account, alleging:

> "That in truth and in fact said James Aldersley at the time of his death had no property whatsoever of any kind or nature, and that the property set forth in the papers of said estate as being the property of said James Aldersley, deceased, was, in truth and fact, the property of said Ellen Williams, and Edwin Aldersley, who owned the same in equal shares, and said James Aldersley, deceased, never had any right, title or interest in or to the same or any part thereof."

New exceptions were filed by the contestants, but the court approved the account, and in its order settling it declared that the said sum of $2,433, "with which said Ellen Williams, while administratrix of said estate, credited said estate, was not a part of said estate, and was a sole property of herself and of Edwin Aldersley, and that said estate had no interest whatever therein, and the sum was so credited by her to said estate by mistake." The appeal is taken principally from this order.

[1] 1. It is contended by the contestants that: "The deeds of trust and the conveyances under them are void because they are a trust to convey forbidden by the rule in the Fair estate" (citing Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70; Id., 136 Cal. 79, 68 Pac. 306). They concede, however, "that the trust to receive the rents, issues and profits of said premises and apply the same to and for the use, purpose, support and maintenance of said James Aldersley for and during the term of his natural life" is valid. Sacramento Bank v. Montgomery, 146 Cal. 745, 81 Pac. 138. That the second paragraph, requiring a conveyance by the trustees, cannot be supported under the rule established by the Fair decision is clear. At the time the deeds were executed, and indeed until the amendment to section 857 of the Civil Code, which went into force August 10, 1913 (Stats. 1913, p. 438), it was the law of this state that a trust to convey was void. It is true that the apparent intention of the trustors was to vest the remainder over after the life of James Aldersley in the sister and brothers who should survive him.

[2] Had such a provision been expressly made in the deeds, upon the termination of the equitable life estate of James, the entire equitable estate, as well as the legal title, would be vested in the trustees, and a conveyance as contemplated by the second paragraph would have been unnecessary. In such a case the provision for a conveyance, if still included, would be regarded as "nothing more than an assurance of title." Hofsas v. Cummings, 141 Cal. 525, 75 Pac. 110. But no words were employed which evidence an independent conveyance of the equitable estate in remainder over to the trustees in their individual capacity. Until the death of James the estate which they held was merely adequate for the purpose of executing the valid provisions of the trusts. Morffew v. S. F., etc., R. R. Co., 107 Cal. 587, 40 Pac. 810. At no instant of time did the trustees possess the equitable estate, and at no instant of time was it possible for a merger to take place.

[3] But the respondent urges that the surviving children are entitled to the entire trust property for other reasons; that, in fact, "the deeds create no trust whatever, except in favor of James Aldersley," and "can only be construed as a direct grant to the three children, or the survivor of them." But the deeds, after employing words of absolute conveyance, clearly restrict the fee conveyed to the grantees to and for the purposes of the trusts. The actual title conveyed was therefore commensurate for this purpose and no more. Accepting the respondent's contention, and the estate granted to the trustees would be strictly that of an unlimited joint tenancy "unto said parties * * * *or the survivors of them*, their heirs and assigns *forever*." (Italics ours.) But that this was not the intention of the respective trustors is clearly manifested by the terms of the second paragraph. By that paragraph it was obviously intended to provide a method of terminating the joint tenancy upon the death of James and vesting the property in fee in the children of John Aldersley then living. That is to say, it was intended by the trustors that James should possess the beneficial interest until his death, and that the children surviving him should take the legal title freed from the trusts only when it was duly conveyed to them by virtue of the authority attempted to be created under the second paragraph. The language employed expresses just that intention. But such a scheme was forbidden by law. It must therefore fail. Upon James' death the trusts created by the deeds terminated, and the property descends in fee to the heirs of the respective trustors. Civ. Code, § 866.

[4] This presents the question whether the attempted sale of the three tracts to Julia A. McCloud passed any interest which James at the time possessed in the property, and, if so, the proportion of the consideration received therefrom which properly belongs to his estate. It is conceded that the trustees had no power of sale other than the power granted under the provisions of the third paragraph. But it is insisted that that provision is void principally because it is inseparable from the provision of the second paragraph. We find no merit in the contention. The deeds expressly provide that such a sale should be made whenever the trustees "deem it advisable, or if it becomes necessary." To hold as contended that the third paragraph only authorizes a sale for the purposes of carrying out the provisions of the second paragraph, referring to the distribution of the principal, is to give the language used a strained construction which is neither required by the context of the instruments, nor in harmony with the obvious intention of the trustors. But even if the provision be merely regarded as a power of sale, the validity of the sale cannot be questioned. Moreover, as has been stated, James, for a valuable consideration, personally gave his deed to Julia A. McCloud, purporting to convey the title of the three tracts to her. This in itself is sufficient to remove all doubt that the title which James possessed in the tracts has passed to the grantee, and we are here concerned with no other interest. This interest of James consisted, in part, of an equitable life estate in tract No. 3 and the reversion therein after satisfaction of the trust. The deeds passed the entire title to this tract. In addition, he possessed an equitable life estate in tracts Nos. 1 and 2, and, as John Aldersley had died intestate leaving the four children as his heirs, was entitled to a one-

fourth interest in the reversion thereof. This, too, was conveyed to Julia A. McCloud. In consideration of the property conveyed to her, as we have pointed out, a sum aggregating $3,150 was paid. No evidence, however, was heard by the probate court as to the exact amount of the consideration received by the two trustees which represents the interest possessed by James in the three tracts. This fact must be determined in order to ascertain what amount should now be credited to his estate.

[5, 6] There is another question to be considered: Under the terms of the trusts, the trustees had authority to use the "rents, issues and profits" of the tracts of land in the performance of their duties. Contention is made that this power does not include the right to utilize in lieu thereof the interest on the consideration received from the sale of the premises. But a fair construction of the instruments leaves no doubt that the words must be construed in that sense. It does not follow, however, that the trustees had any right to use any part of the principal for the purposes of the trusts. It was their duty to preserve the principal until they had returned it to the trustors or their estates after the terms of the trusts had been fully performed. Notwithstanding this, Edwin Aldersley, testifying at the hearing of the account, stated that part of the consideration was expended in caring for James during the ensuing four years; "used it up for his living expenses, doctor bills and other things." It was stated that the amount thus expended amounted to $717. Whether this expenditure was made with the consent of James from his share of the property, or was merely paid out of the amount received from the sale of the entire property without regard to his consent, are matters which have not been shown, but which will be required to be established before the amount of the property to be accounted for in this estate can be definitely determined. It may be remarked, however, that unless the contrary be shown, and since James received the benefit of the said expenditure, the presumption would be that the money was paid solely from his share of the moneys held in trust.

2. We see no force to the objection made to the filing of the account herein by Julia A. McCloud after Ellen Williams had died. Code Civ. Proc. § 1639. The court granted her authority to file it as the legal representative of Ellen Williams, and sufficient facts are set forth in the account to support the order.

[7, 8] Objection was also made to the allowance by the court of the claim for medical attendance during the last illness, costs of burial, and other funeral expenses. In support of these claims Edwin Aldersley testified that they were paid, and various vouchers which had been filed with the first and final account by Ellen Williams were introduced in evidence. It is urged that none of the claims was presented against the estate during the time allowed by law. Code Civ. Proc. § 1493. But the contestants introduced no evidence in support of their contention. For instance, no affirmative evidence was offered to the effect that Ellen Williams, assuming that she had paid the various claims before she was appointed administratrix, as it is claimed, had not afterwards in due time presented her claim against the estate. In the absence of a showing to the contrary we cannot disturb the ruling of the court in allowing the claims. The presumption is that the rulings were proper.

[9] Two other claims were presented by Edwin Aldersley and Ellen Williams for services rendered in nursing and caring for James for the two years prior to his death. The contestants served and filed exceptions to these claims, alleging that they were barred at the time of presentation, that they were excessive in amount, and that any services rendered by the trustees were in fact gratuitous. Although the respondent admitted that the claims were barred and offered no proof in support of them, they were allowed by the court. This is clearly error. Such claims should not be allowed.

[10] It is no objection to the charge for the monument for James Aldersley that it was also intended to serve as a monument for the grave of John Aldersley. No other objection was made to the claim except the general objection that it was likewise barred.

The attorney for Ellen Williams was allowed fees on the full amount accounted for by her in the first and so-called final account. He did not fully administer upon the property, and was therefore not entitled to full commissions. Estate of Piercy, 168 Cal. 750, 145 Pac. 88. Moreover, his fees should be based upon the amount of the estate when the account is finally settled.

No other points require mention.

Order reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

174 Cal. 395

CLAREMONT COUNTRY CLUB et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA. (S. F. 7759.)

(Supreme Court of California. Feb. 9, 1917.)

1. MASTER AND SERVANT 🔑361—WORKMEN'S COMPENSATION ACT—"EMPLOYÉ" — STATUTES—"CONTRACT OF EMPLOYMENT"—"SERVANT."

Under Civ. Code, § 1965, defining a contract of employment to be a contract by which one who is called the employer engages another who is called the employé to do something for the benefit of the employer or of a third person, despite section 2009, providing that a servant is one employed to render personal service to his employer and who remains entirely under the control and direction of the latter, a caddy was the employé within the Workmen's Compensation Act (St. 1913, p. 279), of the country club whose members utilized his services in playing golf, though he was paid by the players he served through the club's caddy master, since the employment and discharge of the caddy during all of the time he was not actually in the service of a member was wholly under the control of the club, the determinative fact.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé; Servant.]

2. Master and Servant 🔑361—Workmen's Compensation Act—Employé.

The fact that the caddy reported for duty and was employed only on specific days did not militate at all against the proposition that he was an employé.

3. Master and Servant 🔑405(6) — Workmen's Compensation Act — Amount of Award to Minor.

In an injured golf caddy's proceedings against the employing country club for compensation under the Workmen's Compensation Act, where the evidence showed that the basis of the award was within the earning capacity of good caddies, the award would not be set aside on complaint that its amount was not justified by the evidence, in that it was based on the earning capacity of a first-class caddy, and there was no assurance that the injured caddy would become such, and there was no assurance that when he attained his majority he would pursue the vocation of a caddy, and that if he did pursue the vocation he would follow it every day instead of only on Saturdays and Sundays, as he was doing when injured; the Workmen's Compensation Act (St. 1913, p. 288) § 17, providing that if the injured employé is a minor, and his incapacity is permanent, his average weekly earnings shall be deemed, within the limits fixed, to be the weekly sum that under ordinary circumstances he would probably be able to earn after attaining the age of 21, in the occupation in which he was employed when injured, if he had not been injured.

In Bank. Proceedings by Raymond Harris, for compensation for personal injuries under the Workmen's Compensation Act, against the Claremont Country Club, employer, and the Ætna Life Insurance Company, insurer. There was an award by the Industrial Accident Commission, and the employer and insurer petition for writ of review to annul such award. Award affirmed.

Redman & Alexander, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondent.

HENSHAW, J. Review to annul an award of the Industrial Accident Commission. On March 7, 1915, Raymond Harris, a boy 14 years of age, while caddying for a member of the Claremont Country Club, leaned against the handrail of a bridge spanning a small creek on the golf course of the club. The rail gave way, and the boy fell backward into the creek, suffering a permanent injury to one of his elbows. He filed his claim for compensation with the Industrial Accident Commission. The Claremont Country Club and its insurer, the Ætna Life Insurance Company, answered, denying only the fact of employment. The commission, after hearing, awarded the applicant $1,170 in addition to his outlay for medical attendance.

[1] The principal contention of petitioners is that the boy was not an employé of the country club within the meaning of the provisions of the Code and the terms of the Workmen's Compensation Act (St. 1913, p. 279). The undisputed facts are that the club owns and maintains a golf links for the pleasure of such of its members as desire to indulge in the game. The general control over this sport is vested in appropriate committees selected from the club members. Many golfers have desired and do desire the services of attendants to carry their golf bags, to aid in the search for the ball, and to perform other like familiar services. For these members the club provides caddies, and over them is a paid employé known as the caddy master. The club also maintains a caddy house, which is the station of the caddies until their services are requisitioned. The caddies are graded into three classes, based upon their records and abilities in the service, the best belonging to class A, the next best to class B, and the beginners and least efficient to class C. A class caddies are paid 60 cents, B class caddies 50 cents, and C class caddies 40 cents a game. A player requisitioning a caddy may not designate the boy whose services he desires. His request is made to the caddy master, who, under a system, summons the caddy whose turn it is to serve. The caddy is supplied with a card, whereon at the conclusion of the game the member makes his report to the caddy master, with remarks touching the service and qualifications of the boy, and from time to time the caddy master regrades his caddies in accordance with these reports. At the close of the game the player hands to the caddy master, with his report, the amount earned by his caddy, and this amount is immediately delivered by the caddy master to the boy. Thus each player pays the caddy, and the indirect method of payment through the caddy master is apparently designed for the twofold purpose of convenience in making change and as a check on "tips" or donations by the members to the caddy in excess of the actual amount earned. The boys are taken on by the club through the caddy master or Greens Committee, and the caddy master or Greens Committee is empowered to discharge a caddy, or, in other words, to forbid him to frequent the golf links and seek and secure employment. Upon the other hand, while actually caddying the control of the activities of the boy are wholly with the member using him, and the club, as a club, has of course no means of knowing what particular orders or directions a member may give to his caddy, nor what unusual or dangerous duties he may call upon him to perform. For these reasons petitioners argue that the caddies are not employés of the club, and that "all

that the club does is to afford boys who wish to serve as caddies an opportunity for employment by the members of the club who play golf." For this position petitioners believe they find full support in section 2009 of the Civil Code, in Boswell v. Laird, 8 Cal. 469, 68 Am. Dec. 345, in Fay v. German General Ben. Soc., 163 Cal. 118, 124 Pac. 844, and Brown v. Smith, 86 Ga. 274, 12 S. E. 411, 22 Am. St. Rep. 456. Touching section 2009 of the Civil Code, petitioners insist that the status of the caddy is that of a servant, as he is employed to render personal service, and that if it be conceded that he would be a servant of the club, while rendering personal service at the direction of the club, the relationship ceases entirely when he is actually engaged in caddying for a member, since by virtue of that engagement he no longer is "entirely under the control and direction" of the Claremont Country Club, but is entirely under the control and direction of the member, who thus becomes "his master." But such refinement of reasoning makes no stronger appeal to us than it has to other courts. Section 1965 of the same Code has a bearing upon the matter, and that defines a contract of employment (under which of course the relationship of employer and employé necessarily arises) to be "a contract by which one, who is called the employer, engages another, who is called the employé, to do something for the benefit of the employer, or of a third person." The reasoning, we say, makes no strong appeal to us, because the language of section 2009 was never intended to mean, for example, that a housemaid, directed to give personal attention and service to a guest within the house, ceased for that reason to be an employé or servant of the householder. No more do waiters in restaurants and cafés who, while attending to the requirements of the patrons and in contract bound to comply with all the reasonable requests of those patrons, cease to be employés of the owners of the particular establishment. Nor indeed is the method of compensation determinative. Taking the single case of waiters, it is a well-known fact that in some establishments they receive no wage from their employers, and are dependent entirely upon the "tips" which they receive from the persons they serve, and it is equally a well-known fact that in some instances this system is carried to such an extent that the waiters themselves pay the employers to obtain the employment. So here it is not of consequence that the member should pay to the caddy directly the amount he has earned, or pay it indirectly through the medium of the caddy master. The employment and discharge of the caddy during all of the time when he is not actually in the service of a member is wholly under the control of the country club, and this is the determinative fact in the matter. In certain of its features the case, then, is not dissimilar to Gaines v. Bard, 57 Ark. 615, 22 S. W. 570, 38 Am. St. Rep. 266, where it is held that a bathroom attendant, selected and subject to be discharged by the owner, and performing service for him in keeping the bathrooms and the adjacent halls clean, is his servant, notwithstanding the fact that he paid such attendant no compensation, and the only compensation which he received was the donations from the patrons under whose control he was while performing service for them. The foregoing, we think, will certainly show the inappositeness of such authorities as Brown v. Smith, 86 Ga. 274, 12 S. E. 411, 22 Am. St. Rep. 456, where the holding is merely that where a master has hired his servant to another, giving the other the complete and absolute control and direction of the servant, with the exclusive right to discharge him, the original master is not liable for his negligence. Wherefore upon this point our own cases, above cited, dealing with the general features of the relationship of employer and employé and master and servant do not call for review, for these caddies are employed by the club, are controlled by the club, and the service which they render simply happens from its nature to be directed to contribute to the convenience and pleasure of the individual members of the club.

[2] The fact that the injured boy reported for duty and was employed only on specific days does not militate at all against the proposition that he was an employé. Dewhurst v. Mather, 2 K. B. 754.

[3] The final complaint of petitioners is that the amount of the award is not justified by the evidence. Elements of uncertainty in this evidence are pointed out by the petitioners, as that it was based upon the earning capacity of a first-class caddy, and there was no assurance that the injured boy would become a "class A" caddy; also that there was no assurance that when he attained his majority he would pursue the vocation of a caddy; and as little assurance that if he did pursue the vocation that he would follow it every day instead of only on Saturdays and Sundays as he was then doing. These statements are unquestionably true, but nevertheless the law itself takes knowledge of them and defines the duties of the Industrial Accident Commission under the indicated circumstances. The evidence did show that the basis of the award was within the earning capacity of good caddies. The act itself (section 17, c. 176, Stats. 1913) provides as follows:

> "If the injured employé is a minor, and his incapacity, whether total or partial, is permanent, his average weekly earnings shall be deemed, within the limits fixed, to be the weekly sum, that under ordinary circumstances, he would probably be able to earn after obtaining the age of twenty-one years, in the occupation in which he was employed at the time of the injury, if he had not been injured."

And it is held, supporting such a law, that it is proper to take into consideration the increased wage which a minor may be fairly expected to earn. Kilberg v. Vitch, 171 App. Div. 89, 156 N. Y. Supp. 971.

The award is therefore affirmed.

We concur: ANGELLOTTI, C. J.; LORIGAN, J.; MELVIN, J.; SHAW, J.; SLOSS, J.; LAWLOR, J.

(174 Cal. 358)

CASS v. ROCHESTER. (L. A. 3829.)

(Supreme Court of California. Feb. 5, 1917.)

1. PLEADING 🔑345(1)—MOTIONS—JUDGMENT ON THE PLEADINGS.

Judgment on the pleadings cannot be given in favor of plaintiff, where the answer puts in issue a material allegation of the complaint or sets up affirmative matter constituting a defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055, 1057–1059.]

2. FACTORS 🔑1—RELATIONSHIP OF PARTIES —"CONSIGNMENT"—"FACTOR."

Where an automobile was received by defendant under contract whereby he was to hold it on consignment and when sold to forward a sum of money to the seller, he was, under Civ. Code, § 2026, a factor, and by section 3053 had a lien on the property; the word "consignment" importing an agency.

[Ed. Note.—For other cases, see Factors, Cent. Dig. § 1.

For other definitions, see Words and Phrases, First and Second Series, Consignment; Factor.]

3. FACTORS 🔑1—CONSIGNMENT—TIME OF SALE.

A sale from consignor to consignee does not in any event take place until the consignee sells the goods, and, if he merely retains the goods and claims a lien for repairs made, he is not chargeable as a purchaser.

[Ed. Note.—For other cases, see Factors, Cent. Dig. § 1.]

4. PLEADING 🔑122—ANSWER—SUFFICIENCY OF DENIALS—INFORMATION AND BELIEF.

Where it was not a matter presumably within defendant's knowledge whether plaintiff was the assignee of the defendant's consignor, defendant's denial of the assignment on information or belief is sufficient to raise the issue.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 249–252.]

5. PLEADING 🔑345(2)—JUDGMENT ON THE PLEADINGS—INCONSISTENT DEFENSES.

A defendant has the right to plead inconsistent defenses, and if one of them denies material allegations of the complaint, judgment cannot be rendered on the pleadings, even though the matter thus denied may be admitted in another defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1056.]

6. PLEADING 🔑127(1)—ADMISSIONS—EFFECT.

In an action by the assignee of the consignor of an automobile for its return and for damages, where defendant on information and belief denied the assignment, a clause in his answer, "that the plaintiff's assignors are indebted to the defendant" in a sum certain, cannot be construed into an admission that the assignment was in fact made.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 264–268.]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Phil Cass against Richmond Rochester. From a judgment for plaintiff on motion for judgment on the pleadings, defendant appeals. Reversed.

John C. Stick, Phelps, Greer, Winston & Wharton, and Paul E. Greer, all of Los Angeles, for appellant. Cass & Shelton, of Los Angeles, for respondent.

SLOSS, J. On plaintiff's motion for judgment on the pleadings the court below entered judgment in his favor for $1,500. The defendant appeals.

The complaint was in two counts. The first alleged that on or about October 1, 1912, the defendant received from the Metallurgique Motor Company a certain automobile, "under the terms of a certain contract between said defendant and said Metallurgique Motor Company whereby the said defendant agreed to hold the said property on consignment, and, when the said automobile was sold, to forward to the said Metallurgique Motor Company the sum of $1,500." It is further alleged that on April 22, 1913, defendant notified said Metallurgique Motor Company that he would not carry out the terms of the said contract. Thereafter, it is averred, the said Metallurgique Motor Company sold and transferred said automobile to plaintiff. The defendant unlawfully withholds said property from the plaintiff, to his damage in the sum of $500, and the value of said property is $2,000. The second count, after restating many of the foregoing matters, alleges that, while the automobile was under the control of the defendant, it was damaged, through the defendant's neglect, in various particulars, to plaintiff's loss in the sum of $1,382.50. The prayer of the complaint was, on the first count, for the return of the automobile or its value, together with the sum of $500 damages for its unlawful detention, and, on the second count, for $1,382.50, the amount of damage done to the automobile while it was in defendant's possession.

The answer admits the receipt of the automobile under the contract set forth in the complaint. It admits that defendant had refused to carry out the contract, unless the Metallurgique Motor Company would repair the automobile, which said company had refused to do. The assignment to plaintiff is denied for want of knowledge or information. The defendant further denies that he unlawfully withholds the property from plaintiff to plaintiff's damage in any sum; he alleges that he is in possession of the automobile, and refuses to deliver the same to the plaintiff, for the reason that plaintiff's assignors are indebted to him in the sum of $204, "as in the counterclaim hereinbelow set out"; that defendant has demanded this sum of plaintiff, and offered to deliver the automobile to him upon his paying said sum, but plaintiff has refused to pay the same. In answer to the second cause of action, defendant denies the allegations of damage to the automobile. There is a further and separate defense based upon the representations of the motor company that the automobile was in good condition; whereas, the defendant alleges it was, in fact, in bad order. In the same defense it is alleged that the Metallurgique Motor Company refused, on defendant's demand, to put the car in good order, and that thereupon defendant demanded that said motor company pay him the sum of $149, which he had paid for freight on said car, and the further sum of $5 per month for storage. In addition, the answer contains a counterclaim for the sum of $204, being the sums advanced on the car by defendant, to wit, $149 for freight and $55 for eleven months' storage at the rate of $5 per month.

[1] Judgment on the pleadings cannot be given in favor of the plaintiff, where the answer puts in issue a material allegation of the complaint, or sets up affirmative matter constituting a defense. Derby v. Jackman, 89 Cal. 1, 26 Pac. 610. Concededly, the answer denied essential averments of the second cause of action. The judgment was, in fact, based upon the first count alone, and the question is whether the answer contained any denials or averments which precluded judgment on this count without a trial.

[2] The plaintiff's allegations and his prayer for relief show very plainly that the complaint was based upon the theory that the automobile was the property of plaintiff, it having been put into the possession of the defendant as the agent, for purposes of sale, of plaintiff's assignor. If this was the correct view, the defendant's position was that of a factor (Civ. Code, § 2026), and he therefore had a lien on the property for all proper outlays made by him in connection with the agency (Civ. Code, § 3053). The right was asserted in the answer. Granting that, upon the agent's refusal or failure to sell, the principal might terminate the relation and reclaim the property, the agent was still entitled to reimbursement for his advances, and to retain the property as security. All of this is virtually conceded by respondent. But, in complete abandonment of the theory on which the case was brought, it is now argued—and this is said to have been the basis for the ruling of the trial court—that the transaction between the Metallurgique Motor Company and the defendant constituted a sale of the automobile to the defendant for the sum of $1,500. This interpretation of the dealings between the parties cannot be sustained. The averment of the complaint is that the automobile was received by the defendant under a contract whereby the defendant was to hold the property on consignment, and, when the automobile was sold, to forward to the motor company the sum of $1,500. There is thus alleged, not a contract of sale, but one which made the defendant the agent of the plaintiff's assignor to sell the automobile.

"The word 'consignment' does not imply a sale. The very term imports an agency, and that the title is in the consignor." Harris v. Coe, 71 Conn. 157, 41 Atl. 552; Rolker v. Great Western Ins. Co., 4 Abb. Dec. (N. Y.) 76; Sturm v. Boker, 150 U. S. 312, 326, 14 Sup. Ct. 99, 37 L. Ed. 1093; Powell v. Wallace, 44 Kan. 656, 659, 25 Pac. 42; Benjamin on Sales (7th Ed.) 7.

Irrespective of the use of the word "consignment," the pleading does not show that the transaction was a sale, or anything other than an entrusting of the property to the defendant as agent for the purposes of sale. The plaintiff relies upon the circumstance that defendant was to remit a fixed sum, irrespective of the amount for which he might sell the property. This, it has often been held, is not inconsistent with the relation of principal and factor.

[3] "We do not think," said the court in Harris v. Coe, supra, "that the absence of a limitation upon the price at which goods may be sold by a consignee who is to account to his consignee at a fixed price, will transform an agreement made in good faith and clearly intended by both parties to be one of agency, into a contract of sale." See, also, McCullough v. Porter, 4 Watts & S. (Pa.) 177, 39 Am. Dec. 68; Soria v. Davidson, 53 N. Y. Super. Ct. 470; Walker v. Butterick, 105 Mass. 237; Benjamin on Sales (7th Ed.) 7. There are decisions holding that the terms of the agreement may be such "as to make the consignee, when the goods are sold, the purchaser and principal debtor for the goods." Benjamin on Sales, supra; Ex parte White, L. R. 6, Ch. App. 397, affirmed on appeal 21 Wkly. Rep. 465; N. E. Mfg. Co. v. J. C. Wagner Co., 108 Wis. 584, 84 N. W. 894; Nutter v. Wheeler, Fed. Cas. No. 10,384, 2 Lowell, 346. But, as indicated in the passage just quoted, even these cases concur in the view that a sale from consignor to consignee does not, in any event, take place until the latter has sold the goods. In the meanwhile, the goods are the property of the consignor, and the consignee is his agent. In the present case, no sale was made by the defendant, and he could not therefore, under any permissible interpretation of the contract, be charged as purchaser of the automobile.

[4, 5] There is still a further ground of objection to the granting of judgment on the pleadings. Defendant denied the transfer and assignment of the automobile by the motor company to the plaintiff. An assignment by the motor company of its interest in the automobile was not a matter that was presumably within the knowledge of the defendant. A denial for want of information or belief was therefore sufficient to raise an issue. Jensen v. Dorr, 159 Cal. 742, 747, 116 Pac. 553. The fact that in the counterclaim the defendant may have made admissions inconsistent with this denial does not impair its effect. A defendant has the right to plead

inconsistent defenses, and, if one of them denies material allegations of the complaint, judgment cannot be rendered on the pleadings, even though the matter thus denied may be admitted in another defense. Nudd v. Thompson, 34 Cal. 39; Botto v. Vandament, 67 Cal. 332, 7 Pac. 753.

[6] It is claimed by the respondent that the denial of the assignment is overcome by an admission contained in the same defense. But the supposed admission consists merely of an allegation that defendant refused to deliver the automobile for the reason "that the assignors of the plaintiff are indebted to this defendant in the sum of $204." This reference to "assignors of the plaintiff" cannot be construed into an admission that an assignment had, in fact, been made, or that defendant had such knowledge on the subject as to preclude a denial for want of information. The fair construction of the pleading is that, while the defendant puts the plaintiff to proof of the alleged assignment, he asserts, at the same time, his right to hold the automobile until he is paid the amount due him from the motor company, to whose title the plaintiff claims to have succeeded.

The judgment is reversed.

We concur: SHAW, J.; LAWLOR, J.

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174 Cal. 377

NORTHERN CALIFORNIA POWER CO., Consolidated, v. WALLER et al.

(Sac. 2269.)

(Supreme Court of California. Feb. 7, 1917.)

1. Appeal and Error 🔑837(1)—Review of Findings.

The Supreme Court will look to findings and conclusions alone of the trial court to determine whether the judgment is supported, and to the evidence, as to whether findings are supported; but the judge's opinion may be used to explain doubtful points.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3262.]

2. Trial 🔑404(1) — Findings — Construction.

The opinion and findings of the trial court construed, and *held* to show that the court disregarded the real point in issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 957.]

3. Appeal and Error 🔑854(2)—Erroneous Reasons for Correct Judgment.

If the evidence in controversy over water rights actually supported the apportionment of water decreed by the court, its reasoning, if erroneous, will be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3408–3410.]

4. Evidence 🔑536 — Expert Testimony — Ditches.

The testimony of persons not possessing engineering skill or knowledge of hydraulics, as to capacity of and amount of water carried by ditches, being mere guesses, was inadmissible as expert testimony; the matter being susceptible of exact measurement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2343, 2344, 2347.]

5. Evidence 🔑470 — Expert Testimony — General Rule.

It is the general rule that, whenever possible, data to establish given conditions must be introduced in evidence, and, if scientific knowledge is necessary, this may be given by the opinion of experts; but, where not possible, opinions of ordinary witnesses are admissible as being the best evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2220.]

6. Evidence 🔑574 — Opinion Evidence — Conflict with Other Evidence.

Where defendant's evidence as to capacity of and amount of water carried by ditches was manifestly inferior to that of plaintiff regarding actual physical conditions, Code Civ. Proc. § 1963, declaring presumption of law that "higher evidence would be adverse from inferior evidence being produced," will apply.

[Ed. Note.—For other cases, see Evidence. Cent. Dig. § 2400.]

7. Waters and Water Courses 🔑152(8)—Action to Protect Water Rights—Finding.

In a controversy over water rights, the court's finding as to allowance and division of water to certain ditches *held* not supported by the evidence.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 156.]

8. Costs 🔑32(3)—Persons Entitled to.

Where plaintiff in a controversy over water rights recovered judgment against defendant, although not for full amount claimed, it was entitled to costs under Code Civ. Proc. § 1022, providing for allowance of costs as of course.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 112.]

Department 2. Appeal from Superior Court, Shasta County; W. D. Tillotson, Judge.

Action by the Northern California Power Company, Consolidated, against John Waller and others. Judgment for defendants, and plaintiff appeals. Reversed.

Carr & Kennedy, of Redding, for appellant. McCoy & Gans, of Red Bluff, for respondents.

HENSHAW, J. Plaintiff brought its action against John Waller and A. P. Waller, charging them with the partial destruction of a dam maintained to impound the waters of North Battle creek in Shasta county, and with threats of the continuance of like trespasses. John Waller filed a cross-complaint, asserting rights in himself and others in the waters of this creek, which rights were declared to be superior to those of the plaintiff. The rights of these cotenants, it was asserted, arose out of a prior appropriation by a ditch known as the Loggerhead Ditch. These cotenants were brought into the action as defendants. While in its form, therefore, this is an action for an injunction against trespass, in its essence it is a controversy over rights to the water of North Battle creek. Dissatisfied with the judgment of the court in its division of these waters, plaintiff has appealed. Its principal contentions are that the vital findings are not supported by the evidence.

In 1886, the first appropriation of the waters of this creek was made by the defendants and their predecessors in interest through the Battle Creek Bottom Ditch Company's ditch. This ditch is commonly known as and will here be called the "Loggerhead Ditch." The recorded notice declared for an appropriation of 600 inches of water measured under a 4-inch pressure. In 1895, the defendants filed a notice of appropriation by the same ditch of 2,000 inches measured under a 4-inch pressure. In 1890 and 1891, another ditch taking water out of the creek was constructed. It was known as the Vilas or the Farlow Ditch, and will here be called the "Vilas Ditch." Appellant contends that by the ownership of Vilas Ditch, which it has acquired, it is entitled to divert 625 inches of water measured under a 4-inch pressure, in subordination to the prior right of the Loggerhead Ditch to 600 inches. The uses of the water under both of these appropriations were originally the ordinary agricultural uses—domestic, watering of stock, and irrigation.

Appellant is a public service corporation engaged in the generation and distribution of electricity for light, heat, and power. It develops this electricity by water, and maintains canals, ditches, power houses, etc., for this purpose. In 1907, it commenced the construction of the "North Battle Creek Ditch to South Power House," a ditch commonly called and which here will be called the "Cross Country Ditch." Under one of its engineers, H. A. Tedford, the locations of water rights were made, and the ditch and its dam constructed. They were completed in 1909, and shortly thereafter the appellant purchased the Vilas Ditch and water rights. The capacity of this Cross Country Ditch is 4,500 miner's inches. The court decreed the right to appellant to divert all the waters of the creek to the full capacity of its Cross Country Ditch, in subordination, however, to the prior rights of the owners of the Loggerhead Ditch.

It is over these prior rights that the controversy arises. The court's first award was to the Loggerhead Ditch and to its owners of 600 inches of water measured under a 4-inch pressure. Next there was decreed to plaintiff (by virtue of its ownership of the Vilas Ditch) 120 inches of water under a 4-inch pressure, after which it was decreed that an apportionment should be made of the remaining waters at the dam of the Cross Country Ditch, by which apportionment one-sixth of the flow of the stream could be retained by appellant, while five-sixths must be permitted to pass on to the Loggerhead Ditch until it was filled to its capacity. This capacity was found to be 1,854 inches of water measured under a 4-inch pressure. The findings further declared against the allegations of the complaint concerning the injury and threatened injury by respondents to appellant's dam. And, finally, the judgment, after setting forth the parties' rights and priorities by the fixed quantities, viz. 600 inches to the Loggerhead Ditch and then the next 120 inches to the Vilas Ditch, adjudicated that the defendants "have the right to take and divert the said five-sixths of said remainder of water in and through the said Loggerhead Ditch and use the same for irrigation on their lands during the irrigating season of each year or when the same shall be needed or required by them for irrigation."

Appellant contends that the court failed to find upon material issues, and that the findings which it made are indefinite, inconsistent, and contradictory and do not support the judgment. Further, that the judgment itself is void for indefiniteness. Other contentions are advanced, but these are the principal ones which demand consideration.

So far as concerns the water rights, the issues may be briefly outlined. The defendants contended for an absolute priority to the first 2,000 inches of the stream measured under a 4-inch pressure, and to all of its flow if the quantity was less than this. Plaintiff conceded a priority to defendants of 600 inches and no more, asserted a second right to the next 625 inches by virtue of the Vilas Ditch and the Vilas water rights, and finally contended for a right in itself of all the remaining flow of the stream subject to these two priorities by virtue of its own appropriation.

The findings and conclusion of the court have already been sufficiently indicated. By them the first right accorded to defendants was a right to but 600 inches measured under 4-inch pressure. Over this right no controversy arises. Plaintiff accepts it and defendants are not appealing. The allowance of but 120 inches to the Vilas Ditch presents the first matter in controversy, and to its understanding a knowledge of the following facts is necessary: Originally the notice of appropriation by the Loggerhead Ditch called for 600 inches—the amount awarded by the court. This ditch, it appears, was cleaned and repaired in the years that followed its construction, and by this work its actual capacity was increased until, as has been said, in 1895, the defendants filed a notice of increased appropriation by the same ditch up to 2,000 inches. Whatever may have been the original flow of the Vilas Ditch, it is not contended that its original carrying capacity was ever increased. Appellant does not assert that it was. Respondents in their evidence deny that it was ever enlarged. One of the witnesses sums up this matter in the following language:

> "Well, when the two ditches was first dug, the best I can recollect it there wasn't but very little difference in the size of them; but the Loggerhead people, as we call them, cleaned their

ditch and kept it up and it got better every year; but the other ditch was very poorly looked after, and it didn't get no better."

There was a time in the history of the Vilas Ditch when the point of diversion was changed and the flume at the original intake abandoned, but this was merely a change in the place of diversion and not in the quantity of water taken.

In deciding the case, the learned trial judge filed his opinion, which in the brief of appellant is presented in extenso for our consideration, and on that opinion appellant bases its argument that the court adopted, to its great prejudice, an unwarranted and unexpected position in weighing the evidence and deciding the case. Respondents make answer that the views of the court are in no wise determinative, that the judgment rests upon the findings and conclusions of law, and that, the findings being supported and the conclusions of law sound, a consideration of the opinion is both irrelevant and improper.

[1-3] Respondents are correct in saying that this court must and will look to the findings and conclusions alone to determine whether or not the judgment is supported, and will consider the evidence alone to determine whether the findings are supported. Nevertheless, the opinion of the trial judge can with propriety here be used, and is often used, to elucidate doubtful points and as an aid in determining what the trial court may have conceived to have been the vital issues. Churchill v. Flournoy, 127 Cal. 355, 59 Pac. 791; Liver v. Mills, 155 Cal. 459, 101 Pac. 299, dissenting opinion of Beatty, C. J. In its opinion the trial court declared that the evidence as to the use of the water carried by both ditches was "vague, conflicting, and unsatisfactory," and concluded that the most feasible plan for it to adopt was "to divide the water among the respective claimants as nearly as may be in proportion to the acreage irrigated on the various ranches described in the pleadings." Then, repeating that the evidence as to the acreage irrigated on the respective ranches was "somewhat vague, conflicting, and unsatisfactory," the opinion declared that it appeared "that the acreage irrigated from the Loggerhead Ditch during the time that the Vilas Ditch was in use was approximately five times as great as the acreage irrigated from the Vilas Ditch," and as an award concluded that the Loggerhead Ditch was entitled to the first 600 inches, that the Vilas Ditch was entitled to the next 120 inches, and that the remaining flow should be divided in proportion of five-sixths to one-sixth. These conclusions, it will be noted, are precisely those which are embodied in the findings and judgment. There is justice, therefore, in appellant's complaint that the court disregarded the vital point of controversy hotly litigated between the parties; that point of controversy being the actual amounts of water which their ditches in fact carried. It was substantially conceded upon each side, such is appellant's contention, that whatever water was in fact carried was put to a beneficial use. But to this, as we have intimated, respondents make answer that the evidence does in fact support the apportionment of the water actually made, and, this being the situation, the reasoning of the court in the opinion, even if held to be erroneous, must be disregarded. The soundness of this position we have already declared.

This summarization of the opinion of the court shows the need, however, for a more careful scrutiny of the evidence relied upon by respondents, since it is quite manifest from his opinion that the trial judge did not accord to it the full weight for which respondents contend; in this regard the opinion declaring as follows:

> "There is some testimony by witnesses who were familiar with the ditches described in the pleadings during their early history as to the comparative quantity of water carried or conveyed in them. Some of such witnesses estimated that the Loggerhead Ditch carried twice as much water as the Vilas Ditch; some thought that the former ditch carried ten times as much as the latter; but the greater number of such witnesses estimated the quantity of water in the Loggerhead Ditch as being from four to five times as much as in the Vilas ditch. While this class of testimony is not very satisfactory or conclusive, it tends to corroborate the testimony of defendants as to the comparative acreage irrigated."

What, then, upon this matter does the evidence disclose? It discloses: First, that there was a gradual increase in the capacity of the Loggerhead Ditch and with that increase of capacity doubtless an increase in the flow. Nevertheless, the amount of this priority is fixed by the court at 600 inches, which amount is the full amount covered by the original notice of appropriation under which the Loggerhead Ditch was constructed. Touching the capacity and diversion of the Vilas Ditch, and remembering that that capacity and diversion it is conceded was never increased, the direct and positive testimony offered by appellant was, first, as to the dimensions of the ditch with its flumes and the gradient of the flow. This evidence showed a capacity of the 625 inches contended for. Second, there was given the direct evidence of Vilas and his successors that during the irrigating season the ditch ran full, "all it would carry." And, third, it was shown that the old water marks still stood upon the original flume at the intake (which original flume was abandoned when the point of diversion was changed) and established that the quantity of water which the ditch was receiving was that claimed by plaintiff.

Against this direct and positive evidence, there was presented on behalf of respondents evidence, principally their own, going in some instances to the carrying capacities of the two ditches, and in other instances to a comparison of the amount of water which they were actually carrying. To the admission of this evidence appellant strongly objected. But dealing here and now only with its weight, and not with its admissibility, it amounted to this: That the witnesses were of varying opinions and placed the capacity of the Loggerhead Ditch at from two times to ten times that of the Vilas Ditch. Evidence of like character was offered by some of these witnesses as to the amounts of water carried. Thus witness Crooker:

> "Well, I should say as to the comparative amounts of water in the two ditches that the Loggerhead Ditch would carry at least five or six times more than the Vilas Ditch was carrying."

Witness Lakey:

> "Well, there might have been four times as much water in the Loggerhead Ditch as there was in the Vilas Ditch. There might have been more and might have been less."

Defendant Patterson:

> "Well, I would say from four or five times up to eight or ten times more water in the Loggerhead Ditch than there would be in the Vilas Ditch on an average."

Defendant Loomis:

> "About one-tenth, the Vilas Ditch carried about one-tenth as much water as the Loggerhead Ditch."

It is to be noted that this evidence was directed to the observations of the witnesses during a number of years, and was carried down until the year 1909, when trouble arose between these litigants. Still further it is to be noted that, while the capacity of the Vilas Ditch remained stationary, that of the Loggerhead Ditch was increased by gradual development work. And, finally, it is not to be forgotten that, whatever that increase, the prior right of the Loggerhead Ditch over the Vilas Ditch, was fixed by the court at 600 inches (Weil, Water Rights, § 474), and by that determination all of the parties, as well as this court, are here bound—the appellant because it is not complaining of it, the respondent because it has not appealed from it, and this court because for those reasons it is an accepted admeasurement and adjudication.

But what is complained of, and it is a complaint which the appellant is entitled to make, is that its water right for the Vilas Ditch was by the finding of the court unjustifiably reduced.

[4] Here it becomes necessary to say a word concerning the admissibility of this evidence thus permitted to be introduced. Admittedly none of these witnesses possessed any engineering capacity or any scientific knowledge of hydraulics. Their estimates, therefore, of the carrying capacity of the two ditches, as well as their estimates of the amounts of water actually carried, were but mere guesses, and the unreliability of the evidence itself is demonstrated upon the face of it when it is remembered that these guesses varied in declaring the superior capacity of the Loggerhead Ditch to be from two to ten times that of the Vilas Ditch. Manifestly this testimony was not admissible as giving the opinion of experts. Goldstein v. Black, 50 Cal. 463; State v. Maioni, 78 N. J. Law, 339, 74 Atl. 526, 20 Ann. Cas. 204.

[5] The general rule upon all such subjects of inquiry is that where possible the data to establish a given condition or fact must be laid before the court, and, if scientific knowledge be necessary to formulate these data into a statement of the ultimate fact to be arrived at, this, if it require a special training or skill, may be done by the opinion of experts. Sappenfield v. Main St. Ry. Co., 91 Cal. 48, 27 Pac. 590; Parkin v. Grayson-Owen Co., 157 Cal. 41, 106 Pac. 210; McLeod v. Miller & Lux (Nev.) 153 Pac. 566; Wigmore, Evidence, § 1918. A necessary modification of this rule is that when these data—these probative facts to establish the ultimate fact—may not thus be presented to the court, the opinions of ordinary witnesses become admissible as being the best evidence available. In illustration, if a controversy had arisen between these parties over their ditches and water rights and both ditches before trial had actually been destroyed, leaving no superior data touching size, capacity, and amounts of water, unquestionably the evidence of these witnesses would be admissible as being the best evidence available to establish the fact in controversy. Or, again, where from the nature of the inquiry it is impossible for any witness adequately to present to the court all of the facts, as in cases of identity of appearance, of manner, of size, of color, of weight, and at times of quantity, the opinions of witnesses based upon the impressions that they have received from their observations become admissible. Wharton, § 513, note; Lawson, Expert and Opinion Ev. p. 3; Rogers on Testimony, 1013. But in the present case it is apparent from what has already been said that incontrovertible evidence was available to both sides to establish the carrying capacity of the Vilas Ditch. It and its flumes were there upon the ground. Its gradient was susceptible of exact measurement. Therefore what that ditch could carry could be shown to a demonstration. What in fact it did carry was established without controversy by the testimony offered by plaintiff, to the effect that when the water was needed the ditch ran full. When such data can be laid before a court it is universally held to be error to admit mere inexpert opinion. Conner v. Stanley, 67 Cal. 315, 7 Pac. 723; Railroad Co. v. Yarborough, 56 Ark. 612, 20 S. W. 515; Indianapolis Tr. & T. Co. v. Kidd, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. (N. S.) 143, 10 Ann. Cas. 942; Commonwealth v. Sturtivant, 117 Mass. 122, 19 Am. Rep. 401; Road v. Leonhardt, 66 Md. 70, 5 Atl. 346; Mann v. State, 23 Fla. 610, 3 So. 207; Hurt v. Railroad Co., 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374; Railroad Co. v. Fox (Tex.) 6 S. W. 569; Baltimore & O. R. R. Co. v. Schultz, 43 Ohio St. 270, 1 N. E. 324; Shaw v. Jones, 133 Ga. 446, 66 S. E. 240; Tenn.

Coal, Iron, etc., Co. v. Kelly, 163 Ala. 348, 50 South. 1008; American Tel. & Tel. Co. v. Green, 164 Ind. 349, 73 N. E. 707; American Soda F. Co. v. Hogue, 17 N. D. 375, 116 N. W. 339, 17 L. R. A. (N. S.) 1113; Keefe v. Armour & Co., 258 Ill. 28, 101 N. E. 252, Ann. Cas. 1914B, 188; In re Coburn, 11 Cal. App. 604, 105 Pac. 924.

[6] Frey v. Lowden, 70 Cal. 550, 11 Pac. 838, upon which respondents rely as supporting the ruling of the court admitting this evidence, involved a controversy over the capacity of a ditch. The declaration of this court was that the evidence of witnesses testifying "upon the subject from knowledge acquired by them in 30 years' experience in mining and in measuring and selling water to miners" was admissible. No criticism can be made of this declaration, taken in connection with what we have already said, because, while the opinion speaks of such evidence as being "nonexpert," it certainly approaches quite closely to the evidence of witnesses possessing a special skill and knowledge. But that opinion takes no account of the next proposition to which we address ourselves, and that is that the opinion evidence in this case, when admitted, is manifestly evidence of inferior character and value to the evidence introduced by plaintiff touching the actual physical facts and conditions. And in such a case there comes into necessary application the declared presumption of our law (Code Civ. Proc. § 1963, subd. 6) that "higher evidence would be adverse from inferior evidence being produced." Respondents, it will be noted, did not seek to controvert the evidence of the capacity of the Vilas Ditch presented by plaintiff, by showing an inaccuracy in its measurements, but contented themselves by offering inferior evidence on the question. And finally upon this subject-matter it may be pointed out that there is no necessary conflict in the evidence. It has been said that the capacity of the Loggerhead Ditch seems to have been steadily increased from the date of its first construction until nine or ten years thereafter, when its owners posted their notice of a new appropriation to the extent of 2,000 inches measured under 4-inch pressure, to be carried by that ditch, and after that until 1905 when the enlargement was completed. Also, it has been pointed out that the capacity of the Vilas Ditch was not increased. The testimony of the witnesses for the defendants ranges through all these years. If we assume (herein, of course, not passing upon the weight of the evidence) that the capacity of the Loggerhead Ditch was thus increased until it was finally capable of carrying 2,000 inches, then in truth it would have nearly four times the capacity of the Vilas Ditch, and to this extent the estimates of respondents' witnesses would be supported, while allowing to the Vilas Ditch the 600 or 625 inches claimed for it. The fundamental difficulty, however, arises from the fact that the court, compelled to fix the first appropriation of the Loggerhead Ditch at 600 inches, adopted the method of cutting down proportionately the rights of the Vilas Ditch and by this method allowed it only 120 inches. The method which the court employed plainly grew out of its conclusion that it would adopt acreage as a basis for its water measurement. But in fact and in law, after awarding to the Loggerhead Ditch the first 600 inches, the water right of the Vilas Ditch was to be determined by reference solely to its own capacity and to the amount of water which, within that capacity, it actually carried (for we repeat that so far as this appeal is concerned the question of beneficial use is not in controversy).

[7] It follows herefrom that the finding allowing the Vilas Ditch but 120 inches is unsupported.

Nor yet can we find any support for the court's adjudication which, after the award of 600 inches to the Loggerhead Ditch and 120 inches to the Vilas Ditch, divides the remainder of the flow in the proportion of five-sixths to the former and one-sixth to the latter. The quantum of water to which the Vilas Ditch is entitled is an absolute quantum after the first priority of 600 inches to the Loggerhead Ditch has been satisfied. It is not subject to increase or decrease beyond that. Nor yet, upon the other hand, is the Loggerhead Ditch entitled to five-sixths of the flow after the quantum of water to which the Vilas Ditch is entitled has been received by it. The Loggerhead Ditch is and can be entitled only to such additional quantum of water over the first 600 inches as it may have legally appropriated either under its second notice of appropriation or by adverse user, and that it is a quantum susceptible of exact ascertainment which therefore should be fixed by the court. After the determination of these amounts, then, as we understand the case, it is not in controversy but that plaintiff by its Cross Country Ditch is entitled to all of the remainder of the water in the stream.

[8] The controversy over the water rights of these parties was substantial. The right which defendants asserted was a priority to 2,000 inches of the water of the stream—practically all of it during certain seasons of the year. While plaintiff's action was in form for injunction, as has been pointed out, the case resolved itself into a trial and determination of these respective water rights. Plaintiff, though not receiving all that it sought, was given a recovery against the claims and contentions of the respondents. It was entitled to its costs. Code Civ. Proc. § 1022; Hoyt v. Hart, 149 Cal. 723, 87 Pac. 569; Stimson Canal & Irr. Co. v. Lemoore Canal & Irr. Co., 160 Pac. 845; Mally v. Weidensteiner, 88 Wash. 398, 153 Pac. 342;

Cuthbert Burrell Co. v. People's Ditch Co. (App.) 160 Pac. 845.

Appellant complains that respondents, under permission to answer an amendment to the complaint, which presented no new matter, improperly availed themselves of this permission to introduce into their answers a new plea of the statute of limitations, and that the court, upon motion, refused to strike out this new plea; and, finally, that after having refused to strike it out the court failed to find upon it. In contemplation of the new trial which must be ordered, these matters cease to be of consequence, and the court will permit such amended pleadings or amendments to the pleadings as may be meet in equity.

The other matters urged upon our attention by appellant do not require detailed consideration, as it is unlikely that they will arise in or at the second trial of this case. Thus, as it has been held that appellant is entitled to its costs in the trial court, and as it is not within the probabilities that there will be another trespass and destruction of appellant's dam, and as the vital controversy is over the apportionment of the water, and, finally, as the judgment is here reversed, it is unnecessary to consider whether or not appellant was entitled to an injunction against the offending defendant Waller, who alone, it appears, tore out a part of appellant's dam. Touching the uncertainty of the judgment, the trial court will, of course, make its judgment as specific within the warrant of the evidence as may be possible.

The judgment and order appealed from are reversed.

We concur: MELVIN, J.; LORIGAN, J.

(174 Cal. 391)

NICHOLSON v. NICHOLSON. (L. A. 3812.)

(Supreme Court of California. Feb. 8, 1917.)

1. Appeal and Error 🔑846(6) — Findings Beyond Issues—Support of Judgment.

Findings, in so far as they go beyond the issues tendered by the complaint, cannot be looked to on an appeal from a judgment as affording support for such judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3357–3362.]

2. Marriage 🔑58(7) — Annulment—Fraud or Force.

Under Civ. Code, § 82, providing that a marriage may be annulled where consent thereto was obtained through fraud or force, a threat that, unless plaintiff consented to marry defendant, he would involve her as an accomplice with a fugitive from justice after conviction of crime, was not enough in itself to require annulment of marriage.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 122.]

3. Marriage 🔑60(8)—Annulment—Force—Sufficiency of Evidence.

In an action under Civ. Code, § 82, to annul a marriage on the ground that plaintiff's consent to marry defendant was obtained by fraud or force, evidence *held* to sustain a finding that the plaintiff's consent had not been obtained by force.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 133–134½.]

4. Trial 🔑388(1)—Default—Findings.

Findings are not required in a default case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 908.]

5. Marriage 🔑60(8) — Annulment—Findings—Want of Cohabitation.

In an action under Civ. Code, § 82, to annul a marriage on the ground that plaintiff's consent had been obtained by fraud or force, the want of cohabitation would be important under subdivisions 4 and 5 only if plaintiff had established that her consent was voidable because of the means by which it had been obtained.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 133–134½.]

6. Trial 🔑367—Conduct — Trial — Argument.

In an action to annul a marriage, where the court permitted the presentation of the authorities upon which plaintiff relied, the extent to which the argument should go was largely in its discretion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 879, 886.]

7. Appeal and Error 🔑1170(6) —"Miscarriage of Justice"—Constitutional Provisions.

In an action to annul a marriage, where the issue was one of fact as to whether plaintiff's consent had been obtained by fraud or force, and defendant was not in court, no substantial prejudice was suffered by the court's refusal to listen to a discussion of the effect of the evidence, nor was there any "miscarriage of justice" occasioned thereby within Const. art. 6, § § 4½.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4066, 4543.]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Sara A. Nicholson against Cecil Nicholson to annul a marriage. Judgment for defendant, and from a denial of an order denying a motion for a new trial, plaintiff appeals. Order affirmed.

L. B. Slosson, John C. Miles, Geo. L. Keefer, and Ben W. Utter, all of Los Angeles, for appellant.

SLOSS, J. In this action, brought to annul a marriage, the defendant defaulted. After hearing the testimony adduced by the plaintiff, the court concluded that a case had not been made out, and entered judgment denying the relief sought. The plaintiff made a motion for a new trial, which was denied, and she now appeals from the order denying such motion.

The complaint alleged as ground for annulment:

"That the consent of the plaintiff to marry the defendant was obtained by force, in this, that while the plaintiff was under the influence of narcotics administered at the solicitation and request of the defendant, the defendant threatened to criminally expose a friend of the plaintiff's and thus induced the plaintiff to consent to said marriage; that immediately thereafter, and while the plaintiff was still in a dazed and obfuscated state of mind, the defendant took the plaintiff into a law office where the marriage ceremony was performed; that the plaintiff's mind was so dazed that she did not realize what was being done or that she was really marrying the defendant."

The trial court made findings of fact to the effect that the consent of the plaintiff to marry defendant was not obtained by force in any way; that plaintiff was not under the influence of narcotics; that she was not in a dazed or obfuscated state of mind when she was married; that her mind was not so dazed that she did not realize what was being done, or that she was really marrying the defendant, but she did know that she was marrying him, and she did marry him. The findings state further that the defendant did threaten to expose a friend of plaintiff's, to wit, one Edwards, who was a fugitive from justice after conviction of crime. The defendant, according to the findings, told the plaintiff that unless she married him he would cause said Edwards to be brought back for further proceedings, "but the plaintiff knew exactly what she was doing when she married the defendant, and the principal thing that caused her to worry was the fact that two days before she was married she was put out of her room at the Victoria Hotel for nonpayment of her bill for two months, and the defendant paid her bill; he then continued to try to persuade her to marry him, and she consented."

[1] Granting that the findings, in so far as they go beyond the issues tendered by the complaint, could not, on an appeal from the judgment, be looked to as affording support for such judgment, they do, nevertheless, serve to illustrate the impression produced by the testimony on the mind of the learned trial judge, and thus to aid in determining whether the plaintiff can maintain her contention that the evidence was such as to require the granting of the relief demanded by her.

[2, 3] Without detailing the evidence, we may say that it fully warranted the court in finding that the plaintiff was not under the influence of narcotics; that she was not, at the time of the marriage, in a "dazed and obfuscated" state of mind; that her mind was not so dazed that she did not realize what she was doing, or that she was marrying the defendant. The court found, in accordance with plaintiff's testimony, that the defendant had made threats to expose Edwards, who was a fugitive from justice. The plaintiff also testified that the defendant threatened, unless she consented to marry him, to involve her as an accomplice of Edwards. But the fact that such threats were made was not enough in itself to require the granting of the relief demanded. It still remained for the trial judge to determine, on the whole case, whether these threats were the inducing cause of plaintiff's consent to the marriage, and, if they were, whether the plaintiff's free exercise of will was thereby overcome to such an extent as to render her consent apparent rather than real. Section 82 of the Civil Code provides that a marriage may be annulled for various causes, including the obtaining of consent to the marriage through fraud or force. Duress and menace, which under the Code provisions dealing with contracts generally are named as causes for avoiding consent (Civil Code, §§ 1567, 1569, 1570), are not eo nomine specified as grounds of annulment. Plaintiff here alleged that her consent had been obtained through force. This averment was certainly not sustained, unless it can be said a threat to make criminal charges constitutes force. But, conceding that menace may be shown as ground for annulling a marriage, it still remains that the consent is deemed to have been obtained through this cause "only when it would not have been given had such cause not existed." Civil Code, § 1568. The evidence as a whole tended to show that plaintiff was so situated that any of various motives and influences may have led her to consent to the marriage. One of these, namely, her financial embarrassment, is suggested in the finding above quoted. We cannot say that the conclusion reached by the court in this regard did not embody a fair and reasonable view of the evidence. This being so, the findings against the plaintiff's necessary allegations cannot be made the subject of successful attack in this court.

[4, 5] It was not error for the court to omit to find on the averment that the parties had not cohabited as husband and wife since the marriage. Passing the point that findings are not required in a default case, the want of cohabitation would be important only if plaintiff had established that her consent was voidable because of the means by which it had been obtained. Civil Code, § 82, subds. 4 and 5.

During the examination of the plaintiff as a witness, the court put certain questions to her. We find no impropriety in these interrogations, nor any invasion of plaintiff's rights.

[6] Finally, it is urged that the court erred in refusing to allow plaintiff's counsel to argue the case. It appears, however, that the court did permit the presentation of the authorities upon which plaintiff relied. Ordinarily, a party to an action has the right to be heard by counsel. But the extent to which argument shall go, especially in civil cases tried without a jury, is largely in the discretion of the court.

[7] In the present case, where the issue was a simple one of fact, and only one of the parties was in court, no substantial prejudice was suffered, nor was a "miscarriage of justice" occasioned, by the refusal of the court to listen to a discussion of the effect of the evidence. Const. art. 6, § 4½. It is perfectly apparent from the record that an indulgence

of counsel's desire to argue the case would have been fruitless.

"Even if the inferior court erred in refusing to let the attorney speak, yet, if the cause has been decided correctly, we will not reverse it merely to give an opportunity to make a speech." Harrison v. Park, 24 Ky. (1 J. J. Marsh.) 170, 174.

The order denying a new trial is affirmed.

We concur: SHAW, J.; LAWLOR, J.

(32 Cal. App. 807)

PASSMORE v. PACIFIC CARBON MFG. CO. et al. (Civ. 1956.)

(District Court of Appeal, First District, California. Jan. 12, 1917.)

APPEAL AND ERROR ⚷781(1)—DISMISSAL—MOOT CASE.

Where both parties conceded at the oral argument that the case had become moot, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3122.]

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by J. D. Passmore against the Pacific Carbon Manufacturing Company and others. From an adverse decision, plaintiff appeals as to defendant Charles L. Kiewert Company. Appeal dismissed.

Elmer E. Nichols, of Berkeley, Byrne & Lamson, of San Francisco, and Ralph H. Wight, of Martinez, for appellant. H. W. Hutton, of San Francisco, for respondent.

PER CURIAM. It being conceded by the appellant and respondent at the oral argument that this is a moot case, all that the plaintiff demanded by his complaint having been accomplished, and the litigation between the parties having been practically settled, it is ordered that the appeal be dismissed.

(32 Cal. App. 418)

GOLDBERG v. GETZ. (Civ. 1796.)

(District Court of Appeal, First District, California. Dec. 28, 1916. Rehearing Denied by Supreme Court Feb. 26, 1917.)

TENANCY IN COMMON ⚷43—SALE OF INTEREST—SECRET PRICE.

A tenant in common, while ordinarily sustaining a quasi confidential relation toward his cotenants, with reference to the common property, so that his action in dealing therewith, to the benefit of the property, will inure to the benefit of all, is not prevented from selling his interest in the property without consulting his cotenant and for any price obtainable, and therefore an agreement by purchaser to pay one cotenant more for his interest than was paid to the other is not void, even if not known to the other cotenant.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 130–132, 136, 137.]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by H. M. Goldberg against Bernard Getz. Judgment for the plaintiff, and defendant appeals. Affirmed.

Leon Samuels, of San Francisco, for appellant. Goodfellow, Eells & Orrick, and Goodfellow, Eells, Moore & Orrick, all of San Francisco, for respondent.

LENNON, P. J. This is an appeal from an order denying the defendant a new trial after judgment in favor of the plaintiff in an action instituted for the recovery of the sum of $1,500, the amount of a check drawn by the defendant on the Crocker National Bank in favor of the plaintiff's assignor, and upon which payment was stopped.

The facts of the case upon which the findings and judgment of the trial court rest are practically undisputed, and in substance are these: Plaintiff's assignor, Jacob Goldberg, was a tenant in common of the Keil Estate Company, a corporation, of certain real property consisting of 20 lots situate in the city and county of San Francisco, each owning an undivided one-half interest therein. On August 1, 1908, and during the absence of Goldberg in Europe, the Keil Estate Company signed a contract with one Lucas, who represented the defendant, Getz, whereby it agreed to sell the lots for the sum of $20,000. The name "Goldberg Estate Company" was also signed to this agreement by E. A. Keil, the president of the Keil Estate Company, but it was an admitted fact in the case that there was no Goldberg Estate Company in existence, and that Keil had no authority to act for or bind Goldberg in the transaction in suit or in any manner. There was, however, in force at this time another instrument executed by Goldberg and the Keil Estate Company, authorizing Baldwin & Howell, real estate brokers, to sell the same property. Upon Goldberg's return from Europe, which was shortly after the Keil Estate Company had executed the contract of sale first above mentioned, Lucas, the agent of the defendant, Getz, endeavored to persuade Goldberg to sell his one-half interest at the same price at which the Keil Estate Company had agreed to sell, viz. $10,000. Goldberg declined, and he so informed the Keil Estate Company. Later, however, and prior to October 8, 1908, Getz and Goldberg agreed to a sale of the latter's interest in the property at an advance of $1,500 upon the price agreed to be taken by the Keil Estate Company for its interest; and thereupon Getz executed and delivered to Goldberg a memorandum, prepared and presented by the former's attorney, reading as follows:

"Upon actual consummation of sale of real property and delivery to me of deed according to terms of an agreement this day made by Keil Estate Co. and Jacob Goldberg, I promise to pay to Jacob Goldberg the sum of $1,500. Dated October 8, 1908.

"[Signed] B. Getz."

Immediately thereafter and as a result thereof there was drafted and inscribed with pen and ink on the reverse side of the contract of sale previously executed on August 1, 1908, an agreement dated October 8, 1908, signed by both the Keil Estate Company and Goldberg, whereby they, as owners of the property, agreed to sell the same to Getz for the sum of $20,250, $250 of which was to be applied in payment of any claim for a commission which Baldwin & Howell might make for alleged services. The Keil Estate Company was not aware of the secret separate agreement to pay Goldberg the additional $1,500 until so informed by Goldberg on the following day after the close of the transaction. Although fully informed of Goldberg's positive refusal to accept $10,000 for his interest in the property, neither the Keil Estate Company nor any one on its behalf made any inquiry of Goldberg at or prior to the consummation of the sale concerning the price which he was to receive for his interest. Pursuant to the contract of sale ultimately made a deed conveying the property to Getz was executed and delivered to him, and thereupon he drew and delivered to the Keil Estate Company, through the medium of a title insurance company through which the transaction was closed, a draft upon the Mercantile Trust Company in the sum of $9,873, and at the same time drew and delivered to Goldberg in the same manner a similar draft in a like amount. Getz and Goldberg then went to the Crocker National Bank, where the check in suit, dated October 13, 1908, and the agreement of October 8, 1908 (wherein Getz promised to pay the sum of $1,500 to Goldberg), were delivered to an officer of the bank, with instructions that the check was to be surrendered to Goldberg when the deed to the property was recorded. Immediately following the recordation of the deed Getz stopped payment of the check.

It will be noted that no claim was made in the lower court, and none is made here, that the execution of the contract in question by the Keil Estate Company was induced by any misrepresentations of Goldberg made to all or any one of the parties to the transaction. With these facts as a basis it was the contention of the defendant in the trial court that the secret separate contract was conceived and consummated in fraud, and that, the consideration for the contract being therefore void, the check in suit, which rests upon the contract, was without a valid consideration to support it, and consequently that public policy will intervene and forbid the aid of the courts to enforce its payment.

In support of this defense it is argued here that tenants in common by operation of law occupy a confidential relationship with reference to the common property, and that Goldberg, as the tenant in common of the Keil Estate Company, violated the obligations of that relationship by failing to reveal the existence of his contract with Getz, and thereby perpetrated a fraudulent concealment upon his cotenant which resulted in detriment and disadvantage to the latter.

The defense thus interposed to the action cannot be sustained upon the theory that Goldberg, as the cotenant of the Keil Estate Company, was obliged to disclose the price which he, without the knowledge or assistance of his cotenant, received for his interest in the common property. Ordinarily cotenants, by virtue of their unity of interest, sustain towards each other a quasi confidential relation with reference to the common property, and therefore the act of one cotenant when dealing with the common property, if beneficial, will inure to the benefit of the other, and neither will be permitted to deal with the property to the detriment of the other. This relation of mutual trust and confidence, however, does not extend to and will not in and of itself operate to impair the right of one cotenant to dispose of his interest without consulting his cotenant at any time and for the best price obtainable, that is to say, in the absence of contractual relations, express or implied, existing in conjunction with the relation of cotenancy, there is nothing in the obligation of mutual trust and confidence which accompanies the latter relation which prevents one cotenant, acting independently in his own behalf, from demanding and receiving for a sale of his interest a greater sum than that paid to the other. Garr v. Boswell (Ky.) 38 S. W. 513; Harris v. Lloyd, 11 Mont. 390, 28 Pac. 736, 28 Am. St. Rep. 475; O'Neal v. Cooper, 191 Ala. 182, 67 South. 689; note to Goldthwaite v. Janney, 48 Am. St. Rep. 62; Bradley v. Harkness, 26 Cal. 69.

Of course, if either party acting for himself and his cotenant had entered into negotiations with Getz for the sale of the common property, his act in fixing a price for the entire property would be for the benefit of both, and therefore, aside from any obligation arising out of the relationship of cotenancy, good conscience, and fair dealing, would preclude either from secretly securing for his interest a greater price than that paid for the interest of his cotenant. No such situation, however, as we have seen, is presented here; and therefore no duty devolved upon Goldberg to reveal to the Keil Estate Company the price he was receiving. In the absence of such a duty his conduct did not amount to a fraudulent concealment.

It follows from what has been said that the evidence supports the finding of the trial court that the check in suit was given for a valid and lawful consideration.

The order denying the defendant a new trial is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

32 Cal. App. 476

Ex parte CHAMBERS. (Cr. 384.)

(District Court of Appeal, Third District, California. Jan. 3, 1917.)

1. Criminal Law 🔑228—Preliminary Examination—Time.

While the statute does not prescribe the time within which the preliminary examination must be begun after information is filed before the committing magistrate, its letter and spirit is opposed to a delay of nearly five months.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 477.]

2. Habeas Corpus 🔑30(2)—Grounds of Relief—Defective Indictment.

An application for a writ of habeas corpus involves the question of jurisdiction, and one held in custody under a bench warrant issued on an indictment which is sufficient to give the court jurisdiction to try the offense is not entitled to the writ, though the indictment is verbally defective so as to be subject to demurrer.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25.]

3. Indictment and Information 🔑159(3)—Amendment of Indictment—Statute.

Under Pen. Code, § 1008, providing that an indictment may be amended by the district attorney where it can be done without prejudice to the substantial rights of the defendant, but cannot be amended so as to change the offense charged, a district attorney can amend an indictment charging perjury which alleged that defendant falsely testified that a note was made January 15th or 22d, by adding allegations that it was material to know when the note was made, and that in fact it was made February 5th.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 513.]

Application by Margaret Chambers for a writ of habeas corpus. Application denied, and petitioner remanded.

Ben Berry and D. P. Eicke, both of Stockton, for petitioner. E. P. Foltz, Dist. Atty., and C. P. Rendon, Deputy Dist. Atty., both of Stockton, for respondent.

BURNETT, J. In the return to this application for a writ of habeas corpus appear three warrants of arrest in proper form which it is claimed by the sheriff of San Joaquin county justify his detention of petitioner. The first two were issued by a justice of the peace, based upon verified complaints charging two separate offenses of perjury, and the third is a bench warrant upon an indictment, also for perjury, found by the grand jury of said county.

As to the warrants issued by the said justice, the contention of petitioner is as follows:

"No preliminary examination has been held upon either charge, neither does it appear that the officers whose duty it is to conduct such preliminary examination intend to hold a preliminary examination upon either charge, as 4 months and 20 days have elapsed since petitioner was deprived of her liberty upon said charges, during which time she has repeatedly requested that preliminary examination be held, all of which requests have been ignored. While such process was at first lawful, she has certainly become entitled to a discharge by reason of the failure of the officers to follow the plain mandate of the law in the premises. Pen. Code, § 1487, subd. 2; Const. art. 1, § 13; Pen. Code, §§ 859, 860, and 861."

As to the other process we have this contention:

On October 24, 1916, petitioner was indicted for perjury. Upon arraignment, November 20, 1916, a demurrer was interposed, one point being that, while the indictment charged the making of certain false statements, there was no sufficient averment of what the real facts were. The demurrer was sustained, and the court made an order granting the district attorney leave to amend by November 21, 1916, at 10 o'clock a. m. "This was not an order or the equivalent of an order that the case be resubmitted to another grand jury. Ex parte Williams, 116 Cal. 512, 48 Pac. 499; Ex parte Hayter, 16 Cal. App. 211, 116 Pac. 370. But whether it may be considered the equivalent of an order or not, it was not submitted to another grand jury, and the demurrer having been sustained, the prosecution was at an end (Pen. Code, § 1000; Ex parte Williams and Ex parte Hayter, supra), unless the amendment authorized by the court was one provided by statute. In pursuance of the order, the district attorney filed what purported to be an amended indictment on November 21, 1916, which indictment was not found or presented by a grand jury, but prepared, presented, and filed by the district attorney, and which indictment differed very materially in substance from the indictment to which a demurrer had been sustained."

The said difference, it is claimed, arises from the allegation in the amended indictment that a certain note was written and delivered on February 5, 1916, and that it was material to know the date of its execution and delivery.

[1] We deem it unnecessary to decide whether said warrants issued by the justice of the peace became inoperative and void by reason of the failure and refusal to bring on the preliminary examination. We may remark, however, as to this, that while the statute does not prescribe the number of days after the information is laid before the committing magistrate within which the preliminary examination must be begun, yet both in letter and spirit it is opposed to such unreasonable delay as occurred herein. It has often been said, and it will probably be advisable many times to repeat it, that a person charged with crime has certain rights guaranteed by the Constitution and statutes that even a district attorney is bound to respect. No one should be detained in prison indefinitely or capriciously in order that a case may be developed in the future or circumstances arise that will justify a trial and probably afford sufficient ground for conviction. The interests of society do not demand and the rights of the individual forbid such invasion of personal liberty.

[2] But, passing the foregoing consideration, we may say that we find no ground for affirming the invalidity of the said bench warrant. The scope of the writ of habeas corpus is familiar, and we need not describe it further than to state that the application for the writ involves, of course, in one form or another, the question of jurisdiction.

Herein we think it must be held that there is no lack of legal authority as to any of the proceedings or process by virtue of which petitioner's detention is sought to be justified. The warrant itself is regular and within the provisions of the statute. Indeed, its sufficiency is not assailed or questioned. It is not denied that the indictment constituting the basis for said warrant was found as the law requires. Said indictment undoubtedly stated a public offense of which the superior court had jurisdiction. Without any doubt, the crime of perjury is therein set forth. We deem is unnecessary to set forth its averments; as it is not seriously claimed that any essential element of said crime was omitted. The objections raised to said indictment relate rather to the phraseology than to any substantial defect, and they do not present any question of jurisdiction.

[3] So far there is nothing to indicate any illegality in petitioner's incarceration. A demurrer was interposed to said indictment, both general and special. It was sustained, the court holding that there was not a sufficient averment of "what the true facts are." It also appears that the court made a further order granting the district attorney leave to file an amended indictment by November 21, 1916, at 10 o'clock a. m. This proceeding was and is warranted also by the statute. Section 1008 of the Penal Code provides that:

> "An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. Such amendment may be made at any time thereafter, in the discretion of the court where it can be done without prejudice to the substantial rights of the defendant. An indictment can not be amended so as to change the offense charged," etc.

The district attorney did file an amended indictment almost identically the same as the original, but adding, as we have seen, the averment that it was material to know whether the note set out in the indictment was written on January 15th or January 22d, and the further averment that it was written February 5th. But the offense was not changed. The amendment constituted, at most, an additional specification of the perjured testimony, and could not have prejudiced the substantial rights of the accused. In fact, the amendments simply made the indictment more certain in the respect indicated. In the original it does at least inferentially appear that it was material to know whether said note was written on January 15th or 22d, and there can be no objection to the addition that it was written on February 5th, since it appears by proper averment that she falsely testified that it was written on January 15th or 22d, and the effect of the amendment is simply to fix the actual date more definitely. The case falls, indeed, within the rule announced in People v. Anthony, 20 Cal. App. 586, 129 Pac. 968, to the effect that under said section 1008 the district attorney has no power to amend an indictment or information in matters of substance, but only as to matters of form. In that case, it may be observed, it was held that "an amendment to an indictment * * * by merely changing the date in a specified month as to the commission of the offense could not be prejudicial to the defendant," and was permitted by said statute.

There is certainly as much reason for holding that the district attorney here did not exceed the limitations imposed by said section of the law. It may be said also that several cases from other jurisdictions approving much more serious amendments are cited by respondent, but it is not deemed advisable to refer to them specifically. But if we concede that the district attorney has added more than the law allows, it does not follow that petitioner is entitled to her discharge. It would be simply a case of error, and not of an entire want of jurisdiction, to be corrected in the court below or reviewed on appeal.

We may repeat: The jurisdiction for the arrest and detention of petitioner, having existed by virtue of a valid indictment, was not lost or affected by reason of an amended indictment charging the same offense, though in somewhat amplified form. The warrant was therefore continued in force as a legal process and justifies the sheriff in holding said petitioner. Ex parte Williams, supra, and Ex parte Hayter, supra, the two cases principally relied upon by the applicant, arose when said section 1008 made no such provision for an amendment to the indictment or information. This was added by the statute of 1911 and approved March 22d of that year. Prior to said amendment, the section read:

> "If the demurrer is allowed, the judgment is final upon the indictment or information demurred to, and is a bar to another prosecution * * * unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment or information, directs the case to be submitted to the same or another grand jury, or directs a new information to be filed."

In each of said cases a demurrer was sustained, and no such order was made by the trial court, and it was therefore held by the higher tribunal that under the express provisions of the statute the prosecution was at an end, and therefore the defendant was entitled to be discharged.

In the Williams Case the demurrer was sustained in 1897 and in the Hayter Case on January 28, 1911. It is apparent, therefore, that these cases are not controlling here.

There seems to be no warrant for holding that the writ should issue, and the application is denied, and the petitioner remanded.

We concur: CHIPMAN, P. J.; HART, J.

(32 Cal. App. 481)

HARTFORD ACCIDENT & INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 2080.)

(District Court of Appeal, First District, California. Jan. 4, 1917.)

MASTER AND SERVANT 🔑405(4)—INJURIES TO SERVANT—RIGHT OF REVIEW.

Evidence *held* to warrant a finding by the Industrial Accident Commission that a servant engaged in sacking pulverized grain contracted actinomycosis, an affection of the nose and mouth, by reason of his employment, and so a writ of review was properly denied.

Petition by the Hartford Accident & Indemnity Company for a writ of review against the Industrial Accident Commission, and others, to review an award of compensation to H. A. Burris, an employé. Application denied.

E. A. Ingalls and H. L. Clayberg, both of San Francisco, for petitioner. Chris. M. Bradley, of San Francisco, for respondents.

PER CURIAM. The petitioner herein presents the entire record of the proceedings before the Industrial Accident Commission, from which it appears that one H. A. Burris was, during the months of October, November, and December, 1915, in the employ of the Perkins Grain & Milling Company, of which this petitioner is the insurer, and that while so employed in the work of grinding and sacking wheat and barley for feed, and while actively engaged in filling sacks of such pulverized grain from the spout of the grinding mill, said Burris became afflicted with an affection of the nose and mouth, which was diagnosed as actinomycosis, from which he suffered partial disability, and for compensation, on account of which he filed his claim before the Industrial Accident Commission. Upon the hearing thereon the chief issue presented was as to whether the applicant for compensation had suffered any injury arising out of and in the course of his employment.

The evidence taken upon this issue was that of expert witnesses as to the nature and causes of actinomycosis, and as to whether it was or could be conveyed by grain to the human organism. Upon this subject the testimony of the physicians was in conflict, as were also the medical treatises upon which they respectively relied for their opinions. The Commission resolved this conflict in opinion and authority in favor of the applicant for compensation by its finding that "the applicant's employment in and about the handling of grain caused him to contract the disease known as actinomycosis." The evidence in support of this finding consists, not only in the opinion evidence of the physicians who treated the applicant and diagnosed his case, but also in the testimony of the applicant himself that he had not theretofore suffered from any such disorder, but that it had become acutely developed whilst he was engaged in the work of sacking and handling pulverized grain for his employer. We think this evidence was sufficient to warrant the Commission in arriving at its aforesaid conclusion, and, this being so, we have no power to interfere with its discretion in making said award.

The application for the writ is denied.

(32 Cal. App. 423)

LEUTHEUSER v. SILENT. (Civ. 1797.)

(District Court of Appeal, Second District, California. Dec. 28, 1916.)

1. CONTRACTS 🔑335(2)—ACTION FOR BREACH—COMPLAINT—VALUE OF WORK DONE.

A complaint on an express contract to dig a well at a certain price per foot, and to case, perforate, and sand-pump it, so as to leave it in condition for the installation of a pump, which alleged that the well was dug, but that defendant refused to permit the other work to be done, and did not allege the reasonable value of the work done, is insufficient, since the price fixed in the contract included work not done, so that it could not be the measure of recovery.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1664–1676.]

2. APPEAL AND ERROR 🔑878(2)—QUESTIONS PLEADED—NECESSITY OF CROSS-APPEAL.

On appeal by defendant from a judgment for plaintiff on a count alleging an express contract, the granting of a nonsuit by the trial court on two counts for reasonable value of work done cannot be reviewed, in the absence of an appeal therefrom by plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3573.]

3. APPEAL AND ERROR 🔑1002—REVIEW — VERDICT—CONFLICTING EVIDENCE.

The determination of the jury, regarding matters as to which there was a conflict of evidence, cannot be reviewed by the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937.]

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by J. Leutheuser against Charles Silent, in which Elizabeth Leutheuser, as administratrix, was substituted as plaintiff. Judgment for the plaintiff, and defendant appeals. Reversed, with directions.

Frank J. Thomas, Edwin A. Meserve, and Irving M. Walker, all of Los Angeles, for appellant. Harry William Elliott, of Corina, for respondent.

JAMES, J. Plaintiff in this action sued to recover for services alleged to have been performed for the defendant in drilling a water well. The jury in the case found a verdict in his favor, upon which judgment was entered. Motion for a new trial being denied, this appeal was taken from the judgment and also from the order denying that motion. The appeal is presented on the judgment roll and a bill of exceptions.

[1] In plaintiff's complaint three alleged causes of action were set up; the first upon an express contract, the second and third

for the reasonable value of work performed. At the conclusion of plaintiff's testimony, a nonsuit was granted as to the second and third causes of action. In the first cause of action it was alleged that the agreement between plaintiff and defendant was that the defendant should pay the plaintiff $2.50 per foot for drilling the well for the first 300 feet and 50 cents additional per foot "in every 100 feet thereafter dug"; that the exact depth of the well was not first decided upon, but that plaintiff was authorized to drill the first 300 feet, and that the matter as to whether a greater depth in the ground should be penetrated was left to the decision of the defendant, who was to notify the plaintiff as to how deep he wanted the well dug. It was further alleged that the plaintiff drilled the well to a depth of 360 feet; that there was no water in the hole at that depth; that the plaintiff notified the defendant that the conditions were unfavorable for securing water, and asked for instructions as to whether he should drill deeper, and defendant notified the plaintiff to cease drilling. After the nonsuit was granted as to the second and third causes of action, plaintiff was allowed to amend his complaint by alleging that defendant neglected and refused to give any decision as to what depth the well should be dug, and never gave any such decision, but instructed the plaintiff to go from the property, and so prevented plaintiff from digging any deeper, and from perforating and sand-pumping the well, as the contract required, and that for such reason said perforation was not made and the casing was not put down deeper in the hole. There was no allegation incorporated, either in the statement of the first alleged cause of action or in the amendment made thereto, as to what the reasonable value of the work performed was. The written offer first made by the plaintiff to the defendant, the acceptance of which by the defendant created the contractual relation between the two, provided that, in addition to drilling the well, the plaintiff was to put down casing furnished by the defendant, and was to perforate and sand-pump the well and leave it in first-class condition for a pump to be installed. The condition of the complaint as it was left after the trial judge had granted the motion for nonsuit on the second and third causes of action was that the express contract and its terms were stated, and the depth to which the well was dug was stated. It was alleged that the work was not completed as called for by the contract because of the action of the defendant, and that there was left undone the placing of the casing to the bottom of the hole and the perforation thereof. It is quite clear from this statement of the allegations of that cause of action that the price as fixed by the contract would not be a measure of the value of the work performed, calculating at the price per foot agreed upon, from the top of the well to the bottom. Necessarily it would be presumed that the work of perforating and sand-pumping the well and putting the casing down to the bottom would cost the plaintiff something in time, material, and effort, which would have to be taken into account in determining what his services were worth. This situation showed clearly the necessity for pleading the value of the work, as far as it had progressed when stopped by the defendant, and we think the complaint did not state a good cause of action without such allegation. While counsel for respondent insists that the contract price was evidence of the value, it cannot be conceded that it would constitute evidence of the value where the work had not been fully performed. As is said in Cox v. McLaughlin, as that case is reported in 52 Cal. 590:

> "Where a variance has occurred in the performance of a specific contract, under such circumstances as still enable a plaintiff to maintain an action on the implied promise to pay the reasonable value of the work actually done, and the contract, so far as it has been performed in accordance with the specifications therein contained, the contract may ordinarily be introduced as evidence of value."

The controversy involved in the case cited was before the court on several appeals, to wit: In 54 Cal. 605; 63 Cal. 198; 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164. In that case work having been abandoned under a grading contract before final completion and because of alleged acts of prevention on the part of the cocontractor, the plaintiff set up the particular contract and sought recovery thereunder. The court indicated that damages might be recovered, but not under the specific terms of the contract; rather for the value of the work performed, together with profits which might have been made upon the uncompleted portion thereof. Before the last appeal the trial judge had allowed an amendment, setting up a cause of action on quantum meruit. The Supreme Court held that there was no abuse of discretion in allowing this amendment. In one of the earlier appeals (54 Cal. 605) it was declared in the opinion "that the present is not an action on the implied promise is apparent, not only from the omission of any averment of the actual value of the work done, but from the whole frame of the complaint."

[2] As to whether the trial judge here was right in granting a nonsuit as to the second and third causes of action is not involved, because no appeal was taken on the part of the plaintiff to review that ruling.

[3] As to the merits of the case on the facts, there was a conflict of evidence which places the determination of the jury regarding those matters beyond the reach of any review by this court. It appears that the well as put down was not perpendicular, neither was it straight. However, the plain-

tiff produced some testimony showing that a pump could be operated successfully, and that it was reasonably practicable to install a pump, in such a well; also, that there was no understanding or agreement that the well should be straight. These matters were directly contradicted by evidence which defendant introduced.

From what has been stated it will be apparent that the judgment and order must be reversed.

The judgment and order are reversed, with direction to the trial judge to allow the plaintiff, if he be so advised, to amend his complaint to correct the imperfection first herein pointed out.

We concur: CONREY, P. J.; SHAW, J.

32 Cal. App. 431

LAZARUS v. BYRNES, Sheriff, et al.

(Civ. 1567.)

(District Court of Appeal, Third District, California. Dec. 29, 1916.)

1. Justices of the Peace 🔑130 — Judgment—Intendments Favoring.

There are no intendments in favor of a judgment of a justice of the peace, and a party relying on such judgment must establish the legality of every step necessary to a valid judgment.

2. Sheriffs and Constables 🔑98(1)—Process as Protection—Colorable Title.

Where, at the time of the alleged sale of property by brother to sister, the ceremony consisted in the brother's taking the property, horses, and vehicles, used in his livery barn, to the street, and stating to the sister's agent, there present, that he had sold the property to her, thereupon taking the property back to the barn, and thenceforward using it in his livery and draying business as he had for years before, to all appearances as the owner, the sister not seeing the property and not having personal possession of it, the sale was merely colorable, and his writ was sufficient justification for a sheriff who took the property on execution as the property of the brother.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 143–145.]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Mary F. Lazarus against Ralph R. Byrnes, Sheriff of Mendocino County, and others, sureties on his official bond. From a judgment for defendants, plaintiff appeals. Judgment affirmed.

Charles Kasch, of Ukiah, for appellant. Mannon & Mannon, of Ukiah, for respondents.

CHIPMAN, P. J. This is an action to recover damages for the alleged conversion of certain personal property of which plaintiff alleges that on September 11, 1913, and for a long time prior thereto she was the owner; that on said mentioned day defendant Byrnes, as sheriff of said county, "wrongfully took and carried away and converted and disposed of said personal property, under the purported authority of a writ of execution"; "that the aforesaid purported writ of execution was not directed against this plaintiff or any property, real or personal, of this plaintiff"; that this plaintiff "is a stranger and not a party to the suit wherein said purported writ of execution was issued"; that said Byrnes, as said sheriff, was without authority to seize, take, or sell said personal property; that by reason of said act plaintiff has been damaged, etc. By proper averments the said sheriff's bondsmen are made parties defendant.

A general and special demurrer was overruled, and defendants answered: Alleged that on November 4, 1910, a judgment was duly given and made in the justice's court of Big River township, county of Mendocino, whereby it was adjudged that certain named persons, plaintiffs in the action, have and recover judgment against M. D. Nolan for the sum of $238 and costs; that on September 11, 1913, an execution was duly issued out of said justice's court, directed to the sheriff of said county, whereby said sheriff was commanded to make the amount of said judgment out of the property of said Nolan; that defendant Byrnes, acting under the written instructions from plaintiff's attorneys in said action and upon the authority of said writ, did take into his possession the personal property mentioned in said complaint and did sell the same; that all of said property then was and for a long time prior thereto had been the property of said Nolan; that said defendant sheriff, as aforesaid, sold said property at public auction, and after deducting the expenses of said sale applied the proceeds thereof in satisfaction of said judgment; that "plaintiff did not previous to said sale nor for more than five months thereafter claim the property * * * or any part thereof as her property by a written claim verified by her oath * * * setting out her right to the possession thereof and serve the same upon the said sheriff."

For further defense: Denied that plaintiff was on September 11, 1913, or at any other time, the owner of said property, and denied that said property was of the value alleged or of any value other than as specifically set forth in the answer; denied that defendant, said sheriff, "did not well, truly, and faithfully perform the duties of his said office" in said matter; denied that defendant, said sheriff, on said September 11, 1913, or any other time, wrongfully or at all deprived plaintiff of the use or possession of said property and denied that plaintiff had been damaged by reason of any acts of said sheriff or at all.

A demurrer to the answer was overruled, and a motion to strike out certain averments of the answer was denied. The cause was tried by the court without a jury, and defendants had the judgment from which plaintiff appeals.

The court found as facts: "That the plaintiff was not on the 11th day of September, 1913, * * * or at any other time the owner or in the possession or entitled to the possession of the personal property described and set forth in paragraph 3 of the first amended complaint or any thereof," nor was plaintiff the owner or entitled to the possession of any of said property at the time of the commencement of the action or at any other time; the value of each article is specifically found, and the court also found the facts pleaded in justification by the sheriff to be as alleged in the answer.

Plaintiff and Nolan are sister and brother. The latter for 14 or 15 years prior and up to September 11, 1913, was engaged in the livery and draying business in Mendocino city and had possession of and was using the property in question in said business. The claim of plaintiff is that Nolan sold the property to her in 1909 or 1910, and that thereafter he had possession of the property as her manager. Nolan testified that plaintiff had loaned him money, from time to time, and the transfer of the property to plaintiff was to discharge this indebtedness. That transaction was fully gone into and the court found upon sufficient evidence that plaintiff had not at the time of the trial or any time prior thereto any right, title, or interest in the property as owner or otherwise, or right of possession thereto. In her opening brief plaintiff does not attack this finding, but assails the judgment of the justice's court as invalid on the grounds: (1) That the trial in that court was not set for any certain hour; (2) that there was no legal notice of setting the case for trial; (3) that the court did not wait one hour after the case was first called before proceeding to hear the evidence and render judgment. It is further contended that there are no intendments in favor of a judgment of a justice of the peace, and a party relying on such a judgment must establish the legality of every step necessary to a valid judgment.

[1] Defendants introduced copies of the pleadings in the justice's court, summons and evidence of service thereof, the docket entries of the justice of the peace, the default judgment, execution, return of the sheriff showing satisfaction of the judgment. In short, copies of all the proceedings in the justice's court and in the sheriff's office relating to said action. Plaintiff points out some irregularities in the proceedings in the justice's court which it is claimed show an invalid judgment. The rule as to judgments of a justice's court is as stated by plaintiff. Eltzroth v. Ryan, 89 Cal. 135, 140, 26 Pac. 647; Harlan v. Gladding, etc., 7 Cal. App. 49, 53, 93 Pac. 400.

In Thornburgh v. Hand, 7 Cal. 554, 567, it was said:

"The rule is, that if a sale is made which was intended to be good between the parties, it cannot be attacked until the officer shows that he is entitled to represent a creditor; but if the sale is merely colorable, and it appears from the testimony that it never was the intention of the parties to pass the title, that the plaintiff is but the agent or bailee of the defendant in attachment, then the writ would be a sufficient justification for the officer, as it is evident that an agent, by reason of a colorable or fraudulent sale, would be in no better condition than his principal.

"The rule is thus laid down by Starkie, in his work on Evidence: 'If the assignment and delivery of possession were merely colorable, and the property still remained in the debtor, against whose goods the execution issued, the sheriff, it seems, would be entitled to a verdict without proof of the judgment, the plaintiff having no property in the goods.'"

[2] The evidence in this case is that at the time of the alleged sale the ceremony constituting the transfer consisted in Nolan's taking the horses and vehicles out of his barn to the street, and stating to plaintiff's agent there present that he had sold the property to plaintiff, and thereupon taking the property back to the barn and thenceforward using it as he had for years before to all appearances as the owner.

Plaintiff resided in Sausalito, and did not see the property, and never did have personal possession of it. There were other facts tending to show that the alleged sale was a mere pretense, and not a bona fide transfer of the property.

The rule stated in Thornburgh v. Hand, supra, seems to be directly applicable here. It is therefore unnecessary to consider the alleged irregularities in the proceedings in the justice's court. The writ of execution was sufficient justification for the sheriff.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

32 Cal. App. 435

KINKADE v. CHAMPION HORSESHOE CO. (Civ. 1806.)

(District Court of Appeal, First District, California. Dec. 30, 1916.)

1. PRINCIPAL AND AGENT 🔑89(5)—ACTIONS FOR COMPENSATION — PLEADING — SUFFICIENCY.

Complaint of assignee of servant alleging that the assignor engaged in the sale of goods for defendant and fully and fairly performed all the conditions of the agreement on his part to be performed sufficiently alleged the performance of services under the contract.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 233, 234.]

2. PLEADING 🔑193(5), 317(5)—DEMURRER—BILL OF PARTICULARS.

In action under contract of employment for compensation if the complaint was insufficient in failing to show the dates and occasions on which plaintiff advanced money to his employer, such defect was a matter to be cured by bill of particulars, and was not subject for demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 433, 441, 442.]

3. PRINCIPAL AND AGENT ⟹89(8)—ACTIONS FOR COMPENSATION — EVIDENCE — SUFFICIENCY.

Evidence *held* insufficient to show modification of original contract of employment so as to provide for compensation only if the employer did business profitably.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 216, 237.]

4. PRINCIPAL AND AGENT ⟹81(4)—ACTION FOR COMPENSATION—ITEMS.

Where in action on contract of employment the servant's assignee introduced a letter from the employer to the servant saying that the employer would pay the cost of shipment of the servant's furniture and of his wife's fare, the amount of such items was allowable.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 196–198.]

5. ATTACHMENT ⟹384—FEES—TAXATION.

In suit wherein attachment is properly levied, the sheriff's costs is serving the writs and the notary fees in the matter of the affidavit and bond for the attachment are properly taxable as costs against the defendant.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1386, 1401.]

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by James Kinkade against the Champion Horeshoe Company. From judgment for plaintiff and order denying motion to tax costs, defendant appeals. Affirmed.

Charles W. Slack and Chauncey S. Goodrich, both of San Francisco, for appellant. R. F. Mogan and George J. Dougherty, both of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment in plaintiff's favor, and also from an order of the court denying the defendant's motion to tax costs by disallowing certain items charged by the plaintiff in his cost bill.

The complainant is in two counts, the first depending upon a written instrument alleged to have been made between the defendant and the plaintiff's assignor, by the terms of which the latter was employed to engage in the sale of certain manufactured goods of the defendant at a salary of $200 per month from July 1, 1912, to January 1, 1913, and of $225 per month from January 1, 1913, to August 30, 1914. The plaintiff did not set forth the agreement in full, but only undertook to plead its substance. The second count of the complaint set forth a cause of action for money alleged to have been expended for the use and benefit of said defendant. A general and special demurrer was presented to the complaint, which was overruled by the trial court, and which ruling the appellant here assails as error.

[1] Upon the several grounds of demurrer urged against the first count in the complaint the appellant insists that the complaint is uncertain in failing to aver whether the plaintiff's assignor performed any services or made any sales under said agreement. The complaint, however, does allege that the said assignor of plaintiff "did engage in the sale of such goods for said company, and has fully and fairly performed all the conditions of said agreement on his part to be performed." We think these allegations sufficiently informed the defendant as to the nature and scope of the plaintiff's demands, especially in view of the fact that it is nowhere contended that the defendant did not at all times have in its possession a copy of the written agreement between the parties, and hence could not have been misled to its injury by the pleader's attempt to briefly set forth the substance thereof.

[2] The appellant's contention that the second count of the complaint was defective in the respect that it did not set forth specifically the dates of any expenditures made by the assignor of plaintiff for the defendant's use and benefit is also without merit, for the reason that this objection to the complaint was the proper subject of a demand for a bill of particulars if the defendant wished for more specific information as to the dates and items of the account.

[3] Upon the trial of the cause the defendant rested its case upon the evidence offered on behalf of the plaintiff, and it is now contended that the proofs were insufficient to justify a judgment in plaintiff's favor. The evidence offered in support of the plaintiff's claim consisted of the written agreement between the defendant and John C. Hogan, the assignor of plaintiff, the substance of which had been pleaded in the complaint, a number of letters passing between the parties during the period of the performance of the terms of said agreement to be performed by said Hogan, and the testimony of said Hogan in respect to the payments made thereon and to the understanding between the parties as to deferred payments on account of his monthly salary. From this evidence it appeared that Mr. Hogan from an early date in the period of his employment did not receive the entire amount of his salary monthly, but would be sent by the defendant a sum from $25 to $75 less than the amount due him each month in cash, accompanied by what was called a "credit memorandum" for the balance, the defendant, in its several letters to him inclosing such payments, stating, "This is the best we can do until we get swinging," or "until the trade can be conducted on a profitable basis." Mr. Hogan testified that he accepted these payments of less amounts than his salary with the accompanying credit memorandum because he thought that was the best he could do at the

time, and that he wanted to help the company along, and that he hoped and was led to believe that in the near future he would be paid in full. The appellant contends that the evidence offered in this connection shows that the original written agreement between the parties was so changed thereby that the assignor of plaintiff was not to have these deficiencies in his monthly salary made up to him unless the business of the company proved profitable. The trial court, however, did not adopt this view, but, on the contrary, found that the averments of the defendant's answer setting forth such a modification of the original agreement between the parties were untrue. We think the evidence fully sustains this finding, and hence that there is no merit in the foregoing contention.

The appellant also insists that the written agreement between the parties was modified in other respects affecting materially the plaintiff's right to recover; as, for instance, in respect to the territory wherein the assignor of plaintiff was to operate and wherein he did in fact engage in making sales of its wares. That such change of base was made there is no question; but it is equally certain that it was made by the consent of both parties, and that such change in no way affected or was intended to affect the amount of monthly salary to be paid to plaintiff's assignor.

[4] The appellant further objects to two items of the account of Mr. Hogan to which he testified in support of the averments of the second count in the complaint. These items have reference to the packing and shipment of certain furniture of Hogan from Omaha to California, and to the expense of travel of his wife between the two places. In support of these charges the plaintiff produced a letter from the defendant to Hogan referring thereto, wherein the defendant wrote: "We will pay the costs of its return and Mrs. Hogan's fare back." We think this promise was fairly susceptible of a construction which would include both of the items of expense to which the defendant objected, and the court's finding in that behalf will not therefore be disturbed.

[5] The final objection of the appellant goes to the alleged error of the court in refusing to tax the plaintiff's cost bill by striking from it certain items of costs embracing the sheriff's fees for serving writs of attachment in the case, and also the notary fees in the matter of the affidavit and bond for such attachment. There is no merit in this contention. This being a proper case for attachment, the fees to which objection is made constituted necessary and proper disbursements in the action, and were therefore proper items of cost to be awarded the plaintiff therein.

Judgment and order affirmed.

(32 Cal. App. 439)

PAFF et al. v. OTTINGER et al. (Civ. 1809.)

(District Court of Appeal, First District, California. Dec. 30, 1916. Rehearing Denied by Supreme Court Feb. 26, 1917.)

1. PRINCIPAL AND AGENT 🔑123(8)—AUTHORITY OF AGENT—SUFFICIENCY OF EVIDENCE.

In an action for an architect's fees, evidence aside from the declarations of the alleged agent *held* sufficient to show that the person who contracted for plaintiffs' services on behalf of defendants was defendants' agent having authority to make such a contract.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 427.]

2. PRINCIPAL AND AGENT 🔑22(2)—ACTIONS AGAINST PRINCIPAL — DECLARATIONS OF AGENT—ADMISSIBILITY.

Where, in an action against a principal, the agency has been established by sufficient evidence outside of the agent's declarations, his declarations made within the scope of his authority are then admissible.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40.]

3. PLEADING 🔑236(3)—AMENDMENT—REFUSAL OF LEAVE—DILATORY PLEA.

It is not an abuse of the trial court's discretion to refuse leave to defendants to amend their answer three years after it had been filed and during the trial, so as to allege the incapacity of plaintiffs to sue because of their failure to comply with Civ. Code, §§ 2466, 2467, relating to the filing of certificates of partnerships under fictitious names, since such an answer is a dilatory plea which is waived by failure to plead it in the first instance.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601.]

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Charles Paff and another against Adolph Ottinger and another. Judgment for the plaintiffs, and defendants appeal. Affirmed.

Leon Samuels, of San Francisco, for appellants. George C. Sargent, of San Francisco, for respondents.

PER CURIAM. This is an appeal from the judgment in the plaintiffs' favor and from an order denying the defendants' motion for a new trial. The action was brought to recover the sum of $1,154.80, alleged to be due as architect's fees for the drawing of plans and specifications for a building to be erected upon premises of the defendants, and for taking bids upon the same. It was the contention of the defendants at the trial of the cause that whatever work the plaintiffs may have done in the premises was authorized and ordered, not by the defendants, but by one H. B. Peterson, whom the plaintiffs claim to have been an authorized agent of the defendants, but concerning whom defendants contend such relation of agency was not sufficiently proven. The facts of the case upon which the plaintiffs relied for their recovery are substantially these: In the year 1907

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the defendants were the holders under a long lease of a certain vacant lot in the city and county of San Francisco, upon which there was at the time a sign to the effect that they would build to suit a tenant, which sign bore the name "B. B. Peterson, Real Estate," and which, one of the defendants testified, had been placed there under the defendants' direction, and that said Peterson was their agent to get tenants for the building to be constructed upon the premises. In the month of September, 1907, said Peterson came to the office of the plaintiffs and requested them to draw plans and specifications and superintend the construction of a class "C" building upon the defendants' said lot. Prior to said time, said Peterson had ordered certain other plans of the plaintiffs for the defendants, and for which the latter had paid. Upon receiving this second order, one of the plaintiffs, Mr. Paff, went to look at the lot and saw there the aforesaid sign. The plans and specifications were accordingly drawn, and when completed were delivered to Peterson, and were by him submitted to the defendants, who, according to Peterson's report to the plaintiffs, pronounced them satisfactory, whereupon the plans by the plaintiffs were submitted to contractors, and bids called for. These bids proved too high, and the plaintiffs were instructed by Peterson to revise their plans so as to provide for a frame building. This was done, and the revised plans again submitted to the defendants and to bidders. While these bids were being taken, a contractor, whose name also was Peterson, presented to Mr. Paff a card of the defendant Ottinger, upon which was written a note signed by the latter asking Paff to let this Mr. Peterson figure on the property. Later Paff called upon Ottinger at the latter's office and found there a set of blueprints of the building first designed and also of the frame building. Upon introducing himself Paff was greeted by Mr. Ottinger with the words: "Oh, yes; you are Mr. Paff, my architect." A conversation then ensued, in which Mr. Paff was assured that the erection of the building would be proceeded with "as soon as the neighborhood had cleared a little of the Greeks." Paff called again in September and reminded Ottinger that some time had elapsed since the plans were drawn, and asked for a payment on account of his fees, to which Ottinger replied that they were about to sublet, and that he would arrange that the plaintiffs should remain as architects and that the subtenants would pay for their services. The defendants finally refusing to pay the bill, this action was brought. The trial court found in plaintiffs' favor from the foregoing facts and rendered its judgment accordingly.

[1, 2] The main contention of the appellants is that the case of the plaintiffs must rest upon proof of an actual agency in the said H. B. Peterson to make the contract for plaintiffs' services, and that neither the existence nor scope of such agency has been proven otherwise than by the self-serving declarations of Peterson himself made at various times to the plaintiffs during the progress of their work, and testified to only by them; and that such an agency cannot be so proven. With the law quoted by the appellants in support of this contention the respondents have no quarrel, but they contend—and we think correctly—that the agency of Peterson has been established by sufficient evidence entirely outside of the statements by Peterson himself, and this having in our view of the testimony been so established, the statements of Peterson, as such agent, to the plaintiffs, in the course of their employment and services, would be admissible in evidence, and hence the objections which the defendants urged thereto would have been properly overruled.

[3] The final contention of the appellants is that the trial court erred in its refusal to allow them to file an amended answer wherein they allege for the first time a lack of legal capacity in the plaintiffs to sue arising out of their alleged failure to comply with the provisions of sections 2466 and 2467 of the Civil Code, relating to the filing of certificates of partnerships under fictitious names. These have always been held to be dilatory pleas, which are waived by the failure in the first instance to plead them; and we cannot say that the court abused its discretion in refusing leave to the defendants to amend their answer by making such a plea more than three years after their original answer had been filed and while the trial of the cause was in progress.

Judgment and order affirmed.

32 Cal. App. 411

LEVY et al. v. DUSENBERY. (Civ. 1797.)

(District Court of Appeal, First District, California. Dec. 28, 1916.)

1. APPEAL AND ERROR 🔑1040(10) — HARMLESS ERROR—OVERRULING DEMURRER—BROKER'S COMPENSATION.

The overruling of special demurrer on ground that complaint to recover broker's commission did not set up exact terms of contract, and hence it could not be ascertained whether broker's services were performed within time limited, was harmless, where defendant was thoroughly informed of the date and facts and was in no way prejudiced.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4098, 4105.]

2. EVIDENCE 🔑417(18) — CONTRACT OF EXCHANGE—PAROL EVIDENCE TO SHOW DATE.

Parol evidence introduced by plaintiff broker to show true date of an exchange agreement between defendant and other party to trade to which plaintiff was not a party was admissible, parol evidence rule applying only to parties to the contract, and such evidence always being competent to show true date.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1897.]

3. BROKERS 🔑50—COMPENSATION—"CONSUMMATION OF EXCHANGE."

A broker's contract for commission payable "upon consummation of exchange within 24 hours" referred to execution of exchange agreement, and not to actual exchange of deeds, where exchange agreement provided for 30 days to examine title.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 68.]

4. BROKERS 🔑50 — COMPENSATION — SUFFICIENCY OF SERVICES—TIME.

Where a broker had procured a purchaser ready, willing, and able to purchase, within time limited, and exchange agreement had been executed, the fact that the actual exchange of deeds was not made until after time limited by exchange agreement for inquiry into title will not defeat his right to commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 68.]

5. EXCHANGE OF PROPERTY 🔑4 — REALTY — CONSTRUCTION OF CONTRACT.

An exchange agreement allowing "30 days for search of title," and "both parties agree to deliver their respective properties free and clear of all incumbrances except as hereinbefore mentioned," referred only to the time for examining title and did not require deeds to be exchanged within that time.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 4.]

6. VENDOR AND PURCHASER 🔑75—CONTRACT —TIME TO EXAMINE TITLE.

Where a contract for sale of land provides no specific time for examination of title, a reasonable time will be allowed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 113–118, 126.]

7. BROKERS 🔑52—COMPENSATION—BRINGING PARTIES TOGETHER.

A broker's right to compensation does not depend upon an actual closing of the transaction, unless so stipulated, where he has actually procured a purchaser ready, willing, and able to purchase within the time limit of his contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 73.]

8. BROKERS 🔑67(1) — COMPENSATION — EXCHANGE OF PROPERTY.

In the case of agreements for exchange of land, procured by a broker, facts may warrant broker's recovery of commissions from one party but not from the other.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 52, 53.]

Appeal from Superior Court, City and County of San Francisco; Edgar T. Zook, Judge.

Action by F. A. Levy and another, trustees for the stockholders of Watson, Pond & Riddle, against Samuel Dusenbery. Judgment for plaintiffs, and defendant appeals. Affirmed.

Vogelsang & Brown, of San Francisco, for appellant. Herbert Choynski and John T. Williams, both of San Francisco, for respondents.

KERRIGAN, J. This is an appeal by defendant from an adverse judgment in an action brought in the name of Watson, Pond & Riddle (a corporation), the present plaintiffs being afterwards substituted for them, for the recovery of $1,200 for services claimed to have been performed for the defendant in bringing about an exchange of real estate in San Francisco.

It appears from the evidence that from time to time during a period of more than a month prior to October 25, 1909, F. W. Thurston, the accredited representative of Watson, Pond & Riddle, had been endeavoring to effect an exchange of certain properties between the defendant and Mrs. Emma Siminoff, with the result that on October 24, 1909, the defendant and that lady arrived at an understanding as to the terms of the proposed exchange, and Thurston was directed to prepare an agreement embodying them. Accordingly, the next day Thurston prepared in duplicate a written agreement of exchange and two contracts of employment, one to be signed by Mrs. Siminoff and the other by the defendant, whereby the parties to the exchange agreed to pay to Watson, Pond & Riddle a commission of $1,300. On said October 25th Thurston called at the office of the defendant and submitted to him the proposed exchange agreement and the contract of employment. Defendant objected to a certain part of the former, and also reduced the amount of commission payable by him to the sum of $1,200, made it payable in installments, and conditional "upon the consummation of the exchange of properties within 24 hours from date." Thereupon Thurston took the two copies of the proposed agreement of exchange and the contract of employment to Mrs. Siminoff; and, after he explained to her the part of the agreement to which defendant had objected, she consented to the modification, and that evening signed it in duplicate. She also at the same time signed the contract of employment prepared for her, whereby she agreed to pay Watson, Pond & Riddle a commission of $1,300. The following morning, October 26th, when both copies of the exchange agreement were handed by Thurston to the defendant for his signature, he signed them and inserted therein the figures and letters "27th" as a part of the date of the instrument. Both copies of this agreement having thus been signed by the parties, Thurston left one copy with the defendant and late that afternoon delivered the other to Mrs. Siminoff.

The contract of exchange recited that Mrs. Siminoff and the defendant were the owners of certain pieces of real property in San Francisco subject to certain mortgages, and bound the respective parties to mutually convey good and sufficient title to their properties, free from incumbrances except those mentioned therein. The contract also contained a provision that:

> "Both parties hereto hereby agree to allow thirty days from the date hereof for the search of title on their respective properties."

The defendant thereafter interposed various objections to the consummation of the sale, claiming that the property of Mrs. Siminoff in certain respects had been misrepresented to him; but it appears that the objections and claim of misrepresentations were without substantial foundation. However, during the discussions between the parties thus arising the defendant proposed to Mrs. Siminoff that they terminate the contract and enter into a new one, but she refused to do so, insisting that the contract already entered into be performed; otherwise there would be no further negotiation. The exchange of deeds was made about a month after the expiration of the 30 days provided in the contract for examination of title.

[1] The first point made by the appellant for a reversal is that his special demurrer to the complaint on the ground of uncertainty and ambiguity should have been sustained. The complaint had pleaded the employment of the plaintiff without setting up its exact terms, followed by an averment that the procurement of the agreement of exchange under said employment was had on October 27, 1909. The point of the special demurrer was that it could not be ascertained from the complaint whether the plaintiff's services had been performed within the time limit set therefor.

Whether or not the demurrer was well taken, we are satisfied from an examination of the record that the appellant was not prejudiced by the ruling in question. The appellant was thoroughly informed of the date of the plaintiff's employment, of the time limit set therefor, and of the fact that the exchange agreement constituting the plaintiff's performance was dated October 27th, which was one day after the expiration of plaintiff's authority. At the trial it was testified on behalf of the plaintiff that, although the exchange agreement bears the date of October 27th, it was actually signed and procured on the preceding day, thus proving it to be, if such testimony were believed by the court, within the time limit of the employment. The defendant met this testimony by categorically testifying that the 27th was the true date of the execution of this document and that it was not signed or delivered before. He thus had the instrument itself and his own testimony in its support, and he could have had no more if the complaint had specifically averred October 26th as the date of procuring the instrument. No other testimony upon this point was introduced by the plaintiff. The court chose to believe the plaintiff's version, but such result was not attributable to any disadvantage suffered by the defendant through ambiguity or uncertainty of the complaint. In the absence of such prejudice an order erroneously overruling a special demurrer will not constitute ground for reversal. Bank of Lemoore v. Fulgham, 151 Cal. 234, 237, 90 Pac. 936; Alexander v. Central L. & M. Co., 104 Cal. 536, 38 Pac. 410; Krieger v. Feeny, 14 Cal. App. 538, 544, 112 Pac. 901.

After the trial the court permitted an amendment to the complaint to conform to the proof, and accordingly an "amended and supplemental complaint" was filed, to which the defendant demurred, whereupon the plaintiff immediately filed a "second amended and supplemental complaint." Defendant's demurrer to this last pleading was also overruled by the court; and what we have just said as to the overruling of the demurrer to the complaint will also dispose of the objections now urged by the appellant to this second adverse ruling.

[2] Equally without merit, we think, is the contention that the evidence introduced by the plaintiff to show that the true date of the exchange agreement was inadmissible in the absence of an issue of mistake or fraud. The plaintiff was not a party to the contract between defendant and Mrs. Siminoff, and it is only as to parties to a contract that the rule may be invoked that parol evidence is not admissible to vary its terms. Dunn v. Price, 112 Cal. 46, 44 Pac. 354; Christenson Lumber Co. v. Buckley, 17 Cal. App. 37, 118 Pac. 466. But even if the plaintiff had been a party to it, still the evidence was correctly received, for parol evidence is always competent to show the true date of a written instrument. Treadwell v. Reynolds, 47 Cal. 171; Gately v. Irvine, 51 Cal. 172; Erickson v. Robertson, 116 Minn. 90, 133 N. W. 165, 37 L. R. A. (N. S.) 1133, Ann. Cas. 1913A, 493; Lee v. Mass. F. & M. Ins. Co., 6 Mass. 208; Moore v. Smead, 89 Wis. 558, 62 N. W. 426.

[3] Coming now to a construction of the broker's contract, it reads in part as follows:

> "I hereby agree to pay you the sum of $1,200 as commissions for services rendered upon the consummation of said exchange of properties, *within 24 hours from date, and payable $100 down and $100 per month.*"

The portion underscored was added by the defendant in his own handwriting at the time he signed the contract. It is quite apparent to us—and we do not understand it to be seriously contested—that the words "consummation of said exchange of properties" as used in this writing refer, not to the final exchange of deeds, but to the execution and delivery of a binding contract for their exchange; for it could not have been within the contemplation of the defendant that the actual exchange of properties could be effected within the 24 hours, as the agreement of exchange itself provided that 30 days should be allowed each party to examine title, and there were other matters to be investigated and adjusted which would require more time than a single day.

[4, 5] The next and main contention of the appellant is that, even assuming that the plaintiff procured the exchange agreement within the time limited therefor, the defendant's liability to pay the specified commis-

sion was still dependent upon the further condition that the actual exchange of deeds should take place within 30 days from the date of the agreement for exchange; and this by virtue of the clause contained therein reading:

> "Both parties hereto hereby agree to allow thirty days from the date hereof for the search of title on their respective properties, and both parties hereby agree to deliver their respective properties free and clear of all incumbrances except as hereinbefore mentioned."

It is pointed out by the appellant that the properties were not exchanged until a day or two over a month after the lapse of the 30-day period, and that therefore the broker had failed to produce a purchaser "ready, willing and able to purchase" within the rule entitling a broker to his commission; in other words, that the broker's contract not only required him to procure the agreement of exchange within the 24 hours, but also imposed upon him the obligation to insure the completion of the exchange within the 30 days mentioned in the exchange agreement.

[6] We cannot agree with this construction. As we read the agreement, no time is therein provided within which the actual exchange of deeds must take place. The 30-day period specifically refers to the time allowed for examining title, and it is a matter of common knowledge in real estate transactions that some period of time between that allowed for such examination and the actual close of the transaction almost always intervenes. When the contract is silent on that point, a reasonable time will be allowed.

[7] Moreover, the question, in our opinion, does not arise in the present case, since the plaintiff's right to recover his compensation did not depend upon the actual closing of the transaction. If the party with whom the plaintiff contracted for an exchange of properties had good title, it was immaterial to the broker's right to recover his compensation whether the exchange was ever effected or not. He had, by procuring the signing of the exchange agreement by Mrs. Siminoff, produced a purchaser "ready and willing," and the remaining requirement of "ability" was evidenced by the fact that her title proved to be good. Not only so, but the plaintiff accepted it, and the exchange was effected on the terms stated in the agreement. And further, even if the 30-day period referred to the time that the exchange was required to be consummated, the failure of the parties to comply with that condition would be immaterial to the plaintiff's right to recover. He had produced a purchaser ready and able to purchase, and who in fact did purchase. The only element of time on which the plaintiff's compensation was contingent was that contained in his written employment; and the cases cited by the appellant in support of the contention we are now considering are all cases dealing with the time limit of the broker's authorization to procure a purchaser, and not with any limitation contained in a contract entered into by buyer and seller as the result of the broker's efforts.

Generally speaking, when there is nothing in the broker's contract making his right to compensation depend upon some contingency, a broker employed to sell real property as a rule has earned his commission when, within the life of his contract or any extension thereof, he has produced a person who is ready, willing, and able to purchase the property on terms satisfactory to the seller, and has obtained a binding and valid contract for a sale on the terms proposed by the seller, or has brought the seller and buyer together and thus enabled them to enter into a contract of sale. Shepherd-Teague Co. v. Hermann, 12 Cal. App. 395, 107 Pac. 622. In such a case it would make no difference that the contract of sale provided for a time to search the title to the property. The agent's right to compensation would accrue, unless otherwise provided by the terms of his employment, when the contract of sale was executed, or when the opportunity to make such contract was given the seller, in which event the agent would be entitled to his commission even if the seller had no title or defective title to the property. Phelps v. Prusch, 83 Cal. 626, 23 Pac. 1111.

[8] So in the case of an agreement for an exchange of properties, when time is given to examine the titles as in the present case, the giving of such time does not affect the agent's right to his commission, although it might affect the time of its payment. His right to the agreed compensation would be fixed by the production of a person "able, ready and willing" to purchase by the conveyance of good title. It is, of course, true that there arise cases in exchanges of property where the broker may be entitled to recover from one party and not from the other. In the case of an agreement for the purchase of properties between A. and B., brought about by a broker under valid employment, the broker's right to compensation from A. is not affected by the inability of A. to convey good title, but is affected by B.'s inability, since the conveyance of good title by B. is the price that A. is to receive for his property, and without it the broker has not produced a purchaser able to purchase. And similarly as to the broker's right to compensation from B., it is unaffected by B.'s inability to pass good title, but is affected by A.'s inability. Connor v. Riggins, 21 Cal. App. 756, 132 Pac. 849. In the present case the question is set at rest by the fact that the title of Mrs. Siminoff proved to be good and was accepted by the appellant.

This disposes of the points meriting detailed discussion, and for the foregoing reasons the judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

(32 Cal. App. 461)

CITY OF SAN DIEGO et al. v. CAPPS, Mayor. (Civ. 2272.)

(District Court of Appeal, Second District, California. Jan. 3, 1917.)

1. Mandamus 🔑23(1) — Persons Entitled to Relief—City and Council.

Under Code Civ. Proc. § 1086, providing that mandamus must be issued upon verified petition of party beneficially interested, the city of San Diego and its council have sufficient interest to entitle them to a writ compelling the mayor to appoint a chief of police, provided for by city charter; the common council's duties not being entirely legislative.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 55–58.]

2. Mandamus 🔑168(2) — Pleading — Presumptions.

In a mandamus proceeding to compel the mayor to appoint a chief of police, it will be presumed, irrespective of full affirmative allegations in petition, that a city of the size of San Diego needs an efficient head of its police department.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 372.]

Original petition for mandamus by the City of San Diego and others against Edwin M. Capps, Mayor. Peremptory writ issued.

T. B. Cosgrove, City Atty., of San Diego, for petitioners. Arthur L. Dorn, of San Diego, for respondent.

JAMES, J. Petition in mandamus for a writ to compel the respondent, mayor of the city of San Diego, to appoint a superintendent or chief of police. It appears from the petition, the facts not being disputed by respondent, that on the 1st day of May, 1915, there became effective a provision of the freeholders' charter of the city of San Diego creating a police department and providing for a superintendent or chief of police; that it was also provided in said charter that the mayor should appoint such chief of police. It appears that no appointment has been made under the charter provision of an executive head for the police department, and that the respondent mayor has refused to make such appointment. It appears, also, by allegations in the petition, that on the 1st day of December, 1916, the city council of said city passed a resolution declaring that necessity existed for the appointment of a chief of police, and demanding that the mayor perform his duty and select some person to fill the office. The resolution further directed the city attorney to institute proceedings to compel the mayor to make the appointment. The city of San Diego and the common council appear as petitioners.

[1] It is contended on the part of respondent that these plaintiffs are not entitled to the writ sought, because they have not such a beneficial interest in the subject-matter as to make them proper parties under section 1086 of the Code of Civil Procedure. While the functions of the common council are in the main legislative, that body has other duties devolving upon it, and, in a qualified sense and subject to the restrictions of the city charter, is the governing arm of the municipality. Where officers of a city, charged with the performance of ministerial duties, neglect or refuse to follow the direction of the law under which they have assumed office, it would seem most proper that the city by its common council should be permitted in a proceeding of this kind to compel such officers to fulfill the obligation which their oath has imposed upon them. That this right exists in the city is very clearly held in City of San Buenaventura et al. v. McGuire, 8 Cal. App. 497, 97 Pac. 526, 528. The statement of the law as contained in that case was approved by the Supreme Court when a petition to have the matter reheard was denied.

[2] In a city of the considerable size of San Diego it must be presumed, irrespective of the very full and affirmative allegations in the petition to that effect, that for the efficient administration of the police department it is necessary that there should be an executive head thereof. The people of the city of San Diego in their charter determined that they would have a chief of police, and made it incumbent upon the mayor as a purely ministerial duty to name some one to fill that office. To say that the mayor may refuse to heed the express mandate of the electors of the city would be to give countenance to a species of executive nullification which the law will not tolerate. When the mayor took his oath and accepted the office, he bound himself to perform all the duties which the charter imposed upon him. No discretion was left under which he might in the regard here considered supplant the judgment of the people, solemnly declared at their charter election, by carrying out a policy which might satisfy his individual notion of what was best to be done in the circumstances. To our minds, this is a most appropriate case for use of the writ sought.

Peremptory writ of mandate is ordered to be issued, the return day to be five days from time of service; petitioners to recover their costs.

We concur: CONREY, P. J.; SHAW, J.

(32 Cal. App. 449)

PEOPLE v. BENJAMIN. (Cr. 650.)

(District Court of Appeal, First District, California. Dec. 30, 1916. Rehearing Denied by Supreme Court Feb. 26, 1917.)

1. Criminal Law 🔑1159(3)—Appeal—Verdict—Conflicting Evidence.

Discrepancies and differences in description of a murderer, creating no more than a conflict in evidence, do not warrant appellate court in setting aside verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076.]

2. Criminal Law 🔑1159(2, 4)—Appeal—Review—Weight and Credibility.

The weight and credibility of evidence are peculiarly for jury, and its determination, in the absence of a showing of inherent improbability, will not be set aside on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3075, 3077.]

3. Homicide 🔑234(1)—Murder in First Degree—Sufficiency of Evidence.

In a prosecution for murder, where the matter in issue was the identity of the murderer, evidence *held* sufficient to justify a conviction for murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 482.]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Judah Benjamin was convicted of murder in the first degree, and he appeals. Affirmed.

Judah Benjamin, in pro. per. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. By an information filed in the superior court of Alameda county the defendant was charged with the crime of murder. He was convicted of murder in the first degree, and his penalty therefor—life imprisonment—was fixed by the verdict of the jury.

The facts of the case as revealed by the evidence adduced upon the trial are substantially these: About the hour of 9 o'clock on the evening of March 4, 1916, Officer Gushe of the Oakland police department was seen to approach and place his hand upon the shoulder of a man who was standing or walking in the vicinity of Twelfth and Clay streets in the city of Oakland. The officer, holding the man by the shoulder, proceeded a few steps, when the latter turned and engaged in a scuffle with the officer, during which a shot from a revolver was fired, after which the man broke the grasp of the officer and fled. The officer followed for a short distance, and, after firing several ineffectual shots at the fleeing man, fell to the sidewalk as the result of a wound inflicted by a 32 caliber bullet, and which wound, it was subsequently shown, caused his death. The man continued his flight, and, although a crowd pursued him, made good his escape. The defendant was arrested several days later and charged with the killing. Several witnesses who were at or near the scene of the scuffle with the officer gave a description of the man whom he apparently had under arrest which fitted the defendant with exactness, and several other witnesses positively identified the defendant as the man who passed within a few feet of them under a bright light pursued by a crowd and running from the scene of the shooting.

Subsequent to the killing and prior to the defendant being charged therewith, the defendant attracted the attention of Officer Hughes of the San Francisco police department, who observed him loitering and apparently begging on Sutter street in said city. Hughes approached the defendant and asked him if he was working. He replied in the negative, and in response to further questions concerning his place of abode and means of livelihood demanded to know why the inquiry was made, whereupon Hughes displayed his star. The defendant then exclaimed, "I shoot the likes of you, got no use for you, and I am going to get you before I get through with you." Hughes thereupon placed the defendant under arrest, and was in the act of searching him when the defendant drew a 32 caliber revolver from his pocket and pressed it against the body of Hughes. The officer grasped the revolver, and, breaking it, proceeded with the search of the defendant's person, which revealed 21 32 caliber loaded pistol cartridges, a large butcher knife, and a razor.

There was offered and received in evidence on behalf of the people a letter written, addressed, and delivered to the chief of police of Oakland subsequent to the killing of Officer Gushe and before the arrest of the defendant, which was shown by expert testimony to be in the handwriting of the defendant, and which reads as follows:

> "I was the man that shot the police Gushe, and to tell you there may be more killed if you don't have the police do thing right, for you have now in the police department that are no good. All they want is their pay every month, so look out."

This letter was followed by the introduction in evidence of another letter also written, addressed, and delivered to the chief of police of Oakland subsequent to the killing of Gushe and prior to the arrest of the defendant, which likewise was shown to have been written by the defendant, and which reads as follows:

> "San Francisco, Cal., March 11, 1916.
>
> "Chief of Police, Oakland, Cal.—Dear Sir: The men on the force under you don't seem to realize they are performing a certain service for the public and that when they exceed that and overstep their bounds and interfere into people's private affairs, they deserve to be shot. That is what happened to Gushe and it should happen to a number more. What were most of these men before they become policemen? Gushe's delight when he was a Pinkerton at the race track was to wing men with his club and he only received back what he got. One dollar a head is the price they paid in New York for shooting these police, and let us hope it won't be long before that rate is established here and then what is left of the force will be men.
>
> "Respectfully yours,
>
> "The One Who Shot Gushe."

[1] The defendant did not take the stand in his own behalf. He rested his defense primarily upon the testimony of several witnesses who were present at or near the scene of the killing, who, in addition to differing to some extent from the witnesses for the people in their description of the man who did the shooting, testified that they could not

identify the defendant as the man whom they saw scuffling with Officer Gushe and running away from the scene afterwards. The discrepancies and differences existing in the description of the murderer of the officer given by the respective witnesses for the prosecution and defense created no more than a conflict in the evidence, which, of course, will not suffice to disturb the verdict of the jury. Moreover, in addition to the testimony of the several witnesses for the people or the defendant who could do no more than describe the man whom they saw scuffling with Officer Gushe, there was the evidence of the letters written by the defendant, which in effect were an admission of guilt, and the testimony of the several witnesses who positively identified the defendant as the man who fled from the scene of the shooting.

[2, 3] Much of the argument presented in support of the appeal is devoted to a discussion of the credibility of the witnesses and the weight of the evidence. Those were questions peculiarly for the jury; and in the absence of a showing of inherent improbability we are not permitted to interfere with the jury's conclusion upon the evidence. In short, we are satisfied that the evidence upon the whole case sufficiently supports the verdict and judgment. The conduct, conversation, and threats of the defendant upon being accosted and arrested by Officer Hughes in San Francisco, considered in conjunction with the defendant's letters to the Oakland chief of police, tend strongly, we think, to show that the defendant was obsessed with a peculiar and pronounced hatred for police officers in general and Officer Gushe in particular; and Officer Hughes' testimony therefore was material and relevant, and rightly received in evidence.

We find no error in the trial court's charge to the jury. The contention that the trial judge was prejudiced, and therefore disqualified from sitting in the case, is not sustained by the record.

Error is assigned as to many of the rulings of the court, but upon examination we find them to be uniformly correct. Upon the whole we are satisfied that the defendant was fairly tried and justly convicted.

The judgment and order appealed from are affirmed.

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32 Cal. App. 463

PLATNAUER v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al.

(Civ. 1600.)

(District Court of Appeal, Third District, California. Jan. 3, 1917.)

1. JUDGMENT 🔑278—SUSTAINING ENTRY.

The actual rendition of a judgment being the judicial act, and the entry thereof merely ministerial, the latter must be supported in all vital essentials by the previous order of the court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 546–551.]

2. CONTEMPT 🔑67—CERTIORARI—QUESTION CONSIDERED.

Where all facts upon which petitioner was adjudged guilty of contempt are certified in full upon certiorari proceedings, the question of whether the judgment announced and that entered were the same *held* unnecessary to decision; the issue being whether petitioner was guilty.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 221, 222.]

3. CONTEMPT 🔑67—CERTIORARI—POWER TO ANNUL JUDGMENT.

The Court of Appeals upon certiorari may review facts upon which lower court adjudged petitioner guilty of contempt, and may annul such judgment if warranted by the facts.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 221, 222.]

4. CONTEMPT 🔑67—CERTIORARI—PRESUMPTIONS.

Mere presumptions and intendments are not to be indulged in support of judgment in contempt, although evidence de hors the record may not be considered.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 221, 222.]

5. CONTEMPT 🔑67—CERTIORARI—PRESUMPTIONS.

Where it appears that an attorney refused to obey the court's order to sit down and resisted its execution, and the court passed it without further notice, but later adjudged attorney in contempt for attempting to conduct the case after court's refusal to permit him to do so, it will be assumed that the court condoned the former conduct, or deemed it insufficient as contempt, and, although set up in the court's entered judgment, will not be considered on certiorari proceedings.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 221, 222.]

6. CONTEMPT 🔑30—POWER TO COMPEL DECORUS CONDUCT.

Every court has a right to compel litigants and attorneys to conduct themselves decorously, and may coerce such conduct on proper occasions.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 91, 93, 94.]

7. ATTORNEY AND CLIENT 🔑14—DUTY TO COURT.

Attorneys are under obligation to uphold the dignity of, and be respectful to, the court, being officers thereof, though possessing a personal dislike for the presiding judge.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 21.]

8. CONTEMPT 🔑80—POWER TO RESTRAIN ATTORNEY FROM PARTICIPATING IN TRIAL.

No court has the right to arbitrarily force a licensed attorney, regularly employed, to retire from active participation in the case, even as punishment for contumacious conduct.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 261–266.]

9. ATTORNEY AND CLIENT 🔑92—DUTY TO CLIENT—CONDUCT OF LITIGATION.

A lawyer engaged in the trial of a case is charged with the duty of safeguarding his client's interests, and for this purpose to interrogate witnesses, object to testimony, and argue objections.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 171–173.]

10. ATTORNEY AND CLIENT 🔑92—DUTY TO CLIENT—CONDUCT OF LITIGATION.

Although a lawyer in discharging his duty to a client be persistent or vehement in presenting his points, he is within his legitimate rights, so long as his language is not offensive or indecorous, and whether he be right or wrong.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 171–173.]

11. ELECTIONS ⟹300—CONTEST—TRIAL—CONDUCT OF COUNSEL.

Attorney for contestee was within his rights in contest of a primary election result, in interposing suggestions in respectful language as to absence of showing that ballots were in same condition as when received, even though his position was legally untenable.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 308–313.]

12. CONTEMPT ⟹63(1)—DISOBEDIENCE TO COURT'S ORDER—RESTRAINING ATTORNEY FROM PARTICIPATING IN TRIAL.

Where attorney, upon seeking to be heard in trial of case, refused to comply with court's order to sit down and keep still, and the court, apparently passing this conduct, later refused to allow him any active participation in the trial, and, upon his respectfully seeking to be heard, adjudged him guilty of contempt, such order *held* beyond court's jurisdiction, and will be set aside.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 195.]

Application for certiorari by R. Platnauer to set aside judgment of contempt of the Superior Court of the State of California, in and for the County of Sacramento, and Honorable Charles O. Busick, the judge thereof. Judgment annulled, set aside, and vacated.

A. M. Seymour, J. S. Daly, and R. Platnauer, all of Sacramento, for petitioner. Meredith, Landis & Chester, of Sacramento, for respondents.

HART, J. The petitioner was, by the respondents, adjudged guilty of contempt of court, and ordered to suffer punishment therefor by imprisonment in the county jail of the county of Sacramento for the period of one day. Claiming that, in so adjudging him guilty of contempt and so punishing him therefor, the court exceeded its jurisdiction, the petitioner, by this proceeding, asks this court for a writ of certiorari, to the end that the action of the court in that regard may be annulled and set aside as being absolutely void.

The alleged contempt occurred during the progress of the trial of the case entitled J. M. Morrison, contestant, v. William D. Lawton and C. E. Mahoney, contestees and respondents. Said proceeding involved and was instituted to contest the question of the nomination of the said C. E. Mahoney, at the general primary election held throughout the state in the month of August, 1916, for the office of supervisor for the Third supervisorial district of Sacramento county, and to that end to obtain a recount of the votes cast at said primary election in said district for said office; the three persons named having been rival candidates for the nomination for said office at the time mentioned.

For a clear understanding of the proceedings culminating in the order or judgment adjudging the petitioner guilty of contempt, it is necessary to explain that the contestant, J. M. Morrison, was, at the time of his candidacy for supervisor, as well as at the time of the hearing of the contest, a deputy in the office of the county clerk, and that petitioner was one of the attorneys representing in said contest the contestee, C. E. Mahoney.

It appears from the record before us—in fact, it is shown by both the petition for and the return to the writ—that, preliminarily to the inspection of the ballots cast at the election for the parties, the petitioner, representing the contestee, declared his intention of attempting to show, in support of his objection to the proposition made by the contestant that the clerks to be appointed by the court to keep the tallies in the proceeding be furnished by the county clerk from the clerical force of his office, that the county clerk was biased and prejudiced against the contestee; that therefore the clerks to be appointed by the court to assist in the counting of the ballots should not be taken from among the deputies of the county clerk. The subjoined is, however, the court stenographer's report of the discussion of this matter and of all other proceedings leading to the commitment, and it is conceived that a clearer understanding of the situation may be obtained from a reproduction herein of the full report:

"Mr. Platnauer: I will ask the court to direct the contestant to deposit such an amount in advance as the court shall fix for compensation and for the assistance of the court in making the canvass. I will read the section of the statute, which is section 28 of the Primary Election Law that provides for a recount. (Reading section.)

"The Court: What act is that?

"Mr. Platnauer: It is the primary election law of 1913.

"Mr. Meredith: There is no objection to that. The law is clear.

"The Court: Not the act that is held up by the referendum?

"Mr. Platnauer: No, this is the act of 1913.

"Mr. Meredith: Before your honor fixes the number of persons, it may be the county clerk can supply us the sufficient deputies from his own office; the persons are only such as the court may need to facilitate the counting. I would like to ascertain from the county clerk if he can furnish regular deputies from his office—

"Mr. Platnauer: If the court please, I object that the county clerk is disqualified from appointing for various reasons, it is obvious—your honor may know—one of them is that the contestant himself is a deputy.

"The Court: Of course, the contestant himself will not be qualified.

"Mr. Platnauer: I understand. We charge that the county clerk is biased and prejudiced.

"The Court: The court will ask the clerk if he has sufficient deputies to act as tally clerks; two will be required.

"Mr. Meredith: Mr. Pfund, can you supply the court with two of your deputies, disinterested, to represent the court in this recount?

"County Clerk Pfund: I can supply two or I can supply three.

"The Court: Two will be sufficient.

"Mr. Platnauer: If the court desires to hear, we desire to be heard on the question of the bias and prejudice of the county clerk.

"The Court: I do not care to hear you, Mr. Platnauer.

"Mr. Meredith (to Mr. Pfund): Will you designate two deputies.

"The Court: Mr. Platnauer, you have changed your position from a year ago.

"Mr. Platnauer: A year ago—

"The Court: At that time you absolutely refused to put up your share of the costs in a proceeding similar to this kind, and insisted that you had the right to the county clerk's deputies to act as tally clerks.

"Mr. Platnauer: In the first place, that was not a procedure similar to this; it was a general election contest; in the next place, there was no charge that the county clerk was biased and prejudiced against any of the litigants.

"The Court: This is not a trial charging the county clerk with prejudice and bias.

"Mr. Platnauer: I understand—

"The Court: Your motion will be denied. The county clerk will furnish two deputies.

"Mr. Platnauer: In this kind of a trial—this question of the county clerk—simply to present testimony when we claim the county clerk is biased and prejudiced.

"The Court: Sit down; I have ruled on that.

"Mr. Platnauer: Will you permit me to address the court?

"The Court: Sit down. Mr. Sheriff, set him down. I am not going to be continually listening to you, you will sit down. Sit him down. You refused to obey the order of the court. The Court will now order that you be restrained; the court will not permit you to further participate in the trial of this action; you are getting to be a nuisance around here. You refused to obey the order of the court. We want to go ahead here and proceed with this count. When the court orders you to sit down, you should obey it.

"Mr. Platnauer: If the court will permit me to address the court.

"The Court: I don't care to hear you any further. I will not permit you to address the court. Sit down, when I tell you to sit down; if not, the court will order you committed to jail; that is all, until you obey the order of the court. Mr. Seymour, go on and proceed with the conduct of the case. I don't care to hear from you any more at all.

"Mr. Meredith: I presume the court is familiar with the nature of this recount. It is for a recount of the Third supervisorial district. The county clerk suggests Mr. H. W. Hall and Mr. Gleason, both deputies in his office.

"The Court: Very well, I will name Mr. Hall and Mr. Gleason—Mr. Gleason and Mr. Hall.

"Mr. Meredith: I was going to suggest to counsel on the other side, would there be any objection to the integrity of the ballots?

"Mr. Platnauer: We cannot agree, you make your proof; I insist you make your proof.

"Mr. Meredith: We ask the court to make an order—it seems to be necessary—for the county clerk to produce the ballots in their original condition before this court, of the Third supervisorial district.

"Mr. Seymour: In this connection, I suggest that the court view the vault.

"The Court: Yes. I will now order that E. F. Pfund, county clerk for the county of Sacramento, forthwith, upon the service upon him of this order, break the seal of the vault in which the ballots of said August primary, of August 29, 1916, are contained, and, after opening the said vault, forthwith produce in open court, in Department 3 thereof, the sealed envelopes containing the ballots cast in such precinct—that is precinct No. 17 to 30 and 43 to 60 and 94 to 109, and 123 to 137, inclusive, in such manner and at such time as the court may order.

"Mr. Seymour: May it please the court, I suggest your honor view the vault.

"The Court: When the count begins, the ballots will be placed on the bar and counsel, one counsel for contestant and one for contestee—

"Mr. Seymour: We can arrange that, after we get them.

"Mr. Meredith: Will the court inspect the vault at the present time?

"The Court: Yes; I will go down.

"(The court left the court room, and, returning into the court, the following occurred:)

"The Court: Counsel for contestant may take a position on my left and counsel for contestee on the right. The ballots will be placed here—

"Mr. Seymour: May it please the court, Mr. Morris is to act in the capacity of clerk for Mr. Mahoney.

"The Court: If there is room, there is no objection. Are you ready to proceed, Mr. Meredith? Have you any particular precinct?

"Mr. Meredith: We would like to start in with precinct 30.

"The Court: I suggest counsel take their places and the ballots be placed on the bar of the court.

"Mr. Meredith: We are ready.

"The Court: When the ballot of a precinct is called for, place it up here. Counsel will take their places. When the ballots are placed on the bar, then they may examine them. Hand it up here, Mr. Clerk.

"The Court (to Mr. Seymour): You will conduct this case. That is the order of the court. Mr. Platnauer, he can stand here at your side; if he wants to make any suggestion to you—I am going to proceed with this case, conduct it in an orderly manner; I am going to proceed with it. I want the work of the court to be facilitated as much as possible. Mr. Platnauer can stand to your side and render you any assistance he desires.

"Mr. Seymour: With all respect to the court, I desire to enter a protest and exception to the order of the court. Mr. Platnauer is the leading counsel in the case. I submit he ought not to be deprived of participating in the case.

"The Court: He may participate in the case, but you are to conduct the case, Mr. Seymour. He may render such assistance to you as he sees fit.

"(At this point envelope No. 109 was placed on the bar by the judge.)

"Mr. Platnauer: There is no evidence the ballots are in the same condition.

"The Court: Mr. Platnauer, sit down. Mr. Seymour is to conduct this case.

"Mr. Platnauer: I am employed to represent—

"The Court: Mr. Platnauer, your conduct is unbecoming to the court. The court adjudges you guilty of contempt of court—

"Mr. Platnauer: I do not see, your honor, unbecoming in addressing the court on behalf of a client.

"The Court: I am not going to be bothered with you any longer.

"Mr. Platnauer: I presume you don't want me in the case?

"The Court: The court adjudges you guilty of contempt of court; guilty of a misdemeanor in that you have been guilty of disorderly, contemptuous, and insolent behavior during the sitting of this court in the immediate view and presence of the court, directly tending to interrupt the proceedings and impairing the respect due this court, and adjudges you to be committed to the county jail for the period of one day in punishment thereof.

"Mr. Platnauer: Might I ask which conduct—addressing the court?

"The Court: You refused to obey the order of the court. The court will direct the clerk to issue a commitment.

"Mr. Seymour: May it please the court, I desire to protest against this action. It deprives the respondent of the aid and advice of counsel, of his chief counsel, in the case. I submit at the time of the adjudging Mr. Platnauer guilty of contempt, he was proceeding to address the court in a respectful manner, in accordance with the respect due the court, within his right as an attorney for the respondent, and I submit—

"The Court: Let the clerk issue the commitment.

"Mr. Seymour: I submit that no contempt was committed by him. I submit, further, that the respondent has the right, the legal right, to the services and advice of his counsel, of Mr. Platnauer, in this case, and now to commit him to jail for the period of one day would be an invasion of the constitutional right of the respondent; is unwarranted, either in fact, or in law.

"The Court: The court directs the clerk to issue the commitment.

"Mr. Seymour: In view of the fact Mr. Platnauer has been committed to jail for a period of one day, I ask that further proceedings in this case be suspended until such time as he shall have served his sentence, in order that the respondent may have the advantage of his advice, of his presence, and his co-operation in this case.

"Mr. Meredith: We object to that.

"The Court: The request will be denied."

Thereafter the court caused to be entered in the proper records of the court a judgment in which it was recited that the petitioner insisted on arguing matters to the court after he was told by the court that the latter did not care to hear further argument and directed him to sit down; that petitioner refused to sit down, said he would not sit down and continued to argue to the court; that thereupon the court ordered the bailiff of said court to seat him; that petitioner resisted the bailiff, and made loud noises and confusion in open court by loud talking and tripping over chairs; that, after order was restored, the court notified petitioner that it would not hear from him further, but that any matter to be presented to the court on behalf of respondents (contestees) should be presented by Attorney A. M. Seymour; that petitioner continued to argue, and was again directed by the court to sit down, and he refused to do so, and stated that the court desired to prevent him from appearing in court. Following the facts thus briefly recited is the judgment.

[1, 2] The point first made by petitioner is that the oral judgment pronounced by the court is the final and, indeed, the only judgment adjudging him guilty of contempt, and that the purported judgment subsequently entered in the minutes of the court is not the judgment pronounced from the bench, and is wholly different therefrom. The argument following from this postulate is that this court, in passing upon the question whether the respondents exceeded their jurisdiction in adjudging the petitioner guilty of contempt, is required to look solely to the judgment pronounced orally from the bench, and to measure the authority of the respondents to pronounce such judgment accordingly; that the judgment so pronounced must be held to be void because it does not contain within its recitals a statement of the facts constituting the alleged contempt. It is manifestly true, as the petitioner contends, that the judgment entered is not the judgment rendered in the case unless it is the judgment which has been considered and ordered, or, in other words, unless it be supported in all vital essentials by the previous order of the court, or the judgment actually rendered and ordered in the first instance; the rendition being the judicial act and the entry merely ministerial. Freeman on Judgments, § 38, p. 43; Peck v. Curtis, 31 Cal. 207, 209; Genella v. Relyea, 32 Cal. 159; Los Angeles Bank v. Raynor, 61 Cal. 145, 147; Ex parte Raye, 63 Cal. 491; Estate of Cook, 77 Cal. 220, 226, 227, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567, 11 Am. St. Rep. 267; Schuster v. Rader, 13 Colo. 329, 22 Pac. 505, 506. But, in view of the fact that the facts upon which the respondents acted in adjudging the petitioner guilty of contempt are certified in full to this court, and therefore are a part of the record before us, it is conceived to be unnecessary to consider that question here, since the facts speak for themselves, and, much more readily than the judgment itself, remove any difficulty which otherwise might be encountered in determining whether the respondents remained clearly within their jurisdictional sphere when they adjudged the petitioner guilty of contempt.

[3] That the facts upon which the court predicated its judgment against the petitioner may, upon certiorari, when they are duly certified to the court from which relief through that writ is sought, be reviewed and accepted as against the judgment of contempt, with which they do not agree, and upon them the proceeding in contempt be annulled and set aside, if such a course be thereby legally warranted, is well settled. Batchelder v. Moore, 42 Cal. 412; Los Angeles v. Young, 118 Cal. 295, 50 Pac. 534, 62 Am. St. Rep. 234; McClatchy v. Superior Court, 119 Cal. 413, 51 Pac. 696, 39 L. R. A. 691.

[4] This proposition is the essential corollary of the definitely settled rule that mere presumptions and intendments are not, as is true with respect to ordinary judgments or perhaps to proceedings upon habeas corpus, to be indulged in support of judgments in contempt. In Los Angeles v. Young, supra, it is said that, while "it may be set down as a universal rule that, as the writ of certiorari is to review a record of an inferior court, board, or tribunal, and to determine from the record whether such court * * * has exceeded its jurisdiction, evidence de hors the record, and contradicting it is never permitted," yet, "upon certiorari, if it becomes necessary for the court of review to be put in possession of the facts upon which the court acted, and which are not technically of record, it is competent for that court to require the lower court to certify such facts in its return to the writ, and this statement of facts would then be a part of the record." See, also, 2 Spelling on Extraordinary Relief, § 2020.

[5] The question, then, is: Do the facts show contemptuous conduct on the part of the

petitioner? In this connection, it is first proper to state that, before this court in this proceeding, oral testimony was received for the purpose of showing the manner or personal attitude assumed by the petitioner when the court ordered the deputy sheriff to force him to his seat, and particularly when that official attempted to execute the court's order. Some of the witnesses testified that the petitioner violently resisted the attempt of the officer to force him to be seated, while others testified that the petitioner merely placed his hands in his pockets and planted his feet firmly upon the floor and adjusted his body in a position of rigidity, apparently for the purpose of enabling him the more readily to successfully resist being forced to his seat. But we may, with propriety, forego consideration of this testimony or the particular episode to which it relates; for, since the fact is that the court passed it without notice, it may be assumed that the court either condoned the conduct then of the petitioner or regarded it as insufficient to stand as a predicate for a judgment of contempt. In this connection, it is to be observed from the facts above set forth, that when, in the first instance, the court stated that he did not care to hear further from the petitioner upon the point then sub judice, the latter appears to have ceased addressing the court, and that nothing further occurred between the court and the petitioner until the court gratuitously and unnecessarily suggested to the petitioner that his position on the pending question was wholly different from his position on what the court conceived to be a precisely similar legal question arising in an election contest in the superior court of Sacramento county several years previously. Perhaps the matter would have ended peacefully but for this untimely and wholly irrelevant suggestion by the court. But, however that may be, the court, as above stated, did pass the incident unheeded and so treated it as closed, so far as taking direct action upon it was concerned, and took no action against the petitioner until he attempted, against the previous direction of the court, to take an active part in the trial. It follows, then, that the whole controversy here reduces itself down to the single and simple question whether it is within the lawful power of a court to deny and foreclose the right of a regularly licensed attorney, regularly employed by a litigant to represent him in the trial of a case, to participate in such trial, even though such attorney might at some time in the progress of the trial of the cause have been guilty of contumacious conduct, and to punish him as for contempt of court if he attempts actively to represent his client in the trial.

The facts, briefly recapitulated, are: The trial of the contest was immediately resumed after the close of the incident above referred to, court and counsel repaired to the clerk's office to inspect the vault in which the ballots were kept by the county clerk, and, after such inspection, court and counsel returned to the courtroom. At this time the court announced that Mr. Seymour, of counsel for contestee, would be required to conduct the trial on behalf of the latter and that the petitioner would be permitted to take no part therein, except in so far as he might desire or conceive it necessary to advise with his associate, Mr. Seymour. And when the petitioner, in a respectful manner, interposed an objection to the consideration of one of the ballots, the court interrupted, saying: "Mr. Platnauer, sit down. Mr. Seymour is to conduct this case," whereupon the petitioner was about to say that he was employed to represent the contestee, when the court adjudged him guilty of contempt. It is thus to be observed that, as above stated, the facts show, if the commitment does not, that the gist of the offending by the petitioner, and for which specific conduct the court adjudged him guilty of contempt, was in attempting to take part in the trial of the pending cause in behalf of his client.

[6] Every court has the right to protect its dignity by compelling litigants and attorneys appearing before it to conduct themselves with decorum and in a respectful manner and the proceedings of a trial in an orderly way. With this right necessarily attends the power to coerce decorum and decent conduct on the part of the parties and their counsel, and to compel them to demean themselves in a manner befitting the dignity of courts of justice. And the power should, on all proper occasions, be unsparingly exercised and applied, to the end that the courts, which represent in the highest form the majesty of the law, shall be accorded that respect to which the sacredness of their functions and their high dignity entitle them.

[7] The members of the legal profession should, above all other members of society, be the first to uphold the dignity of judicial tribunals and to protect them against falling into that disrepute to which they would be hastened if proceedings before them were conducted without order or decorum or the respect due the ministers of the law for the law's sake. Indeed, such is among the first and most important of the obligations to which the lawyer under his oath solemnly subscribes when he is granted the right to practice his profession, and to him, no less than to the magistrate, is looked for the maintenance and preservation at all times of the honor, integrity, and dignity of the courts of which his right to practice therein makes him an officer. If he fails in his duty in this regard, he falls short of measuring up to the calls of his high and honorable profession, and the requirements of the obligations of his oath of office. Not only this, but thus he impairs the dignity of the profession, and himself loses that respect and that confidence of the public which are among the most valuable and fruitful of his

assets as a practicing lawyer. And even if it happens that, for some reason wholly personal to himself, he dislikes the presiding judge as an individual, he is no less in duty and honor bound to be uniformly respectful to the court and to do no act that will impair or degrade its honor and dignity in the estimation of the public. The attorney who does not understand this to be his duty, or, understanding it, fails to practice it, should surrender his license and so relinquish his granted right further to pursue the profession—a profession whose immutable and exalted and, indeed, well-understood ideals he promised, as one of the conditions upon which he was admitted into it, to exemplify in all his professional engagements.

[8] But no court, in this state at least, has the right or possesses the lawful power of arbitrarily or capriciously forcing a licensed attorney, regularly employed to represent a litigant in the trial of a case, to retire from active participation in such trial. Such judicial action cannot be justified on the ground that it is intended to operate as a punishment for contumacious conduct on the part of the attorney. No such power either inheres in our courts or exists by virtue of legislative fiat. If it did, a litigant could be arbitrarily deprived of the right to the services of an attorney of his own choosing. Besides, such power in any court would, when exercised, have the effect of qualifying or limiting the rights which a citizen acquires by virtue of his license to practice law. In the present case, if the petitioner had been the lone legal representative of the contestee, the latter, under the order of the court denying the petitioner the right to take an active part in the trial, would have been compelled to employ other counsel, with the inconvenience and trouble incident thereto, or have proceeded with the trial unaided by the skill of a lawyer.

[9] A lawyer, when engaged in the trial of a case, is not only vested with the right, but, under his oath as such officer of the court, is charged with the duty of safeguarding the interests of his client in the trial of an issue involving such interests. For this purpose, in a trial, it is his sworn duty, when the cause requires it, to offer testimony in behalf of his client or in support of his case in accordance with his theory of the case, to object to testimony offered by his adversary, to interrogate witnesses, and to present and argue to the court his objections or points touching the legal propriety or impropriety of the testimony or of particular questions propounded to the witnesses.

[10] If, in discharging this duty, he happens to be persistent or vehement, or both, in the presentation of his points, he is still, nevertheless, within his legitimate rights as an attorney, so long as his language is not offensive or in contravention of the common rules of decorum and propriety. As well may be expected in forensic polemics, he cannot always be right, and may wholly be wrong in his position upon the legal question under argument and to the mind of the court so plainly wrong that the latter may conceive that it requires no enlightenment from the argument of counsel. But, whether right or wrong, he has the right to an opportunity to present his theory of the case on any occasion where the exigency of the pending point in his judgment requires or justifies it.

[11, 12] It does not appear from the facts as they are here disclosed that the petitioner at any time addressed the court in disrespectful language. On the contrary, he appears to have proceeded with full consciousness of the duty which an attorney owes to a court, and, when adjudged guilty of contempt, had merely interposed a suggestion in respectful language as to the absence of a showing that the ballots were in the same condition in which they had been received. He was within his rights as an attorney when making this suggestion and in objecting to their consideration until such a showing had been made, even though the objection might have been legally untenable and, as a matter of fact, without foundation, which latter proposition was probably true. But the court appears to have been relentlessly insistent on compliance with its order that the petitioner should not take any active part in the trial of the case or under any circumstances address the court; and, as declared, it was alone the persistency of the petitioner to be heard in behalf of his client, of whom he was the senior counsel, which brought forth the judgment and commitment for contempt. In other words, the alleged contemptuous conduct on the part of the petitioner appears to have consisted entirely in the petitioner's attempt to take part in the pending proceedings after the court had ordered that he should not further participate therein. As above indicated, our conclusion is that in so acting the court transcended its lawful authority, and that the order was wholly beyond the jurisdiction of the court and is, therefore, void.

It follows that the judgment adjudging the petitioner guilty of contempt must be annulled, set aside and vacated; and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

(32 Cal. App. 443)

SOWELL v. LONDON ASSUR. CORP.

(Civ. 1798.)

(District Court of Appeal, First District, California. Dec. 30, 1916.)

1. STIPULATIONS ⚷18(4)—EFFECT—MATTERS CONCLUDED—FACTS IN ISSUE.

In an action on a fire policy, where it was stipulated that plaintiff's vendor of the property and assignor of the policy owned the property when the policy was issued, evidence tending to show that one W. E. B., the son of the W. E. B. who owned the property, had signed the deed to plaintiff, was properly excluded; the matter being no longer an issue in the case.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 44.]

2. INSURANCE ⚿378(3) — FIRE INSURANCE — WAIVER OF CONDITIONS OF POLICY—SOLE OWNERSHIP OF PROPERTY.

The approval by a fire insurance company through its general agent of the transfer of a policy to the buyer of the property with full knowledge of the ownership of the property by the vendor, and of the vendor's outstanding contract of sale with a third person at the time of the deed and assignment to the assignee of the policy, amounted to a waiver of those conditions of the policy, respecting the title to the property, which required sole ownership in the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 986.]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by L. B. Sowell against the London Assurance Corporation. From a judgment for plaintiff, and an order denying new trial, defendant appeals. Judgment and order affirmed.

H. A. Thornton, of San Francisco, for appellant. Gallaher & Aten, of Fresno, for respondent.

PER CURIAM. This is an appeal from a judgment and order denying a new trial in an action to recover upon an insurance policy, in which action the plaintiff prevailed.

The complaint in the case alleged that one W. E. Beeson was the owner of the land and buildings insured at the time of the issuance of the policy thereon, and that subsequently thereto said W. E. Beeson sold, assigned, transferred, and set over to the plaintiff all of his interest in the property, and that said W. E. Beeson shortly after said transfer also assigned and transferred to plaintiff all of his interest in and to said policy of insurance, with the consent of the said defendant by its agent indorsed on said policy; that thereafter the said buildings were destroyed by fire. The answer of the defendant denied that at any time said W. E. Beeson was the owner of the lands, premises, and buildings mentioned in the complaint, but alleged that at the time of the issuance of the policy of insurance the said W. E. Beeson represented himself so to be. The defendant also denied the alleged purchase of the said lands and premises from the said W. E. Beeson, for want of information and belief, and further denied upon the same ground that the said W. E. Beeson sold or transferred the said policy of insurance to the plaintiff, or that the defendant through its agent consented to the same. The answer also set up as an affirmative defense the averment that the interest of said W. E. Beeson in the insured property was not such an unconditional and sole ownership thereof as the terms of the policy required.

Upon the trial of the cause it appeared that W. E. Beeson, subsequent to the issuance to him of the policy of insurance, had made a contract of sale of the premises to a party by the name of Beringer, who had gone into possession thereunder and was in such possession of the property at the time of its transfer by said W. E. Beeson to the plaintiff. After the introduction of this proof it was stipulated in open court between the counsel for the respective parties that:

> "There was no dispute as to the ownership of the property except that after the insurance policy was issued a certain contract of sale was made by W. E. Beeson to a party by the name of Beringer, and that that change in the title, if it was a change in the title, constituted the essence or gist of the defense."

This stipulation was agreed to by counsel for the defendant with the additional suggestion that the contract of sale made with Beringer was prior to the conveyance to the plaintiff of the premises and assignment of the policy.

Upon the conclusion of the plaintiff's case a motion for nonsuit was made on behalf of the defendant upon several grounds, upon the argument of which it was again stipulated "that W. E. Beeson was the owner of the property at the time the policy was issued." The motion for a nonsuit was then denied.

[1] If there is anything which seems perfectly plain from the foregoing statement of facts as shown by the record, it is that the ownership of the property by the Mr. W. E. Beeson who was alleged in the complaint to be its owner at the time of the issuance of the policy of insurance, and who thereafter made the contract of sale to Beringer and the transfer of the property and assignment of the policy to the plaintiff herein, was stipulated and agreed to by both sides at the trial and prior to the close of the plaintiff's case, and that thereby the ownership of the said W. E. Beeson, and his identity as such owner and transferor of the property and policy of insurance, ceased to be an issue in the case. Notwithstanding this state of the record the defendant, after its motion for nonsuit had been denied, undertook to offer some evidence tending to show that a certain W. E. Beeson, who was the son of the W. E. Beeson who owned the property, had signed the deed to the plaintiff. Objection was made to the introduction of any such evidence upon the ground that there was no such evidence in the case in view of the stipulation as to the title to the property. The remarks of the court in ruling upon this matter—which ruling the appellant assigns as error—are somewhat involved and obscure; but it seems sufficiently plain that the court intended to rule out the evidence upon the ground that the matter was no longer an issue in the case, and this appears more certain when we turn to the findings of the court, which are in accord with the stipulation of the parties as to the identity of the W. E.

Beeson who was the owner of the property and to whom the policy was issued, and who made the various agreements and transfers and assignments shown in the evidence. We find no error, therefore, in the rulings and findings of the court as to the ownership of the property, and transfer thereof by the same person who was alleged in the complaint to have acted as such owner and transferor thereof and assignor of the policy of insurance upon which this action is brought.

[2] The other point insisted upon by the appellant is that the evidence in the case shows that at the time of the transfer of the property and assignment of the policy by W. E. Beeson to the plaintiff herein he was not the sole owner of the property, by virtue of the fact of his outstanding contract of sale to Beringer, which fact not being noted upon the policy by the defendant through its authorized agent at the time of such assignment thereof, renders the policy void, and hence the judgment erroneous. The evidence in the case, however, shows that the facts regarding the outstanding contract with Beringer, and the possession by the latter of the premises thereunder, were fully known to C. P. Walton, the agent of the defendant who had issued the insurance policy and who indorsed upon the same the approval of the transfer thereof. The finding of the court is that said C. P. Walton was the general agent of the defendant for the purpose of soliciting insurance, writing and delivering policies, and making indorsements on and transferring interests in such policies, and the evident conclusion of the trial court from these findings is that said C. P. Walton, by his indorsed approval of the transfer of the policy from the person originally insured to the plaintiff, with full knowledge of the state of the title to the property, waived on behalf of the defendant the terms of the policy which would render such transfer void when the state of the title is not made to appear on the face of the policy or the indorsement thereon. We are of the opinion that the finding of the court as to the authority of said Walton as a general agent of the defendant is sustained by the proofs in the case, and that his full knowledge of the ownership of the property by Beeson and of his outstanding contract of sale with Beringer at the time of the deed and assignment to plaintiff, was sufficiently shown. This being so, we are satisfied that as a matter of law the approval by the defendant of the transfer of the policy to the plaintiff, made by its general agent under the circumstances above set forth, amounted to a waiver of those conditions of the policy respecting the title to the property which otherwise would have rendered the assignment void. Raulet v. Northwestern National Ins. Co., 157 Cal. 213, 107 Pac. 292; Bennett v. Union Central Life Ins. Co., 203 Ill. 439, 67 N. E. 971; Phenix Insurance Co. v. Grove, 215 Ill. 299, 74 N. E. 141, 25 L. R. A. (N. S.) 1. We are therefore of the opinion that the appellant's contention in this respect is also without substantial merit.

The judgment and order are affirmed.

32 Cal. App. 426

ELLIS v. FUNK et al. (Civ. 1994.)

(District Court of Appeal, Second District, California. Dec. 28, 1916. Rehearing Denied by Supreme Court Feb. 26, 1917.)

1. Gifts 🔑54—Gifts Causa Mortis—What Constitutes.

Decedent's transfer of personal property by bill of sale to defendant who had been serving him for a period of two years and caring for his property is not, decedent having declared that he desired defendant to have the property in compensation for his services, a gift causa mortis.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 119–121.]

2. Fraudulent Conveyances 🔑135 — Transfer of Possession—Statute.

Where defendant who received a bill of sale for personal property was already in possession of the property as the transferor's agent, Civ. Code, § 3440, declaring that transfers of property not accompanied by immediate delivery, etc., are deemed fraudulent, has no application.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 427.]

3. Wills 🔑88(1)—Validity—Testamentary Disposition—Deed.

Decedent, an aged man, while suffering from his last illness conveyed his lands to defendants who agreed to discharge decedent's debts and thereafter undertook to carry out his wishes with respect to making payments to other relatives. After his death defendants acknowledged that the conveyance of the land to them was in consideration of their complying with decedent's wishes. *Held*, that the transfer could not be impeached on the ground that it was in effect a testamentary disposition not in accordance with the statute.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 208, 214, 217.]

4. Deeds ⚷17(1) — Consideration — Sufficiency.

An agreement to pay the debts of the grantor and to make other payments in accordance with his wishes is sufficient consideration to support a deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 31, 32.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Harvey Denis Ellis against William H. Funk and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Flint, Gray & Barker and Wheaton A. Gray, all of Los Angeles, for appellant. G. A. Skinner, of Long Beach, and Jones & Weller, of Los Angeles, for respondents.

SHAW, J. This is an appeal from a judgment entered upon the granting of defendants' motion for a nonsuit made at the close of plaintiff's evidence.

Plaintiff is an heir of one George W. Ellis, deceased, and brought this action on behalf of himself and a number of coheirs to have certain transfers of real and personal property made by Ellis to defendants, who were nephews of deceased, set aside and annulled. Shortly after the death of George W. Ellis, defendant Funk wrote a letter to the plaintiff, wherein he stated:

> "I will give you a statement of how Uncle George left his affairs. He left 5 acres of land on the west slope of Signal Hill with about 200 lemon trees on it. He left no will, but deeded his property to me and John H. Ellis of Riverside, and also gave us a bill of sale for all his personal property, and we have to settle all his indebtedness, which will be between $3,000 and $4,000. He gave me $1,000 and the personal, which amounted to $250, for what time I was with him, and requested us to give Nana Sanders $500, and to Mabel Coulter Warren $500, and to Ewena Belshaw $200, and to Lizzie, my wife, $500; and what was left John Ellis and me were to divide equal between us. Those are all the bequests he made."

In addition to any weight or inference to be drawn from this statement, the evidence construed most strongly in favor of plaintiff tends to prove that 10 days before the death of Ellis, who was a man over 71 years of age, feeble, and then suffering from the illness from which he died, and being averse to having his estate administered by the probate court, he, on November 20, 1911, executed a grant deed, absolute in form, conveying to defendants all his real estate, and 5 days later gave to one or both of them a bill of sale to all his personal property, thus divesting himself of all worldly possessions. That these transfers were made in contemplation of the apprehended near approach of death admits of little doubt.

[1, 2] As to the personal property, the character of which is not made to appear, appellant insists that the purported transfer thereof was in the nature of a gift causa mortis, but that as such it must fail of its purpose for the reason that there was no actual delivery of the possession of the thing given made by the donor to the donee, nor any means of getting possession and enjoyment thereof (Knight v. Tripp, 121 Cal. 679, 54 Pac. 267); and while it appears that the personal property was made the subject of a bill of sale executed by deceased to defendants, it is insisted that gifts causa mortis cannot be effected by formal instruments of conveyance or assignment, but "are manifested by and take their effect from delivery." McGrath v. Reynolds, 116 Mass. 566. Conceding appellant's contention as to the essential elements of a gift causa mortis, it appears that the personal property was not the subject of nor intended to be a gift. The bill of sale was not offered in evidence, and some uncertainty exists as to whether it was executed to William H. Funk alone or to him and John Harvey Ellis, his codefendant, jointly. However this may be, it does appear without contradiction that Funk had for a period of two years been serving his Uncle George in caring for him and his property, and was told by the latter that he wanted to compensate him for his labor, and would give him a bill of sale of the personal property. The transfer of the personal property, consisting, as stated by Funk, of "what stuff was there—that is, the farming horses and stuff, or the horse; he only had one horse"—was made for a valuable consideration, to wit, in payment of an acknowledged indebtedness due to defendant Funk for services rendered. Prior to this transfer, we may fairly infer from the physical condition of the vendor that Funk, who, prior to the execution of the bill of sale, had charge of his affairs, was in possession of this personal property as his agent. Thereafter and upon the delivery of the bill of sale, which was on November 25, 1911, his possession thereof was that of owner, rather than agent. This was sufficient to take the case without the provision of section 3440, Civil Code, under which certain transfers of personal property, unaccompanied by an immediate delivery, are deemed fraudulent. In our opinion, the evidence shows a valid sale and transfer of title absolute to the personal property involved in the litigation.

[3, 4] With regard to the transfer of the real estate, it appears from the meager evidence offered that the estate of the grantor's deceased wife held a one-half interest in the land, consisting of 5 acres, upon which 200 lemon trees were growing, so conveyed to defendants, which estate George W. Ellis as surviving spouse would inherit subject to the payment of certain notes which he and his deceased wife had signed, one of which was secured by mortgage upon the land. The chief evidence as to what transpired in connection with the transaction is that given by defendants. From this it appears that

George W. Ellis had prior to the execution of the deed, on several occasions, said to defendants that he wanted them to have the property; that he recognized the claims against the estate therein of his deceased wife would have to be paid in order to clear the property of the lien thereof, and also recognized his liability upon other outstanding notes for small amounts—as to all of which he expressed the wish that defendants pay the same. And they told him they "would carry out his wishes—whatever he wanted done they would do." At the request of deceased, Mr. Bixby prepared the deed, and he, with defendants, was present when it was executed. At this time, according to the testimony of one witness, Mrs. Belshaw, Mr. Bixby, in reply to something said by the grantor to defendants, stated, "You will have to give them a straight deed and trust to their honor to do what you want them to do." At the time of the execution of the deed no definite instructions had been given by the grantor as to what he wanted them to do, but the fair inference is that in conveying the property he relied upon their promises to carry out and comply with the wishes he had in mind, viz. the payment of certain sums of money to third parties, which constituted the consideration for the conveyance to them. Five days after the execution of the deed, to wit, on November 25, 1911, the bill of sale was executed, and on the next day the grantor told defendant Funk, to whom he had delivered the bill of sale, that he wanted Nana Sanders, Mabel Warren Coulter, and the wife of Funk to have $500 each, and Ewena Belshaw $200, making a total of $1,700. At this time Funk made a memorandum of what his uncle had said, and later communicated the same to his codefendant. After the death of George W. Ellis both defendants, in effect, made statements acknowledging that their uncle had conveyed the land to them in consideration of their complying with his wishes, which, as we have seen, was to pay to third parties to whom he owed no legal obligation the sum of $1,700. This promise—conceding that the promise to pay his debts was within the statute of frauds for the reason that it was not evidenced by writing—constituted a sufficient consideration for the transfer of the land to defendants by deed absolute in form. No creditor of deceased is attacking the transfer. No claim is made that the grantor was at the time mentally incompetent, or that the conveyance was obtained by fraud or duress. Neither, assuming such fact to be material, is there anything in the record indicating that defendants' promises were not be performed until after the grantor's death. Hence the transaction cannot be construed as a testamentary disposition of the property belonging to the grantor's estate.

Appellant relies upon the case of Knight v. Tripp, 121 Cal. 674, 54 Pac. 267, and that of Kimball v. Tripp, 136 Cal. 631, 69 Pac. 428. In those cases it appears that the property was transferred to defendant Tripp to be by him disposed of in accordance with a memorandum only in the event of the grantor's death; and it was there held that the transfer of the property constituted gifts causa mortis, but since no delivery thereof was had prior to the donor's death, they failed of their purpose. In the opinion filed in the case of Knight v. Tripp, the court, in reference to an instrument containing the donor's instructions, says:

> "By this memorandum the disposition of the property is limited to the event of death. * * * It is very clear, therefore, that it was not intended by Mrs. Cook to make a present, irrevocable gift of the property to him (Tripp), and that she did not intend that he should in any event have all of the property for himself."

In our opinion, these cases are to be distinguished from the case at bar, since in the former no promise, as here made by defendants, was made by Tripp to pay the amounts specified. Moreover, in those cases the payment was in express terms made contingent upon the death of the grantor.

Conceding that in a judgment upon nonsuit the evidence must be construed most strongly in favor of the plaintiff, we are nevertheless constrained to hold, upon a more careful consideration of the record than that given on the former hearing, that the judgment should be affirmed; and it is so ordered.

We concur: CONREY, P. J.; JAMES, J.

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32 Cal. App. 507

SMITH v. HIRST et al. (Civ. 1865.)

(District Court of Appeal, First District, California. Jan. 12, 1917. On Rehearing, Feb. 9, 1917.)

1. Bills and Notes 🔑416 — Presentment for Payment—Time.

The maker or holder of a note cannot change the time of day at which it shall be payable, and at which its maker shall be in default for nonpayment by merely delivering it to a bank for collection, nor can the time when notice of dishonor may be given be thus advanced.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1164–1172, 1174–1177.]

2. Bills and Notes 🔑419—Notice of Dishonor—Verbal Notice.

A mere verbal statement made in the course of the afternoon of the day of maturity of a note to the effect that it had not been paid would be insufficient notice of dishonor.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1129–1137, 1143, 1144.]

3. Bills and Notes 🔑416 — Notice of Dishonor—Time.

Such notice was also premature.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1164–1172, 1174–1177.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by E. G. L. Smith against C. H. Hirst and N. A. Dorn. Judgment for defendant Dorn, and plaintiff appeals. Affirmed on petition for rehearing, opinion amended, and petition denied.

Pillsbury, Madison & Sutro, of San Francisco, for appellant. N. A. Dorn, F. A. Dorn, and C. D. Dorn, all of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendant N. A. Dorn after his demurrer to the third amended complaint of the plaintiff had been sustained, the latter declining to further amend his pleading.

The facts of the case are these: On March 1, 1912, the defendant C. H. Hirst made, executed, and delivered to one L. L. Long his promissory note for the sum of $1,500, payable one year after date, of which said note the defendant N. A. Dorn was the indorser. Before the maturity of said note the maker thereof absconded and departed from the state of California, and had neither a residence nor place of business therein at the time said note fell due. Prior to the maturity of the note said L. L. Long transferred and delivered the same to the plaintiff herein, who, also prior to the date of its maturity, delivered said note to the Crocker National Bank of San Francisco for collection. The first day of March, 1913, the date of the maturity of said note fell on Saturday. At about the hour of 4 o'clock of said day, said note not having been paid, the said bank directed one Alice Spencer, a notary public, to give notice of dishonor of said note to said defendant Dorn, and at about 4:30 o'clock of said day said Alice Spencer personally and orally notified said Dorn that the said C. H. Hirst had absconded and departed from the state of California and was then absent from said state, and that said note had not been presented to C. H. Hirst for payment and had not been paid by him. On the morning of March 3, 1913, said Alice Spencer inclosed in an envelope a written notice signed by her, to the effect that said note had not been paid, and addressed and mailed the same to the defendant Dorn at his office address in the city of San Francisco, which notice said Dorn received at his said office address on the morning of March 4, 1913. He did not pay the note, and this action was commenced to recover upon the same. The judgment of the trial court in favor of said defendant was predicated upon the foregoing facts.

The sole question presented for decision upon this appeal is as to whether or not the said defendant Dorn had due notice of the dishonor of the note in question so as to bind him as its indorser. The appellant seems to concede that the written notice from the notary public mailed to said Dorn at his office on March 3, 1913, and received by him on the morning of the following day, to the effect that the note had not been paid, was insufficient to bind him as an indorser thereon for the reason, apparently, that it was not addressed to the indorser at his place of residence as the Code requires (Civ. Code, § 3144); and appellant therefore rests his whole case and argument upon the contention that the oral notification that the maker of the note had absconded and that the note had not been paid, given to said Dorn at about the hour of 4:30 o'clock on the day on which the note fell due, constituted a sufficient notice of dishonor. The respondent, however, insists that notice of dishonor must be in writing; but that whether or not such be the case, this notice was premature because given before the time arrived when the note could be dishonored by the nonpayment thereof, viz. the close of the day on which it fell due. The appellant concedes that this contention might be sound if the note had remained in the hands of the plaintiff, but claims that the respondent cannot avail himself of it because the note was delivered to a bank for collection the business hours of which close at 3 o'clock p. m. of business days except that on Saturday they close at 12 o'clock noon.

[1-3] We cannot give our adherence to a rule that the maker or holder of a note can change the time of day at which it shall be payable and at which its maker shall be in default for the nonpayment thereof, by merely delivering it to a bank for collection; nor that the time when notice of its dishonor may be given can be thus advanced. Aside from this, however, it seems quite clear from a reading of sections 3141 to 3145, inclusive, of the Civil Code that notice of dishonor of negotiable instruments must be in writing; and that a mere verbal statement made in the course of the afternoon of the day of maturity of the note to the effect that it had not been paid would be an insufficient notice of dishonor. Besides, such a notice, irrespective of its infirmities in point of form and substance, would be premature. There were several hours still remaining of that day which the maker of said note had within which to pay the same, and the fact as to whether or not he had absconded or departed from the state, or had neither residence nor place of business in it, could not operate to either enlarge or lessen the rights and liabilities of the indorser (Roper v. Gould, 22 Cal. App. 114, 133 Pac. 622; Civ. Code, 3141); and the fact that the maker of the note had absconded or was absent from the state, or had neither residence nor place of business in it, while it might excuse presentment to him for payment, would not excuse the holder of the note from giving notice of dishonor to its indorser (Applegarth v. Abbott, 64 Cal. 459, 2 Pac. 43).

The case of California National Bank v. Weldon, 14 Cal. App. 765, 113 Pac. 334, is clearly distinguishable as to its facts from the case at bar; and whatever is said therein with reference to notice of dishonor must be limited in its application to the facts of that particular case, and cannot be held as sustaining the doctrine that the notice of dishonor which is required to be given to the indorser of a promissory note is excused by an excusable failure to present the note for payment to the maker except in the cases specified in sections 3155, 3156, and 3157 of the Civil Code.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

On Rehearing.

PER CURIAM. Our attention having for the first time been called upon petition for a rehearing to the case of Pierce v. Schaden, 55 Cal. 406, wherein it was held that sections 3141 to 3145 of the Civil Code did not operate to change the common-law rule allowing notices of dishonor to be given verbally, our opinion heretofore filed is modified by striking therefrom the following words: "It seems quite clear from a reading of sections 3141 to 3145, inclusive, of the Civil Code, that notice of dishonor of negotiable instruments must be in writing"—the foregoing paragraph being unnecessary to the decision of the case. The opinion of the court heretofore filed being thus amended, the petition for a rehearing will be denied.

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32 Cal. App. 489

SAWYER v. McROSKEY. (Civ. 1859.)

(District Court of Appeal, First District, California. Jan. 10, 1917.)

APPEAL AND ERROR ⟹979(4)—NEW TRIAL—CONFLICTING EVIDENCE.

The discretion of the trial court in granting a new trial on conflicting evidence is absolute, and will not be interfered with on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3872.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by F. W. Sawyer against L. H. McRoskey. From an order granting defendant's motion for a new trial, plaintiff appeals. Affirmed.

F. W. Sawyer, of San Francisco, for appellant. F. H. Dam, of San Francisco, for respondent.

Mr. Presiding Justice Lennon: This was an action for the purchase price of 51 shares of a certain corporation alleged to have been sold by the plaintiff to the defendant. The defense was that there was no delivery, and that there was no sale, and that if there had been a sale, the sale was rescinded. Upon the trial of the case the plaintiff's evidence tended to show that there had been a delivery of the stock and a subsequent refusal to pay for the same. Upon behalf of the defendant there was some evidence tending to show that there had been no delivery. The trial court made its findings in favor of the plaintiff, finding that there had been a delivery and a completed sale. A motion for a new trial was made by the defendant based upon all the statutory grounds, including the insufficiency of the evidence to support the findings, which motion was granted. The appeal is from the order granting such motion, and in its consideration of course all of the grounds of the motion are involved in order to test the correctness of the order. Do you concede, Mr. Sawyer, that there was evidence adduced upon the trial in the court below sufficient to have supported a finding in favor of the defendant?

Mr. Sawyer (plaintiff in person): No.

Mr. Presiding Justice Lennon: The evidence is conflicting?

Mr. Sawyer: I hardly think so. The evidence shows by the defendant's own testimony—by Mr. Dam's testimony in the matter—that there was a delivery of the stock.

Mr. Presiding Justice Lennon: Conditional?

Mr. Sawyer: Well, that may be.

Mr. Presiding Justice Lennon: That creates a conflict, does it not?

Mr. Sawyer: Is it a substantial conflict in the face of an agreement to pay $500 and the defendant repudiated his contract? The stock was actually delivered to Mr. Dam, and he was to pay the $500 the next morning. Mr. Sawyer went to Mr. Dam's office for the $500, and immediately the contract was repudiated. A party who repudiates his contract by refusing to pay cannot rescind.

Mr. Presiding Justice Lennon: But Mr. Dam was not the purchaser; he was merely the attorney for the purchaser; and his testimony was to the effect that the stock was delivered to him conditionally and not absolutely.

Mr. Sawyer: That is the effect of his testimony, but I think that does not make a substantial conflict in the testimony.

Mr. Presiding Justice Lennon: If there was a conditional delivery to Mr. Dam, who was not the purchaser, then there was no absolute delivery as you allege.

Mr. Sawyer: He was the agent for the purchaser.

Mr. Presiding Justice Lennon: If the delivery was conditional it was not absolute.

Mr. Sawyer: Of course, if that is the view your honors take about that matter, I of course am out on that theory, but I think there was not a substantial conflict.

Mr. Presiding Justice Lennon: Wasn't there some evidence in the record that the plaintiff, subsequent to the alleged sale and delivery involved here, had commenced an action to restrain the sale of that stock for the nonpayment of an assessment, and in effect averred in the allegations of the complaint in that action that he was still the owner of the stock?

Mr. Sawyer: Yes, but also qualified with a statement in the complaint that the action was commenced to protect the stock against an illegal assessment.

Mr. Presiding Justice Lennon: That was evidence against the plaintiff tending to show that he was still the owner of the stock, and negatived the claim of a sale and delivery as alleged in the complaint in this action. That was some evidence which would in a measure, have supported a finding in favor of the defendant had the court so found in the first instance.

Mr. Sawyer: That is sufficient evidence in your opinion to make a conflict?

Mr. Presiding Justice Lennon: Not that alone, but we think that all of the evidence adduced upon the whole case created a substantial conflict; and the rule is, wherever there is a conflict in the evidence, and a finding might be rightfully made either way, and the lower court grants a new trial in general terms—as it did in this case—its discretion is absolute, and cannot be interfered with by this court. Wendling, etc., v. Glenwood, etc., 153 Cal. 411, 416, 95 Pac. 1029.

Mr. Sawyer: That is the only question, as to whether there was a substantial conflict. You have stated the facts better than I could, and whether there was a substantial conflict is entirely with your honors.

Mr. Presiding Justice LENNON (Mr. Justice KERRIGAN and Mr. Justice RICHARDS concurring): We are satisfied that the case is as we have stated it generally, that there is a substantial conflict in the evidence, and therefore the discretion of the trial court in granting a new trial, grounded in part upon the insufficiency of the evidence, cannot be disturbed by this court. For that reason the order appealed from is affirmed. It is further ordered that the statement of the case, the views of counsel, and the conclusion of the court as expressed upon the oral argument of the case, be transcribed by the stenographic reporter, and that said transcription be filed as the opinion of the court.

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32 Cal. App. 493

WAGNER v. CARDINET FOUNTAIN BRUSH CO. et al. (Civ. 1893.)

(District Court of Appeal, First District, California. Jan. 11, 1917.)

Appeal and Error ⟹46 — Amount Involved—Statute.

Under Code Civ. Proc. § 52, limiting the jurisdiction of the Appellate Court to cases where the demand amounts to $300, where judgment against defendant on his liability as a stockholder was for less than $300, and the demand in the complaint as against him was for less than $300, the Appellate Court had no jurisdiction of plaintiff's appeal from an order setting aside judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 198–201.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by G. Wagner against the Cardinet Fountain Brush Company, a corporation, Niels Lund, and others. Judgment was taken against Lund by default, and he moved that it be set aside. The motion was denied, and Lund made another motion to set aside satisfaction of the judgment, procured by plaintiff by proceedings against other defendants, and the judgment. From an order granting the motion as to the judgment, plaintiff appeals. Appeal dismissed.

Hiram E. Casey, of San Francisco, for appellant. L. D. Manning and L. C. Fish, both of Oakland, for respondents.

PER CURIAM. In this action the plaintiff sued the Cardinet Fountain Brush Company to recover upon a promissory note given by that corporation, and included as defendants the names of a number of persons who, it was alleged, were stockholders of the corporation in certain amounts, giving at the same time the total subscribed capital stock of the corporation, and stating in the complaint, in so far as it referred to them, the amount that was due from each upon his stockholder's liability for this debt. The total amount of the debt was about $3,000, and the stockholder's liability of Niels Lund, the respondent, was figured out in the complaint at about $111. Lund did not appear, and a judgment was taken against him for the said amount of his stockholder's liability, with some added interest. Learning of the judgment apparently, Lund then appeared, and moved the court to set aside the judgment upon the ground that the court had no jurisdiction over the subject-matter of the action for the reason that, as far as he was concerned, the action was brought to recover a less amount than $300. Before that motion could be brought on to hearing it appears that the plaintiff procured a satisfaction of the judgment by proceedings against some other defendants, so that when the motion did come on to be heard, it appeared that the judgment had been satisfied, whereupon the court denied that motion. Thereupon defendant Lund made another motion before the court to set aside the satisfaction and the judgment. The court granted the motion as to the judgment, whereupon the plaintiff appeals from that order.

At the threshold the respondent calls attention to the fact that since this judgment against him was for less than the sum of $300, and since the demand in the complaint for that judgment was for less than $300,

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

this court has no jurisdiction of the appeal, because the jurisdiction of this court is limited to cases where the demand amounts to $300 (Code Civ. Proc. § 52); and the respondent cites as upholding his contention the case of Gorton v. Ferdinando, 64 Cal. 11, 27 Pac. 941.

We are of the opinion that this court has no jurisdiction of the appeal; and, since that question stands upon the threshold of the matter, it would be idle to go further into the merits of the case. The appeal is therefore dismissed.

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33 Cal. App. 492

SUNSET LUMBER CO. v. DUNLAP et ux. (Civ. 1912.)

(District Court of Appeal, First District, California. Jan. 11, 1917.)

COURTS 🔑121(1)—JURISDICTIONAL AMOUNT—CALIFORNIA SUPERIOR COURT.

In an action for $310.10, the balance due on the sum of $506.10 for goods sold, alleging that $250 had been paid on account, where the answer denied that $310.10 was due, and there was a judgment for plaintiff for the sum demanded, the issue before the superior court involved $300 or more, and hence was within its jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 410, 413, 416, 426.]

Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Action by the Sunset Lumber Company against George T. Dunlap and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Sterling Carr, of San Francisco, and P. M. Bruner, of Oakland, for appellants. C. L. Colvin, of Oakland, for respondent.

LENNON, P. J. The plaintiff in this case commenced an action for the sum of $310.10, which the complaint alleged was the balance due of the sum of $506.10 alleged to be the reasonable value of goods sold to the defendants. The complaint, however, incidentally alleged that the sum of $250 had been paid on account of the $506.10, followed by the above-mentioned allegation that there was a balance of $310.10 due and unpaid. The answer of one of the defendants denied that there was any amount due, and the other denied that the sum of $310.10 was due. The case came on for trial upon the issues thus raised. The defendants did not appear, and judgment went for the plaintiff for the amount demanded. The appeal is taken from the judgment, and the point is made that the trial court did not have jurisdiction of the action because the demand was for less than $300.

While the allegations of the complaint taken in conjunction with the prayer for judgment created some ambiguity and uncertainty, the issue raised by the answer of one of the defendants and attempted to be raised by the other was as to whether the sum of $310.10, the amount for which judgment was prayed, was due and owing. No demurrer was interposed to the complaint on the ground of uncertainty, and the issue before the court as above stated involved an amount within the jurisdiction of the court.

The judgment is therefore affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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32 Cal. App. 483

Ex parte AKI. (Cr. 375.)

(District Court of Appeal, Third District, California. Jan. 9, 1917.)

1. INTOXICATING LIQUORS 🔑48—LICENSES—REVENUE MEASURE.

As a revenue measure a license can only be imposed upon the business of selling intoxicating liquors, etc., and a single sale does not constitute the carrying on of such business.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 49.]

2. INTOXICATING LIQUORS 🔑6—REGULATION—POLICE POWER.

The sale of spirituous liquors is a matter to be regulated under the police powers of the state.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 4.]

3. INTOXICATING LIQUORS 🔑146(1) — LICENSE—PENALTY—ORDINANCE.

The city of Sacramento, as to which there are no general laws limiting the power of the council to make stringent or even prohibitive regulations as to the sale of intoxicating liquors, has the power to regulate, including the power to determine whether the privilege of selling intoxicating liquors may be exercised and the requirements of the persons who may be granted the privilege of making sales, and under an ordinance making it unlawful to sell or dispose of intoxicating liquors without having obtained a license, under penalty, without providing for the license of single sales of liquors, and providing for a license fee from which city derived revenue, one might be convicted of a single illegal sale without having first obtained a license.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 159, 163.]

Application by S. Aki for a writ of habeas corpus. Writ denied, and petitioner remanded.

John J. Bauer and J. V. Hart, both of Sacramento, for petitioner. H. B. Bradford, Dist. Atty., and Stephen Otis, Asst. Dist. Atty., both of Sacramento, for respondent.

PLUMMER, Judge pro tem. On the 6th day of March, 1916, the petitioner was convicted in the police court of the city of Sacramento of illegally selling intoxicating liquors. The gravamen of the offense consists in having sold liquors without first having obtained a license therefor, and consisted, so far as the record shows, of a single sale.

It is contended on the part of the petitioner that the ordinance under which the petitioner was convicted is a revenue measure, and therefore the city has no power to impose a license upon a single sale. The title of the ordinance involved is as follows:

> "An ordinance regulating the sale of wines, spirituous and malt liquors; prescribing a license therefor, regulating the management and conduct of places where such liquors are sold, furnished or given away, and fixing a penalty for the violation of this ordinance."

Section 1 provides:

> "It shall be unlawful for any person to keep a saloon, bar, barroom, tippling house, dram shop, store or other place where any wine, ale or beer, or any spirituous, vinous, malt or mixed liquors, or any intoxicating drinks, are manufactured, sold or given away, or to manufacture, sell, dispense or give away any such wine, ale or beer or spirituous, vinous, malt or mixed liquors, or any intoxicating drinks, without first having obtained a license therefor as provided in this ordinance."

The petitioner was arrested, prosecuted, and convicted under the second provision of the above-quoted section, which purports to make it unlawful for one to sell or dispense intoxicating liquors, irrespective of place, without first having obtained a license so to do. The petitioner seeks his discharge upon the authority of the cases of Merced County v. Helm, 102 Cal. 159, 36 Pac. 399, and Ex parte Seube, 115 Cal. 629, 47 Pac. 596, and one or two minor cases involving the principle there considered.

[1] These cases clearly establish the law that as a revenue measure a license can only be imposed upon the business of selling intoxicating liquors, etc., and that a single sale does not constitute the carrying on of such business. But these cases, and especially the Helm Case, recognize the difference between police measures, or police regulations, and ordinances adopted primarily for the raising of revenue. The court, speaking through Justice Harrison, in the Helm Case, says:

> "The right of the county to prohibit the sale of intoxicating liquors in the exercise of police powers conferred upon it by article 11, section 11, of the Constitution * * * is not involved in the determination of this case, as the ordinance in question does not purport to have been enacted under this power. By its very terms the ordinance is a revenue measure, and this suit is simply a civil action to recover a liability," etc., "and the collection of a tax does not come within the exercise of police powers. * * * That power is exercised in the enforcement of the penalty prescribed for a noncompliance with the law, or for the doing of some prohibited act."

No prohibitive acts were involved in the Helm or Seube Cases, and no question of the police power of cities or counties, as given by section 11 of article 11 in the Constitution of this state, was involved.

The subdivision of the Constitution just referred to reads:

> "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

In chartered cities of this state there are no general laws restraining or limiting the power of the city council of such cities to make such regulations stringent, or even prohibitive, in so far as the sale of intoxicating liquors is concerned, nor does it appear that the right to prohibit or regulate the sale of intoxicating liquors depends in any wise upon the number of sales involved, or, as said in People v. Harrison, 256 Ill. 102, 99 N. E. 903, Ann. Cas. 1913E, 362:

> "The manner and extent of its regulation, if permitted to be carried on at all, are to be determined by the state, so as to limit, as far as possible, the evils arising from it."

Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620:

> "In cities, authority for such regulation or prohibition has been conferred by the Legislature upon the city councils, and all sales of intoxicating liquor are unlawful and are prohibited unless made by virtue of a license granted under an ordinance. The power conferred upon the city is coextensive with that of the state, and includes authority to adopt any means to reduce the evils arising from the sale of intoxicating liquor, reasonably adapted to that end, which do not violate constitutional rights."

[2] That the sale of spirituous liquors is a matter to be regulated under the police powers of the state has been so frequently decided that the enumeration of authorities is unnecessary.

In Ex parte Fedderwitz, 6 Cal. Unrep. 562, 62 Pac. 935, the ordinance involved provided that:

> "It shall be a misdemeanor for any person to sell or give away any spirituous liquors within the city, except a licensed druggist selling on the prescription of a regularly licensed physician."

It was held that the ordinance was valid, and was a proper exercise of the police power of the state in prohibiting a single act of selling or giving away of spirituous liquors by one not engaged in the liquor traffic. The court, speaking through Chief Justice Beatty, says:

> "The charge upon which the petitioner was convicted was that of selling and giving away malt and spirituous liquors. It is not alleged that he kept a saloon, or that he was otherwise engaged in the traffic, either as a wholesale or retail dealer; and the question is whether the ordinance contains a valid prohibition against the act charged. If it does, it matters not that it may contain other prohibitions which the city has not the power to impose. The ordinance, in that case, would be merely void pro tanto, and its partial invalidity would not affect the judgment against this petitioner. It is claimed upon the authority of Merced County v. Helm, 102 Cal. 159, 36 Pac. 399, that a municipal corporation cannot make a single act of selling or giving away intoxicants a crime. But that case has no bearing upon the proposition. That was a civil action to recover a license which was imposed, and could only be imposed, for the privilege of conducting the business; and it was there held, among other things, that a single sale was not carrying on a business in the sense of the license laws. It does not follow from this, however, that a single sale may not constitute a crime if the ordinance so provides, as this clearly does. And the power to pass such an ordinance is granted in the most sweeping terms in section 11 of article 11 of the Constitution."

Justice Beatty further, in his opinion in this case, in referring to the Case of Campbell, 74 Cal. 20, 15 Pac. 318, 5 Am. St. Rep.

418, points out the distinction which is applicable here, and says:

> "The court was careful to say that the case did not involve any question as to the right to sell liquor apart from the traffic, but it was not decided or intimated that a prohibition of single sales was beyond the power of the municipality."

This court, in the Matter of Anixter, 22 Cal. App. 118, 134 Pac. 193, had before it an ordinance involving the restrictive principle here in question. The ordinance of the town of Winters provided:

> "It shall be and is hereby made unlawful for any person, etc., within the corporate limits of the said town of Winters, to solicit orders, take orders or make agreements for the sale or delivery of any intoxicating liquors or liquor of any kind whatever, or in any quantity or quantities."

Section 2 of the same ordinance contained exceptions allowing registered pharmacists holding licenses to sell liquors for certain purposes. This court, speaking through Justice Hart, held that there is absolutely no restriction upon the right of the state, in the exercise of its powers of police, to deal with the business of selling intoxicating liquors by retail in any manner that it deems fit or proper. A state or its municipalities may prohibit the traffic in such liquors altogether, or, permitting the traffic to be carried on, may impose such conditions upon its existence as it pleases.

The ordinance involved in the Anixter Case did not relate to any particular place of doing business, but distinctly made it a misdemeanor to sell intoxicating liquors in any quantity, unless the person came within one of the excepted classes and held a license authorizing him to sell. This same case was before the Supreme Court in 166 Cal. 762, 138 Pac. 353, and the doctrine was there affirmed that a state and its subordinate municipal agencies may pass laws, even laws penal in their character, regulating and indeed prohibiting the sale of intoxicating liquors, or soliciting orders, or the making of contracts for the sale of such liquors, and also holding that such an ordinance was a valid exercise of the police power granted to the cities of this state.

In Re Kidd, 5 Cal. App. 159, 89 Pac. 987, the ordinance in relation to the sale of intoxicating liquors in the city of Riverside prohibited the sale of all intoxicating liquors by any person except that the city council might issue a permit to a keeper of hotels having 40 or more bedrooms. This ordinance was upheld, the court expressing the view that the constitutional requirement with reference to the uniformity in operation of all laws of a general nature has no application to ordinances enacted in pursuance of the legitimate exercise of the police power, and only when it is manifest that there is an unjust discrimination do courts interfere.

In Ex parte Hansen, 158 Cal. 494, 111 Pac. 528, the ordinance involved provided that it was unlawful for any person within the county and outside municipalities therein to sell, furnish, distribute, or give away intoxicating drinks of any kind, except for certain purposes. The offense charged against the petitioner was the purchasing, receiving, and accepting a particular intoxicating drink, and furnishing, selling, distributing, and delivering the same. The ordinance was upheld, and the petitioner remanded.

In Re Coombs, 169 Cal. 484, 147 Pac. 131, an ordinance of the city of Los Angeles providing, among other things, that "no person shall sell any intoxicating liquor in any quantity whatsoever, except at a fixed place of business, or without first obtaining a license therefor under the provisions of the ordinance," was upheld, the court adding that:

> "The power to regulate involves a wide discretion in the selection of the classes of dealers in intoxicants who should be subjected to regulation. For example, an ordinance is valid which gives the right to sell liquors only by keepers of hotels, and permits the serving of intoxicants only in the dining rooms of such hotels and as parts of regular meals. Indeed, the governing power which may prohibit a thing altogether may impose even arbitrary restrictions upon its existence."

This case also holds ordinances of the character involved in this proceeding to be legitimate exercises of the police powers vested in the city councils.

[3] In the case at bar, there is no unjust or invidious discrimination. The petitioner has no inherent right to sell intoxicating liquor, whether in one or many sales, and he does not show himself to be one of the excepted classes. The power to regulate must necessarily include the power to determine whether the privilege of selling intoxicating liquors may be exercised, and also the requirements of the persons who may be granted the privilege of making sales.

The ordinance before the court is, by its express terms, declared to be one for regulating the sale of spirituous liquors; it is prohibitive and penal in its terms, and explicitly makes it unlawful for any one to sell intoxicating liquors in any quantity whatsoever, unless he comes within one of the excepted classes, and has first obtained a license to make the sale. The fact that the ordinance contains no provision licensing single sales of intoxicating liquors does not alter, change, or affect its penal prohibitive features. The authorities herein reviewed clearly establish the power of the city council to make a single sale by a person not having a license and not within the excepting clauses a misdemeanor, and that is exactly what has been done by the ordinance under review. Nor do any of the provisions of the ordinance of the city of Sacramento, exacting the payment of a certain sum per annum before any license to engage in the business of selling liquors can be granted, change the character of the ordinance as being a police regulation.

As we have shown, the city council of the city of Sacramento possesses the undoubted right to regulate, in any manner that it sees fit, and this regulation may be as well by exacting licenses, and penalizing sales without licenses, as by any prohibitory measures. If that is the purpose and the plain intent of the ordinance, it is not to be set aside on the plea that the city may derive a revenue therefrom, nor because the method of regulating may not be efficient. The prohibition or penalizing of single sales of intoxicating liquor must be held to come within the necessary police powers of cities and counties, and its exercise just and reasonable, and a measure tending to minimize the evils flowing from the traffic, confining it to definite and licensed places where peace officers may always exercise supervision.

It follows from what has been said that the writ must be denied, and the petitioner remanded. It is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

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32 Cal. App. 495

BRYANT et al. v. BOARD OF SUP'RS OF ORANGE COUNTY et al. (Civ. 2184.)

(District Court of Appeal, Second District, California. Jan. 11, 1917.)

1. CERTIORARI 🔑21 — REMEDY — ACTS OF QUASI JUDICIAL BODY.

The proceeding by writ of review is under appropriate circumstances the proper means of relief against void proceedings for the organization of a corporation for public purposes where the method of its creation is prescribed by statute and where a local board is empowered to create it upon certain conditions and the ascertainment of certain facts after hearing held upon notice to interested parties; as in ascertaining the required facts and determining that they exist, the board's action is of a judicial character, and as it sufficiently comes within the purview of the writ if such proceedings are of a judicial nature and are exercised by a quasi judicial body.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 33, 34.]

2. CERTIORARI 🔑50—RETURN—EVIDENCE.

On a petition for a writ to review proceedings of a county board of supervisors on a petition for the formation of a storm water district under act approved March 13, 1909 (St. 1909, p. 339), as amended by St. 1913, p. 504, resulting in the creation of such district, the clerk of the board in making the return required of him under Code Civ. Proc. § 1070, might certify to the fact that no evidence was received, which fact may be then considered by the court, and, although the law does not provide for taking down or preserving the evidence in such proceedings by the board, it may be required to make as full a return as it is possible for it to make of the facts shown in evidence before it, where the question raised goes to the fact of its jurisdiction to act upon the petition.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 131.]

3. LEVEES 🔑6 — STORM WATER DISTRICT — CREATION—JURISDICTION OF BOARD OF SUPERVISORS—OWNERSHIP OF LAND.

In a proceeding on petition to a county board of supervisors for the formation of a storm water district under St. 1909, p. 339, §§ 1, 2, as amended by St. 1913, pp. 504, 505, the board's jurisdiction to act upon a petition of those representing themselves to be owners of land within the proposed district depends upon the fact that they are such owners, rather than upon the act of receiving ex parte testimony at a time when no hearing upon notice under section 1 could be had; so that where the jurisdictional fact of ownership existed when the petition was filed, the board's failure to receive testimony prior to passing its resolution of intention was not a sufficient reason for holding its proceedings in establishing the district void, though it would be better practice for the board to require sworn evidence of such fact before passing its resolution of intention.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 16.]

4. LEVEES 🔑6 — STORM WATER DISTRICT — PROCEEDINGS TO ESTABLISH—NOTICE.

Under the Storm Water District Act (St. 1909, p. 339, as amended by St. 1913, pp. 504, 505), section 2 of which originally required the clerk of court of the board of supervisors to mail copies of the specified notice to each owner of land in the proposed district whose name appeared as such on the last completed assessment roll, the omission of the word "completed" from the amended section was immaterial, as an uncompleted assessment roll is not an assessment roll at all; and the sending, on June 27, 1916, of copies of the notice of intention to form the district under the resolution of intention to each owner whose name appeared as such on the last completed assessment roll of the county when under Pol. Code, § 3672, there could not be a completed assessment roll for 1916 until the first Monday in July, was not a sending of notices to those whose names appeared as owners of land in the district on the "last completed assessment roll," and was not the giving of the required notice, so that the board was without power to proceed further in the formation of the proposed district until the statutory notice had been given.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 16.]

Petition for a writ of review by Susanna P. Bryant and others against the Board of Supervisors of the County of Orange, State of California, and T. B. Talbert and others, constituting such board, and W. B. Williams, County Clerk and ex officio Clerk of the Board. Demurrer to petition overruled, and resolution of Board declaring the formation of a storm water district annulled and set aside.

Gibson, Dunn & Crutcher, Wm. J. O'Brien and E. W. Freeman, all of Los Angeles, for petitioners. L. A. West, Dist. Atty., A. E. Koepsel and Walter Eden, Deputy Dist. Attys., all of Santa Ana (Homer G. Ames, of Anaheim, of counsel), for respondents.

CONREY, P. J. Certiorari. On the 7th day of June, 1916, there was presented to the board of supervisors of Orange county a petition for the formation of a storm water district under the provisions of an act entitled, "An act to provide for the formation, organization and government of storm water districts, for the purpose of protecting the land therein from damage from storm water and from the waters of any innavigable stream, water course, canyon or wash, for the construction of the necessary works of protection by said district, and for the levying of taxes and assessments to pay for the cost of constructing, repairing and maintaining such improvements," approved March 13, 1909 (Stats. 1909, p. 339); such district to be known as and called "United Storm Water District of Orange County." Such proceedings were had that thereafter, on the 2d day of August, 1916, the board of supervisors passed a resolution whereby it purported to form and create said storm water district. On the 8th day of September the petitioners herein filed their petition for a writ of review, and the writ was issued. Return having been duly made by the respondents, who at the same time filed a demurrer to the petition, the matter has been argued and submitted at the same time upon the demurrer and the return.

[1] Respondents claim that the proceedings sought to be reviewed cannot be examined into under a writ of review, because it is not made to appear that the board of supervisors has exceeded its jurisdiction in the exercise of a judicial function, and because the petitioners have a plain, speedy, and adequate remedy by the writ of quo warranto. This contention cannot be sustained. The proceeding by writ of review is, under appropriate circumstances, the correct means of relief against void proceedings for the organization of a corporation for public purposes, where the method of creation of such corporation is prescribed by statute, and a local board is empowered to create the corporation upon certain conditions and upon the ascertainment of certain facts by such board, after a hearing held after notice to the parties interested. In ascertaining the required facts and determining that they exist, the action of the board is of a judicial character. And it sufficiently comes within the purview of the writ if such proceedings are of a judicial nature and are exercised by a quasi judicial body. Imperial Water Co. No. 1 v. Board of Supervisors of Imperial County, 162 Cal. 14, 120 Pac. 780. The statute relating to the creation of storm water districts is similar in character to the statute providing for the creation of irrigation districts, referred to in the case above cited. The present proceeding in this court has been commenced promptly, in order to prevent at its inception the organization of the district. The case is therefore different from those where de facto corporations are transacting business as existing organizations, and where, on account of the situation thus existing, it has been held that quo warranto was the exclusive remedy. Jaques v. Board of Supervisors, 24 Cal. App. 381, 141 Pac. 404; Keech v. Joplin, 157 Cal. 1, at page 14, 106 Pac. 222.

The petition of June 7, 1916, was signed by 31 persons, of whom it was recited in the petition that they were "owners of land whose names appear as such upon the last assessment roll of the county of Orange, state of California," within a district of land in Orange county described in the petition and which those petitioners desired to have formed into a storm water district. Attached to that petition was a certificate, dated June 7, 1916, signed by the assessor of Orange county, by his chief deputy, certifying "that more than ten of the foregoing names appear on the assessment roll of said Orange county for the year 1915–16 as owners of property within the district above described." Immediately preceding the foregoing certificate was a separate certificate by the same officer that "I hereby certify that ten or more of the above signers are taxpayers of Orange county." It is stipulated that no evidence was taken or received by the board of supervisors as to the genuineness of the signatures to any petition filed with it for the formation of said district prior to the adoption (on the 7th day of June, 1916) of the resolution of intention to form said district, nor was any evidence taken or received by said board, prior to the adoption of said resolution, that the persons whose names were subscribed to any petition were the owners of land within said proposed district, other than the above-mentioned certificates of the county assessor. It is further stipulated that on the 25th day of July, 1916, the board of supervisors received evidence showing the genuineness of said signatures, and that more than ten of said signers were owners of land in said district, as shown by the assessment rolls of 1915–16, and thereafter appeared on the assessment rolls of 1916–17; but that at the same time objection was made (though not by the petitioners herein) that said board had not at that time jurisdiction to organize said district, because of the fact that prior to the adoption of the resolution of intention to form said district no proof was made to it that the signatures attached to the petition were the genuine signatures of the persons whose names were signed to said petition.

Section 1 of the Storm Water District Act of 1909, as amended in 1913 (Stats. 1913, p. 504), reads as follows:

> "Storm water districts may be formed under the provisions of this act for the purpose of protecting the lands in such districts from damage from storm water, and from the waters from any innavigable stream, water course, canyon, or wash (or such districts may be formed for the purpose of spreading, conserving, storing, retaining or causing to percolate into the soil within such district any or all such waters). When ten or more owners of land whose names appear as such upon the last assessment roll, in any district of land which lies in one body and is liable to damage from storm water or from the waters of any innavigable stream, canyon or wash (or when such owners desire to spread, conserve, store, retain, or cause to percolate into the soil within such district any or all of such waters), shall present a petition to the board of supervisors of the county in which said land lies, or if the same lies in more than

one county, then to the board of supervisors of the county in which the greater area of such land lies, setting forth the exterior boundaries of said district and asking that the district so described be formed into a storm water district under the provisions of this act, the said board of supervisors shall pass a resolution declaring their intention to form and organize said portion of said county or counties into a storm water district for the purpose of protecting the lands therein from damage from storm water, and from the waters of any innavigable stream, canyon or wash (or for the purpose of spreading, conserving, storing, retaining or causing to percolate into the soil within such district any or all of such waters), and describing the exterior boundaries of the district. Said resolution shall fix a time and place for the hearing of the matter, not less than thirty days after the passage thereof, and direct the clerk of said board to publish a notice of the intention of the board of supervisors to form such storm water district, and of the time and place fixed for the hearing, and shall designate some newspaper of general circulation, published and circulated in said proposed storm water district, or if there is no newspaper so published and circulated, then some newspaper of general circulation, published and circulated in each county in which any part of said proposed district is situated in which said notice is to be published."

The foregoing quotation does not differ from the same section as enacted in 1909, except that the words which we have placed in parentheses were added in the amendment of 1913.

Section 2 of the same act, as amended in 1913 (Stats. 1913, p. 505), reads as follows:

"Thereupon said clerk shall cause to be published in the newspaper or newspapers so designated, for a period of twenty days before the date fixed for the hearing, a notice, which shall be headed 'Notice of intention of the board of supervisors to form a storm water district.' Said notice shall set forth the fact of the passage of such resolution with the date thereof, the boundaries of the proposed district, and the time and place for the hearing, and shall state that it is proposed to assess all property embraced in said proposed storm water district, for the purpose of paying the damages, costs and expenses of constructing and repairing such dikes, levees, ditches, canals (reservoirs, shafts), and other improvements as may be necessary to protect the land in said district from damage from storm water and from waters of any innavigable stream, canyon or wash (or to spread, conserve, store, retain or cause to percolate into the soil within such district any or all of such waters), and the necessary expense of maintaining said district, and shall refer to the resolution for further particulars. Said clerk shall send a copy of said notice by registered mail, postage prepaid, to each owner of land in the proposed district whose name appears as such on the last assessment roll of the county or counties in which said proposed district lies, addressed to such owner at his address given on such assessment roll, or if no address is given, then at his last known address, or if it be not known then at the county seat of the county in which his land lies. Said clerk shall make and file in his office an affidavit of such mailing, showing the names and addresses of the persons to whom such notices were sent, which shall be prima facie evidence that such notices were mailed as herein required."

The foregoing quotation is identical with the same section as enacted in 1909, except that the words which we have placed in parentheses were added in the amendment of 1913; and except that where the amended section uses the words "whose name appears as such on the last assessment roll," the original section used the words "whose name appears as such on the last completed assessment roll"; and except that in the last clause of the section the word "such" has been substituted for the word "said" in the phrase "that such notices were mailed."

[2] In making the stipulation to which we have referred, it was further agreed that "such parts of this stipulation as the court shall decide are competent shall be deemed and taken as the return of the respondents to said writ of review"; but it was likewise agreed that in making the stipulation the respondents did not admit that any of the facts thus admitted were material, competent, or relevant. The respondents now contend that the fact that the board did not receive any evidence prior to passing its resolution of June 7, 1916, should not be considered, because it is a fact outside the record, in this, that it is a fact which could not be set forth in the return, since the board had no record of that fact. In support of this proposition we are reminded that the law does not provide for taking down or preserving the evidence in a proceeding of this kind before the board of supervisors, nor for the settlement of a bill of exceptions; and we are referred to Central Pac. R. R. Co. v. Placer Co., 34 Cal. 352, and Johnston v. Board of Supervisors, 104 Cal. 390, 37 Pac. 1046, as cases in point. In those cases, however, we observe that the only disputed question was as to the sufficiency of evidence produced before the board of supervisors to authorize it to determine and act in a specified manner; the record clearly showing that the board did have jurisdiction to hear and determine the matter concerning which it was acting. As to such cases it was held that in a certiorari proceeding the court would not receive other evidence than the usual record to show what the evidence was which had been received by the board. It was said in the first of those decisions that some convenient mode might have been adopted by the board for the preservation and authentication of the evidence, when it was desired to have the proceedings reviewed; the inference being that in that event the evidence thus shown and made part of the return might have been considered by the court. That being so, we think that the clerk of the board in making the return required of him (Code Civ. Proc. § 1070) may certify to the fact that no evidence was received, and that this fact may then be considered by the court. There is another and even more forcible reason why in a case like the present the board might be required to make as full a return as it is possible for it to make of the facts shown in evidence before it, when we take into consideration the nature of the question presented; for here the question goes to the

very fact of jurisdiction of the board to act at all upon the petition for the formation of the storm water district. "An exception to the rule that the sufficiency of the evidence will not be reviewed is made when the question is whether jurisdictional facts were or were not proved. This exception arises out of the most important office and function of the writ—the keeping of inferior courts and tribunals within proper bounds. If the decision of the inferior tribunal as to the sufficiency of the evidence to establish jurisdictional facts were not reviewable, the writ of certiorari would be of no avail as a remedy against an assumption of jurisdiction. And for the purpose of enabling the reviewing court to determine whether jurisdictional facts were established, it will require a return to be made of the evidence upon which such facts are based." Stumpf v. Board of Supervisors, 131 Cal. 364, 367, 63 Pac. 663, 664 [82 Am. St. Rep. 350]. Upon certiorari, though the inferior tribunal is required to certify only matters of record, yet if the jurisdictional facts do not appear of record it must certify "not only what is technically denominated the record, but such facts, or the evidence of them, as may be necessary to determine whatever questions as to the jurisdiction of the inferior tribunal may be involved." Blair v. Hamilton, 32 Cal. 49; Golden Gate Title Co. v. Superior Court, 159 Cal. 474, 481, 114 Pac. 978. In view of the law as thus established, we shall, in determining this case, give credit to the facts stipulated, and overrule the objection.

[3] While admitting that in fact more than ten of the signers of the petition of June 7, 1916, were owners of land in the proposed storm water district, whose names appeared as such on the assessment roll of 1915–16 (and thereafter likewise appeared on the assessment roll of 1916–17), the petitioners herein contend that since the board of supervisors passed its resolution of intention of June 7th without first receiving evidence to prove these facts, therefore the board was without jurisdiction to pass that resolution. This contention involves the proposition that the board's jurisdiction depended not merely upon the actual existence of certain jurisdictional facts, but also upon the production to the board of some formal evidence of those facts. And it involves the further proposition that the alleged defect of jurisdiction (or of evidence of jurisdictional facts), thus caused, could not be remedied by evidence which the board received at the time of hearing of the application after notice published, at which time it was proved that the necessary number of signers of the petition were landowners as required by the statute.

We are of opinion that the jurisdiction of the board to act, in the first step of its proceedings, upon the petition of those who represented themselves to be landowners of land within the proposed district, depended upon the fact that they were such landowners, rather than upon the act of receiving ex parte testimony at a time when no hearing upon notice could occur. The case differs from that of People v. Town of Linden, 107 Cal. 94, 40 Pac. 115. In that case the statute defining the proceedings for organization of the proposed corporation provided that the petition should be accompanied by affidavits which would be prima facie evidence of the requisite number of signers; and it is stated in the decision not only that the affidavit failed to state the necessary facts, but also that there never was any evidence of the genuineness of the signatures offered before the board of supervisors, and that the board never found or declared that such petition had been in fact signed by the necessary number of qualified petitioners. But in this case, it appears that after the notice required by section 1 of the statute had been given, and when the time of hearing thereby provided had arrived, the same questions of fact as to ownership of land by the petitioners, which necessarily came before the board as matters essential to the right of the board to "declare such storm water district formed" (section 4 of Storm Water District Act of 1909), were heard and determined. The return herein shows that at that time, July 25, 1916, evidence was received and the fact of such ownership of land by the petitioners of June 7th was duly established. It therefore duly appears by the record before us that this jurisdictional fact did exist when the petition of June 7th was filed. This being so, we think that the omission of the board to receive testimony prior to passing its resolution of intention of June 7th does not establish a sufficient reason for holding that the board's proceedings were void. In arriving at this conclusion we are not attaching any importance whatever to the certificates of the county assessor which were attached to the landowners' petition. Neither do we deny that it would be better practice for a board of supervisors to require sworn evidence of some kind, of such facts, before passing its resolution of intention in proceedings of that kind.

[4] As we have shown, section 2 of the Storm Water District Act, as adopted in 1909, requires the clerk of the board of supervisors to mail copies of the specified notice to each owner of land in the proposed district "whose name appears as such on the last completed assessment roll," etc.; whereas the same section as amended in 1913 omits the word "completed" from the clause just now quoted. This verbal change made no difference in the meaning of the clause. An uncompleted assessment roll is not an assessment roll at all. In the proceedings here under review, as the return herein shows, copies of the notice of intention to form the United Storm Water District of

Orange County under the resolution of intention passed June 7, 1916, were mailed to sundry persons by the clerk of the board on the 27th day of June, 1916. On that day the clerk duly made his affidavit of mailing such notices and therein stated that he had sent them by registered mail, postage prepaid, to each owner of land in the proposed storm water district "whose name appears as such on the last completed assessment roll of said county of Orange." The time of the hearing before the board as provided in the notice was the 19th day of July, 1916. The hearing at that time was duly adjourned to the 25th day of July. On that date sundry objections, which had been filed, were presented. One of the objections urged at that time, and also now insisted upon, was that copies of the notice had been sent to only a portion of and not to each owner of land in the proposed district whose name appeared as such on the last assessment roll of the county. The objections were heard and considered by the board, which thereafter overruled the objections by resolution wherein it was recited that the clerk did send a copy of said notice by registered mail, etc., "to each owner of land in the proposed district whose name appears as such on the last assessment roll of said county of Orange, * * * as will more fully appear by the affidavit of J. M. Backs on file in the office of the county clerk of the county of Orange." A list of the persons to whom notices were sent is attached to the affidavit of J. M. Backs, the clerk of the board. The assessment roll of the county for the year 1916–17 could not legally have been completed so as to become an assessment roll, under the provision of the Political Code, as early as the 27th day of June. The board of supervisors cannot hold its meeting to examine the assessment book and equalize the assessment of property until the first Monday in July (Pol. Code, § 3672); and in contemplation of law there cannot be a completed assessment roll until the business of equalization is completed. The board may order the addition of new items to the assessment book. (Pol. Code, § 3681). The affidavit of Mr. Backs, therefore, apparently referred to the "assessment roll" of 1915–16.

But by the stipulation to which we have referred it is admitted (subject to respondents' objection that the facts are neither material, competent, or relevant, and shall not be considered unless this court shall hold that they are admissible) that it appeared from the evidence taken before the board of supervisors at the hearing before it that the clerk had mailed the notice only to persons whose names appeared as owners of land upon a partially completed assessment roll of 1916–17 and the residue from that portion of the statements of taxpayers, made and filed with the county assessor of said county between the 6th day of March, 1916, and the 27th day of June, 1916, which had not at that time been entered upon said roll, or upon the reports of the field deputies of said county assessor made and filed with said county assessor between said dates; that said assessment roll had at that time been mostly completed and there were but a few of said reports of field deputies which had not been entered on the book; that on the 27th day of June, 1916, no assessment roll for the fiscal year of 1916–17 had been certified by the county assessor of said county, or delivered by said county assessor to the board of equalization of said county. But that said reports of field deputies of the assessor were, on the 27th day of June, 1916, all in the assessor's office, and no change was afterwards made in said reports, and the data shown by said reports were afterwards put on the assessor's books of 1916–17; so that the names of landowners, appearing on the assessment roll of 1916–17, as the same was certified and filed with the board of equalization on July 3, 1916, were the same as appeared by said reports of said field deputies from which said mailing list was prepared. That said clerk in mailing the said notices did not refer to or use the assessment roll of 1915–16; that the names and addresses shown by the said affidavit of the clerk are the names and addresses as they now (date of stipulation being September 26, 1916) appear upon said assessment roll of 1916–17; but it does not contain the names of all owners of land within said proposed district whose names appear as such upon the assessment roll of 1915–16. Further facts are stipulated showing that the assessment was delivered to the board of equalization on July 3d as required by law, and that the equalization proceeded to completion in due form.

For the same reasons and upon the same authorities which have led us to accept for use herein the stipulated fact that no evidence was received by the board prior to the passing of its resolution of intention, we also accept, as part of the return, the foregoing agreed facts, whereby it appears that the clerk did not mail copies of the notice of the subsequent hearing to all owners of land within the proposed district whose names appeared as such upon the last assessment roll, and to whom the statute required that such notices should be sent. That the board of supervisors was without power to proceed further in the formation of the proposed district until notice had been given to all persons whom the law has pointed out as interested parties entitled to such notice is, of course, to be assumed without argument.

The petitioners herein further contend that the notice as published and mailed by the clerk is not in the form and does not contain the matters required by the statute; also, that the petition, notice, and resolution of intention were all fatally defective in that the attempted description of the exterior boundaries of the proposed district is so ambiguous on its face that it is impossible to trace the proposed boundaries or identify the land to be included in the district. It appears from the record that the notice as given followed the form prescribed in section 2 of the Storm Water District Act as enacted in 1909, and omits all of the additional matters required in such notice under said section 2 as amended in 1913. It is not necessary for us at this time to enter into a discussion of the effect of these omissions upon the question of sufficiency of the notice. Neither is it necessary to examine into the alleged defects in description of the boundaries of the proposed district. Since the judgment herein must go in favor of the petitioners by reason of the failure of the clerk of the board of supervisors to give notice to some of the persons entitled thereto, it is fair to assume that if the attempt to form the storm water district shall be prosecuted any further, care will be taken to frame the petition and the notice in the required statutory form and to avoid the alleged defects in description of boundaries.

For the reasons herein stated, the demurrer is overruled, and it is ordered that the resolution of the board of supervisors of Orange county declaring the formation of the United Storm Water District of Orange County be and the same hereby is annulled and set aside.

We concur: JAMES, J.; SHAW, J.

(32 Cal. App. 286)

WOLF et al. v. GALL et al. (Civ. 1940.)

(District Court of Appeal, First District, California. Dec. 9, 1916. Rehearing Denied Jan. 8, 1917. Denied by Supreme Court Feb. 7, 1917.)

1. MARRIAGE 🔑54—VALIDITY—ANNULMENT.

Under Civ. Code, § 82, subd. 3, declaring that a marriage may be annulled if either party to it was of unsound mind when entering into it, such marriage is binding upon the parties and upon all the world, until such annulment is declared.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 93–103, 105, 106, 109.]

2. COURTS 🔑8, 9—STATUTES—EXTRATERRITORIAL EFFECT.

The laws of one state or country have no extraterritorial effect.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 18, 19.]

3. BASTARDS 🔑96—WHAT LAW GOVERNS.

The courts of this state in questions of succession will apply the statutes of the state in determining the status of the claimant to the succession, and if claimant shows that he is entitled thereunder to take as a legitimate child it is sufficient, and the fact that by the law of his own country he is illegitimate is immaterial.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. § 247.]

4. BASTARDS 🔑105—RIGHT TO INHERITANCE—LINEAL KINDRED—STATUTES.

Civ. Code, § 215, provides that an illegitimate child becomes legitimate by the subsequent marriage of its parents, and section 230 provides that when the father of an illegitimate child publicly acknowledges it as his own, etc., the child is thereupon deemed for all purposes legitimate from its birth. Section 1387 provides that every illegitimate child is an heir of the person acknowledging him to be his child and is an heir of his mother, but that he does not represent his father or mother by inheriting any part of the estate of his or her kindred, lineal or collateral, unless before its death his parents shall have married, and his father thereafter acknowledges or adopts him. Section 1386 confers rights of inheritance upon legitimate children. *Held*, that section 1387 does not apply to children legitimated under sections 215 and 230, and that such children inherited as prescribed by section 1386 by right of representation of their deceased father their part of their grandmother's estate.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 263, 264.]

5. BASTARDS 🔑100—RIGHT OF INHERITANCE—COMMON LAW.

At common law a child born out of wedlock was filius nullius and had no heritable blood, meaning no more than that certain legal disabilities were attached to his status, one of which was his lack of capacity to inherit from his father or his parent's kindred.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 263, 264.]

6. BASTARDS 🔑105—DISABILITIES—INHERITANCE—STATUTE.

The Legislature can remove the disabilities of illegitimate children as the right of inheritance of both legitimate and illegitimate children alike is a creature of law and can be changed at any time and to any extent; and the Legislature, granting legitimacy in general terms, can perpetuate former disabilities or create new ones, or discriminate against persons legitimated by statute.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 263, 264.]

7. BASTARDS 🔑105—RIGHT OF INHERITANCE—STATUTES—CONFLICTING PROVISIONS.

There is no conflict between Civ. Code, § 1387, giving certain restricted rights of inheritance to illegitimates as such, and the later provision of section 230, conferring legitimacy, even though the same conditions are made sufficient to confer legitimacy which formerly only gave restricted rights of inheritance; since where there are two conflicting sections in a Code or other compilation that section prevails which is derived from a source which may be considered as the latest expression of the lawmaking power, without regard to the relative position of such sections in the Code.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 263, 264.]

8. DESCENT AND DISTRIBUTION 🔑26—CONSTRUCTION OF STATUTES — "CHILDREN"—"LAWFUL ISSUE."

The words "children" and "lawful issue," when found in statutes of succession, are not to be confined to their strict common-law signification.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 76, 77.

For other definitions, see Words and Phrases, First and Second Series, Children; Lawful Issue.]

9. Bastards 🔑11—Legitimation—Statutes—Minors.

Civ. Code, § 215, providing that an illegitimate child becomes legitimate by the subsequent marriage of its parents, and section 230, providing that when the father of an illegitimate child makes public acknowledgment, etc., such child is thereupon deemed for all purposes legitimate from its birth, are not confined in their application to children who have not attained their majority.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. § 13.]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Arturo Wolf and Maria Julia Wolf against Charles Funkenstein Gall and others. Judgment for plaintiffs, and from a part of the judgment defendants appeal. Part of judgment appealed from affirmed.

Rehearing denied by Supreme Court 163 Pac. 350.

See, also, 162 Pac. 115.

J. R. Pringle, Edgar D. Peixotto, and Leon Samuels, all of San Francisco, for appellants. George Lezinsky and Theodore A. Bell, both of San Francisco, for respondents.

KERRIGAN, J. Arturo Wolf and Maria Julia Wolf, the respondents in this case, are the children born out of wedlock of Newman Wolf and Carmen Gonzales, and seek to have awarded to them a share in the property described in the complaint as heirs at law of Tobe Funkenstein, deceased, their grandmother, by right of representation of their deceased father, it being the claim of respondents that the subsequent marriage of their parents legitimated them by virtue of the provisions of section 215 of the Civil Code, and that their adoption by their father into his family in connection with such marriage also had for its effect their legitimation under section 230 of the same Code. The court, among other things, decreed that the respondents are heirs at law of said Tobe Funkenstein, and entitled to succeed to a part of her estate, and it is from this portion of the judgment that the defendants have appealed.

The judgment is declared to be erroneous for various reasons, among them being the alleged failure of the respondents to prove that they were the children of Newman Wolf, that the marriage ceremony between Wolf and their mother was in fact a marriage; the contention that there was no acknowledgment of respondents as his children by Newman Wolf, and principally for the reason that even conceding the findings of the trial court as to these matters to be correct, the respondents are debarred by the provisions of section 1387 of the Civil Code from inheriting any part of the estate of their grandmother.

Notwithstanding the argument of the appellants to the contrary, we are satisfied after a careful review of the record that the evidence sustains the view that Newman Wolf and Carmen Gonzales were the parents of the respondents; that they were duly married on July 21, 1913, both of the respondents at that time having attained the age of majority; and that if any acknowledgment of the respondent was required it was sufficiently established.

[1] Equally without merit is the contention of the appellants that the marriage of Newman Wolf and Carmen Gonzales was a nullity by reason of Wolf's mental condition at the time of its celebration. The evidence does not show him to have been entirely without understanding. A similar question arose in the case of Estate of Gregorson, 160 Cal. 21, 116 Pac. 60, L. R. A. 1916C, 697, Ann. Cas. 1912D, 1124, and it was there held that while subdivision 3 of section 82 of the Civil Code, declaring that a marriage may be annulled if either party to it was of unsound mind at the time of entering into it, it was binding upon the parties and upon all the world until such annulment was declared.

[2, 3] Nor do we think that the fact that Wolf was an alien and domiciled outside of California renders ineffectual the acts claimed to result in the legitimation of respondents. While it is generally true that the laws of one state or country have no extraterritorial effect, on the other hand, when the status of a person is under consideration before the courts of this state in questions of succession, they will apply our own statutes in determining the status of the claimant to the succession; and if the claimant shows that by applying our law he is entitled to take as a legitimate child, it is sufficient, and the fact that by the law of his own country he is not legitimate is immaterial. In the case of Blythe v. Ayres, 96 Cal. 532, 564, 31 Pac. 915, 19 L. R. A. 40, the plaintiff was an illegitimate alien and at all times domiciled beyond the jurisdiction of California, and claimed to succeed to the estate of her intestate father by reason of having become legitimated by acknowledgment on his part in accordance with the provisions of section 230 of the Civil Code. In upholding her claim the court said:

> "Our statute, conjoined with principles of international law, would have changed her bastardy to legitimacy in the world at large; and regardless of international law, and regardless of all law of foreign countries, our statute law alone would have made her legitimate in the world at large *whenever and however that question should present itself in the courts of California.*"

[4-6] This brings us to the principal contention of the appellants in the case and the one argued at length by them, viz. that in any event the respondents, being born out of lawful wedlock, are not capable of inheriting any part of their grandmother's estate, for the reason that to so inherit they must take by right of representation of their father,

and that by section 1387 of the Civil Code the right given to illegitimates of succession to the estate of lineal or collateral kindred of their parents is expressly limited to the estates of their brothers and sisters.

The question of the rights of succession of a child legitimated by statute to succeed to his grandmother's estate is new in this state, and for that reason is one of more than ordinary interest. Section 1387, referred to above, reads as follows:

> "Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; *in which case such child and all the legitimate children are considered brothers and sisters, and on the death of either of them, intestate, and without issue, the others inherit his estate, and are heirs, as hereinbefore provided, in like manner as if all the children had been legitimate; saving to the father and mother, respectively, their rights in the estates of all the children in like manner as if all had been legitimate.*"

In the brief of appellants there is to be found an exhaustive and able analysis clause by clause of this section, by which is demonstrated beyond doubt that the part of the section which we have italicized gives only a limited right of succession by representation, to wit, the right to succeed to the estate of deceased brothers and sisters, and does not confer the right to succeed to the estate of a grandmother. And it is the contention of appellants that legitimated children come within the terms of this section of the Code, and that their rights of succession are governed by it.

We cannot agree with the view that the scope of section 1387 extends to legitimated children. We are of the opinion that this section has nothing to do with the rights of children who, though born out of wedlock, have become legitimated by compliance with section 215 or section 230 of the Civil Code. Those two sections read respectively as follows:

> "Sec. 215. A child born before wedlock becomes legitimate by the subsequent marriage of its parents."
>
> "Sec. 230. The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption."

We think it quite clear that compliance with the terms of either one of these sections makes a child born out of lawful wedlock legitimate; that, as stated in section 230, he is legitimate for all purposes; and that, as a legitimate child, his rights of inheritance are governed by section 1386 of the Civil Code which confers rights of inheritance upon legitimate children.

At common law a child born out of wedlock was said to be filius nullius, and to have no heritable blood. These expressions are of course figurative, and meant no more than that certain legal disabilities were attached to his status, one of which was his lack of capacity to inherit from his father or his parents' kindred. There can be no doubt that the Legislature could remove those disabilities. The right of inheritance of legitimate and illegitimate children alike is a creature of law, and can be changed by the Legislature at any time and to any extent. When the law provides means for making legitimate a child born out of wedlock, it changes the status of that child, and in the absence of special provision to the contrary, he thenceforth comes within the provisions of the laws relating to legitimate children. Thereafter a child so legitimated is included in the designation "child" or "children" when those words refer to a child or children legitimately born; and he is no longer included in the designation "illegitimate child" when that term is used in a statute, unless it is obvious that such words are intended by the Legislature to include one who, though now legitimate, was formerly illegitimate. We think these propositions are self-evident. Of what avail is it to have legitimated a child if he still labors under the disabilities of his former condition? If he has not acquired the rights by law given to, and become subject to the duties imposed upon, his new condition, there has been no change at all, for it is obvious that the fact that he was born out of wedlock has not been changed and never can be. If any stigma attaches to that condition it still remains, and all that the law can do—and all it seeks to do—is to remove the disabilities attached to the condition. We freely grant that the Legislature can limit the extent to which the disabilities of an illegitimate child are removed; that although it has granted legitimacy in general terms, it can still perpetuate former disabilities or create new ones; so that, in a statute granting rights of succession to the property of intestates a discrimination may still be made against persons legitimated by statute. It is the claim of appellants that this is in fact what has been done in section 1387 by that part of the section which we have italicized. A reading of that section without reference to its history lends much color to this contention, but a consideration of that history will make it apparent that the section deals only with the rights of children born out of wedlock who have never been legitimated. Its provisions first appeared in the law of this state in a statute passed in 1850 (Stats. 1850, p. 219), where, as section 2 thereof, we find it almost word for word. At that time there was no method known to our law of legitimating a child born out of wedlock; and the provisions contained in said section 2—and which are relied upon by appellants as limiting the right of succession of legitimated children—had only as their effect to confer upon illegitimates the limited right of succession there given, and did not purport to change their condition of illegitimacy. They remained illegitimate, and received those limited rights of succession as such. This statute of 1850 remained in force until March 31, 1870, when it was repealed; but upon the adoption of the Civil Code, taking effect on January 1, 1873, we find section 2 of said statute reappearing almost word for word as section 1387 of said Code. Being merely a re-enactment of an old statute it must, upon familiar principles, be given the same meaning and effect as it originally had. Upon its original enactment it merely conferred certain limited rights of inheritance upon illegitimates complying with certain conditions, and did not purport to make them legitimate or to remove their disabilities in toto. Simultaneously with section 1387 there appeared in the Civil Code, section 230, being itself a re-enactment of section 9 of an act of the Legislature approved March 31, 1870. Stats. 1869–70, p. 530. Said section 9 had provided for the first time a method for making legitimate by law children born out of wedlock. Section 230 declares that compliance with its provisions makes the child who was theretofore illegitimate legitimate for all purposes. Being legitimate for all purposes it became in the eyes of the law a legitimate child with all the rights conferred by law upon legitimate children, including that of inheritance under the provisions of section 1386 of that Code. The legislation contained in section 9 of the act of March 31, 1870, and re-enacted as section 230 of the Civil Code, was a radical departure from existing law. It may be said to have inaugurated a new era in the rights which society accorded to children born out of wedlock. A note to the section (Civ. Code, Deering, 1915) states that it was based on Field's draft, New York Civil Code, section 116. Stats. 1869–70, p. 531, § 9. Speaking of it our Code commissioners said:

> "This provision, like the rest, is new, but is so manifestly just, and the present state of the law so unmerciful to innocent children, that it is presumed that no objection will be made to the change. * * *"

At the session of the Legislature following the adoption of the Codes section 215 of the Civil Code was enacted. It was but the incorporation into the Code of a provision of law which had existed as section 8 of the Act approved March 31, 1870, already mentioned. The terms of that section are set forth above; and it will be seen that it provided that the mere marriage of the parents of an illegitimate child legitimated him. It was now no longer necessary, as required by section 230, that the father publicly acknowledge him, receive him into his family, or otherwise treat him as a legitimate child. This is perhaps the most liberal of all enactments removing the disabilities of children born out of wedlock; but under the argument of appellants a child made legitimate by compliance with the requirements of this section has not even the rights of succession that the statute of 1850 (re-enacted as section 1387, Civ. Code) conferred upon illegitimates complying with its terms, for the mere marriage of the parents of the illegitimate was not sufficient to confer even those limited rights; there was the further requirement that the father acknowledge the child and adopt him into his family.

Nor, under the construction of the statutes concerning legitimacy contended for by appellants, would an illegitimate child legitimated by section 215, Civil Code, have any right to succeed to the estate even of his father, for under that construction his rights of inheritance being exclusively governed by section 1387, it would be necessary that the father acknowledge in writing his paternity of the child—a condition not required by section 215. Thus we would have a case where a child made legitimate by statute is incapable of inheriting from his own father, much less from his father's kindred, although by the provisions of section 1388 of the Civil Code both the father and the father's kindred are given the right to succeed to his estate. If the construction of the law contended for by appellants were correct we would have the anomalous condition that 60 or 70 years after the original enactment of section 1387 in 1850, and in spite of the increasingly liberal and humane tendency of legislation in respect to illegitimate children, a child to-day, made legitimate by statute, has more restricted rights of succession than an illegitimate child in the year 1850.

It is suggested that sections 215 and 230 are mere statutes of status, and confer no rights of succession, and that those rights must be sought in the sections of the Code dealing with succession. That is perfectly true; but the fallacy of appellants' position is that they ignore the changed status of the respondents, and seek to relegate them to section 1387 dealing with the rights of succession of illegitimates, and to exclude them from section 1386, which deals with the rights of legitimates.

[7] If sections 230 and 1387 were concurrent and conflicting legislation, there would be some force in the contention that the rights of succession of a child legitimated by section 230 should be governed by section 1387, for it could be argued that as the same requirements are found in both sections, it was intended that although on the one hand compliance with them conferred legitimacy, yet when it came to the question of succession such compliance did not put the illegitimate in the situation of a legitimate, but

only had the limited effect stated in section 1387, and that their apparent conflict should be reconciled in that way. But the re-enactment of the provisions of section 1387 did not make them concurrent legislation with section 230. The rule in this regard is that:

> "Where there are two conflicting sections in a Code or other compilation of statutes, that section prevails which is derived from a source which may be considered as the latest expression of the lawmaking power, without regard to the relative position of such sections in the Code." 26 Am. & Eng. Ency. of Law, 735, citing Lamar v. Allen, 108 Ga. 158, 33 S. E. 958.

As we have seen, the provisions of section 230 were later legislation than that contained in section 1387; and the latter section means no more and can be given no other construction than it theretofore had, when its effect was solely to give certain restricted rights of inheritance to illegitimates as such. It is obvious that there is no conflict between such legislation and a subsequent law conferring legitimacy, even though incidentally the same conditions are made sufficient to confer legitimacy which formerly only gave restricted rights of inheritance.

Moreover, the proposition that section 1387 is not to be regarded as a limitation upon section 230 has been directly decided by the Supreme Court of this state in the case of In re Jessup, 81 Cal. 408, 447, 21 Pac. 976, 980 (6 L. R. A. 594) wherein it is said:

> "We cannot agree to the proposition that the provision contained in section 1387 of the Civil Code, that 'every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child,' is a limitation upon section 230, and excludes an illegitimate child, adopted as provided in the latter section, from the inheritance. If so, section 230 would be deprived of much of its force. * * * Section 230 expressly provides that upon the adoption of a child as therein provided, it shall 'be deemed to be legitimate for all purposes.'"

[8] That the words "children" and "lawful issue" when found in statutes of succession are not to be confined to their strict common-law signification was decided by our Supreme Court in the Estate of Wardell, 57 Cal. 484, 491, where it is said:

> "If courts were now to restrict the word to its common-law meaning, all children born of an unlawful marriage, all children by adoption or acknowledgment of their father, and all children whose parents intermarried subsequent to their birth, would be excluded from rights of inheritance or succession. But by statute, the offspring of marriages null in law (section 84, Civ. Code), children born out of wedlock whose parents subsequently intermarried (section 215, Id.), and children by acknowledgment or adoption of their father (sections 224, 227, 228, and 230, Id.), are all legitimate. These, although incapacitated at common law from succeeding to any rights of their father, are regarded for all purposes as legitimate from the time of their birth. * * * Hence the term 'children,' as used in section 1307 of the law of succession, must relate to status, not to origin —to the capacity to inherit, not to the legality of the relations which may have existed between those of whom they may have been begotten. The word has, therefore, a statutory and not a common-law meaning; and its meaning includes all children upon whom has been conferred by law the capacity of inheritance."

[9] Finally, the contention is made that the respondents do not come within the terms either of section 215 or section 230, for the reason that these sections, as the appellants claim, refer only to minor children. It is true that in the Estate of Pico, 56 Cal. 413, section 230 was thus limited in its effect; but the reason it was so limited, as is apparent from the opinion in that case, was that the section comprises part of a chapter of the Code on adoption, and the language of the section is that the illegitimate child, by the acts therein enumerated, is "adopted" as a legitimate child, and thereby becomes legitimate. As the provisions of the Code relating to adoption apply only to minors, the court concluded that the section could not apply to one who had attained his majority because he could not be adopted. But section 215 is not included in the chapter on adoption; and the reasoning in the Estate of Pico, supra, has no application to it. Its language makes no distinction between minors and majors, and there is nothing in the reason or necessity of the enactment which would warrant this court in confining its application to children who had not attained their majority.

It results from what we have said that the respondents, having been legitimated by the subsequent marriage of their parents, come within the terms of section 1386 of the Civil Code, and that within the meaning of that section they are "lawful issue" and take by representation.

The portion of the judgment appealed from is therefore affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

32 Cal. App. 286

WOLF et al. v. GALL et al. (S. F. 7217.)

(Supreme Court of California. Feb. 7, 1917.)

BASTARDS 🔑101—RIGHT TO INHERITANCE—LINEAL KINDRED — STATUTES — "ILLEGITIMATE CHILD."

Civ. Code, § 215, provides that an illegitimate child becomes legitimate by the subsequent marriage of its parents, and section 230 provides that when the father of an illegitimate child publicly acknowledges it as his own or adopts it into his family, it is deemed for all purposes legitimate. Section 1386 prescribes rights of inheritance of legitimate children, and section 1387 provides that an illegitimate child does not represent his father or mother by inheriting any part of the estate of his or her kindred, lineal or collateral, unless before his death his parents shall have intermarried, and his father thereafter acknowledges him or adopts him into his family, in which case such child and all legitimate children are considered brothers and sisters, and section 1388 provides for succession to the property of an illegitimate child. *Held*, that the term "illegitimate child," as used in the last two sections, includes illegitimate children who have been legitimated; that section 1387 does not provide any rule contrary to section 1386 as to children legitimated by intermarriage or acknowledgment, so that such children inherited a share of the estate of the mother of their deceased father.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 252, 253.

For other definitions, see Words and Phrases, First and Second Series, Illegitimate Child.]

Melvin and Lawlor, JJ., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Arturo Wolf and Maria Julia Wolf against Charles Funkenstein Gall and others. From a judgment of the District Court of Appeals (163 Pac. 346), affirming part of judgment for plaintiff on appeal by defendants, defendants apply for hearing in the Supreme Court. Application for hearing denied.

See, also, 162 Pac. 115; In re Funkenstein's Estate, 170 Cal. 594, 150 Pac. 987.

J. R. Pringle, Edgar D. Peixotto, and Leon Samuels, all of San Francisco, for appellants. George Lezinsky and Theodore A. Bell, both of San Francisco, for respondents.

PER CURIAM. We concur in the conclusion of the District Court of Appeal as to the capacity of the respondents to inherit from Tobe Funkenstein, through their deceased father, Newman Wolf, but in denying the application for a hearing in this court we deem it proper to say that we are not entirely in accord with all the reasoning by which that conclusion is reached by that court. We cannot agree either that section 1387, Civil Code, has no application to children situated as are the respondents, or that, fairly construed, that section excludes respondents from taking a share of the estate of the mother of their deceased father. To our minds the term "illegitimate child," as used in both sections 1387 and 1388, includes illegitimate children who have been legitimated, and in so far as they lay down rules of succession contrary to the general rules found in section 1386, Civil Code, must prevail as to any child born illegitimate. See Estate of De Cigaran, 150 Cal. 682, 89 Pac. 833. But, in our opinion, section 1387 should be construed as not providing any rule contrary to section 1386 in so far as children situated as respondents are concerned. When the section expressly provides, as it does, that an illegitimate child "does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family," it by necessary implication recognizes the right of one whose parents intermarry and whose father, after such marriage, acknowledges him as his child or adopts him into his family, to represent his father or mother by inheriting from the kindred of either, either lineal or collateral, just as a legitimate child would inherit under section 1386, Civil Code. We do not believe that the succeeding clause, commencing with the words "in which case such child and all the legitimate children are considered brothers and sisters," etc., should be construed as a limitation on this right. This cause was manifestly intended to remove all doubt as to the right of brothers and sisters to inherit from each other where one of them is legitimated as provided in the preceding part of the section, and gives the legitimated child a right of direct inheritance from brothers and sisters, in addition to the right of inheritance by representation conferred by the preceding clause. The result is the same as that reached by Mr. Justice Kerrigan in the opinion of the District Court of Appeal, viz. that section 1386 does apply in this case, and that under its provisions respondents are, in view of the facts, heirs of Tobe Funkenstein.

The application for a hearing in this court is denied.

MELVIN and LAWLOR, JJ., dissent from the order denying a hearing in this court.

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174 Cal. 412

DODDS v. SPRING et al. (L. A. 3846.)

(Supreme Court of California. Feb. 13, 1917.)

1. Mortgages 🔑282(1) — Conveyance of Mortgaged Property — Personal Liability.

The mere fact that a deed recited the property was subject to mortgage, but did not recite grantee's personal liability, did not relieve him from assumption of such liability, nor prevent equities against him from being asserted against one who purchased notes after maturity without inquiry, though knowing his transferor had once owned the property subject to the mortgage, and took assignments of the mortgage and the trust deed supporting the notes, since the promise by the mortgagor's grantee personally to be answerable for the payment of the mortgage may appear and bind the grantee because of a clause in the deed or by a separate written instrument, which need not be executed with the formalities necessary to a deed, and which, if preceding the execution of the deed of conveyance, is not so merged in the latter that the omission of the assumption clause from the latter will release the buyer from his prior covenant.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 740, 741, 751, 753, 755.]

2. Frauds, Statute of 🔑18(3)—Mortgages 🔑280(3) — Agreement of Purchaser of Mortgaged Property to be Liable for Debt.

The agreement of the purchaser of property subject to mortgage to be personally liable for the debt may rest wholly in parol, and is not within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 29; Mortgages, Cent. Dig. §§ 742, 744.]

3. MORTGAGES ⊂⊃318—PURCHASE OF EQUITY OF REDEMPTION — ASSUMPTION OF DEBT — PAYMENT—EFFECT—STATUTE.

If the purchaser of an equity of redemption has assumed payment of the debt, or otherwise made himself personally liable for it, the payment of the debt will extinguish the mortgage, and he cannot take an assignment of it to himself, under Civ. Code, § 1473, providing that full performance of an obligation, by the party whose duty it is to perform, or by any other person, in his behalf, and with his assent, if accepted by the creditor, extinguishes it.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 956–961.]

4. PAYMENT ⊂⊃52—EXTINGUISHMENT OF OBLIGATION.

The full performance of an obligation by any one for the principal with his assent, if accepted by the creditor, extinguishes the obligation.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 136.]

Department 2. Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Suit by O. S. Dodds against A. Spring and others. From a judgment for plaintiff, the named defendant appeals. Judgment affirmed.

Rupert B. Turnbull, Bennett, Turnbull & Thompson, Flint, Gray & Barker, and Tobias R. Archer, all of Los Angeles, for appellant. Ralph E. Swing, of San Bernardino, for respondent.

MELVIN, J. Plaintiff sued to foreclose a mortgage made by G. O. Trauzettel and his wife, Georgia A. Trauzettel. The date of the said mortgage was December 1, 1908, and it was intended, as the court found, to cover principal and interest representing two loans evidenced by promissory notes, one dated December 1, 1908, for the principal sum of $1,500 due three years thereafter, and the other for $1,160, bearing date April 1, 1909, due two years later. By the terms of the mortgage it apparently covered the west half of section 19, township 2 south, range 1 west, S. B. B. and M., in Riverside county, and was recorded April 8, 1909. The complaint in this action was filed June 30, 1911, and a lis pendens was placed of record on that day. Judgment was given in favor of O. S. Dodds, the plaintiff, and this appeal is by A. Spring, one of the defendants, who claimed rights in the property superior to those of the plaintiff.

It appeared from the findings of the court that G. O. Trauzettel acquired title to the north half of said section 19 prior to August 20, 1908, and remained such owner until October 10, 1910. On December 10, 1910, he parted with his interest in the north half of said section together with other property by a grant deed to William A. Kjellman, one of the defendants in this action.

Prior to the making of the notes and the mortgage in favor of Dodds, the Trauzettels had borrowed from John Galli $3,000, evidenced by a note, payable in three years, bearing date August 20, 1908, secured by a trust deed in which L. W. Clark was named as trustee. On the same day, August 20, 1908, the Trauzettels had borrowed $1,000 from Mary Holmes Wilson, evidenced by a note payable in three years and supported by a mortgage of even date. The trust deed and the mortgage were recorded, the former having priority. Both the mortgage and the trust deed were upon the north half of said section 19, and the date of their recordation was August 25, 1908.

Subsequently William A. Kjellman and G. O. Trauzettel entered into correspondence looking to the exchange of the latter's property in California for the former's land in Texas. There was an escrow agreement in writing whereby William A. Kjellman assumed and agreed to pay incumbrances aggregating $8,920 upon the property in Riverside county and other land. The transaction involving the exchange of the lands in Texas for those in California was consummated, and on December 12, 1910, a deed bearing date October 10, 1910, was placed of record. The deed recited that the property conveyed (which was the north half and the southeast quarter of section 19) was subject to the note for $3,000 and the trust deed in favor of Galli, the note for $1,000, and the mortgage to Mary Holmes Wilson. It also specified liens of a mortgage dated September 16, 1908, to secure the payment of a note of $1,120 in favor of O. S. Dodds and another dated December 1, 1908, to secure a note of $1,500, also in favor of the plaintiff. The plaintiff did not seek to foreclose the mortgage dated September 16, 1908, but, as shown by the testimony and found by the court, the note for $1,120 was merged into and paid by the later note for $1,500.

The court also found that when the mortgages to plaintiff were made the Trauzettels owned only the north half of section 19, and that their intention was to mortgage that part of the section. By an amendment to his pleadings plaintiff had asked for a reformation of the contract in that particular, and by the judgment it was reformed as prayed.

Further findings were to the effect that William Kjellman paid to Galli and Wilson the sums due them, and thereby satisfied their claims; that after the filing of the lis pendens in this case O. J. Kjellman executed and delivered to A. Spring her note for $3,000, secured by a mortgage on the northeast quarter of section 19; that at that time Spring had no notice of the fact that plaintiff's mortgage was intended to cover the north half of said section; that on November 21, 1912, William A. Kjellman delivered the Galli note and the accompanying trust deed and the Wilson note to defendant, A. Spring, and assigned the Wilson mortgage to said Spring, and that both said notes were then past due; that they had been fully paid and extinguished, and, together with the mortgage and the deed of trust, had ceased to be of any force.

Regarding a purported sale to Spring on December 11, 1912, by L. W. Clark under and pursuant to the Galli trust deed of the north half of section 19, it was held that the trustee had no authority to make it.

Among the conclusions of law was one to the effect that Spring's mortgage was prior to that of plaintiff on the northeast quarter of section 19.

Appellant insists that, since the record title was in O. J. Kjellman when the Galli and Wilson notes were transferred to him by William A. Kjellman, and since the deed from the Trauzettels merely recited that the property was "subject to" the Dodds' mortgage, he had no notice of William A. Kjellman's assumption of personal liability, and was therefore a purchaser in good faith of the Galli and Wilson notes and liens in the hands, not of the mortgagee, but of a third party.

It is true that William A. Kjellman divested himself of title by a deed to O. J. Kjellman on January 5, 1911. The appellant insists that the purchase by William A. Kjellman of the Galli and Wilson incumbrances after he had parted with the title to the land did not work a merger. He admits that as between Mr. Kjellman and the Trauzettels an estoppel may apply, but insists that he had no notice (and could have none) of the personal assumption of the mortgage debt by William A. Kjellman in and by the terms of the unrecorded escrow agreement.

[1] But the mere fact that the deed to Kjellman from the Trauzettels did not recite his personal liability would not relieve him from an assumption of such burden nor prevent equities against him from being asserted as against one who purchased notes after maturity and took assignments of the mortgage and the trust deed supporting said notes. The promise by the mortgagor's grantee personally to be answerable for the payment of the mortgage may appear and bind such grantee because of a clause in the deed or by a separate written instrument wihch need not be executed with the formalities necessary to a deed, and which, if preceding the execution of the deed of conveyance, is not so merged in the deed that the omission of the assumption clause from the latter instrument will release the vendee from his prior covenant.

[2] Indeed, the agreement may rest wholly in parol, and in such case is not within the statute of frauds. 27 Cyc., 1344"d"; Jones on Mortgages, § 748; Hopkins v. Warner, 109 Cal. 133, 41 Pac. 868. When appellant received assignments of the Galli and Wilson interests the notes were more than a year past due. He knew that his transferror had once owned the property subject to the mortgages, yet, as he testified, he made no inquiry of the mortgagor respecting any personal assumption of the debt by Mr. Kjellman.

[3] If the purchaser of an equity of redemption has assumed payment of the debt or has otherwise made himself personally liable for it, the payment of the debt will extinguish the mortgage, and he cannot take an assignment of it to himself. 27 Cyc. 1331. Section 1473 of the Civil Code provides that:

> "Full performance of an obligation, by the party whose duty it is to perform it, or by any other person on his behalf, and with his assent, if accepted by the creditor, extinguishes it."

In the early case of Gordon v. Wansey, 21 Cal. 77, the facts were as follows: Certain negotiable promissory notes were assigned before maturity to one of the makers and by him after maturity to the plaintiff. It was held that the transaction amounted to payment, and that the notes became functus officio and were not revived by the assignment to the plaintiff. In Yule v. Bishop, 133 Cal. 574, 62 Pac. 68, 65 Pac. 1094, the same principle is announced.

[4] The full performance of an obligation by any one for the principal with his assent, if accepted by the creditor extinguishes the obligation. See, also, Crystal v. Hutton, 1 Cal. App. 251–256, 81 Pac. 1115; Bray v. Cohn, 7 Cal. App. 124, 93 Pac. 893.

The appellant therefore took the note long past due subject to all existing defenses. Elgin v. Hill, 27 Cal. 373–375; James v. Yaeger, 86 Cal. 184–188, 24 Pac. 1005; Adams v. Hopkins, 144 Cal. 19–34, 77 Pac. 712.

No further assignments of error require discussion.

The judgment is affirmed.

We concur: HENSHAW J.; LORIGAN, J.

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174 Cal. 400

CONNER v. BANK OF BAKERSFIELD.
(L. A. 3859.)

(Supreme Court of California. Feb. 13, 1917.)

1. Banks and Banking ⚷145—Certification of Check by Bank—Effect.

By certifying a check a bank becomes bound as a direct and original promisor to the payee.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 419–433.]

2. Banks and Banking ⚷145 — Certified Check—Measure of Damages.

As the obligation of a bank on a check certified by it is one to pay money only, by the direct provision of Civ. Code, § 3302, the measure of damages for breach of such obligation is the amount due by the terms of the obligation with interest thereon.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 419–433.]

3. Banks and Banking ⚷155—Action on Certified Check—Pleading—Complaint—Sufficiency.

A complaint, alleging that a check payable to bearer and certified by defendant bank was presented by plaintiff to defendant and payment

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

refused, stated a cause of action for recovery of the face of the check, with interest from date of presentation, and the sufficiency of the complaint to state a cause of action was not impaired by the fact that plaintiff asked for more items of damage than are recoverable.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 536–538.]

4. Pleading 🔑106(2) — Dilatory Pleas — Another Action Pending.

The plea of another action pending is dilatory in its nature, and is not favored.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 221–223.]

5. Interpleader 🔑32—Relief Awarded.

In interpleader, the only question that can be litigated between plaintiff and defendants is whether the plaintiff is entitled to compel the defendants to interplead with respect to their claims to the fund or debt alleged by plaintiff to be in his hands, or due from him, and defendants are entitled to aver and prove any facts to show that the plaintiff is not entitled to maintain his bill, but they cannot, by counterclaim or cross-complaint, seek affirmative relief against the plaintiff concerning matters not embraced within his bill.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 72, 73.]

6. Interpleader 🔑33—Consent of Defendants—Effect.

In interpleader by a bank, if defendants had appeared and consented to an interlocutory order, requiring them to interplead concerning their claims to a check certified by the bank, and to consequent dismissal of the bank, each of defendants might have been precluded from asserting that the bank was under any further liability arising out of the check.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 68–71, 74.]

7. Abatement and Revival 🔑17—Demurrer—Another Action Pending.

Under Code Civ. Proc. § 430, subd. 3, providing that a defendant may demur to the complaint when it appears on the face thereof that there is another action pending by the same parties for the same cause, in an action against a bank on a check certified by it, a plea of another action pending, relying upon an interpleader suit brought by the bank against this plaintiff, and another not shown by the complaint to have raised the same issues, should have been raised by answer and a demurrer to the complaint on that ground, was not properly sustained.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 123–126; Pleading, Cent. Dig. § 427.]

8. Pleading 🔑111 — Defenses — Another Action Pending.

The defense of another action pending does not authorize a judgment on the merits, but the only relief to which the defendant is entitled upon establishing such defense is a judgment that the action abate.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 234–236.]

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Sarah L. Conner, executrix of the last will of C. L. Conner, deceased, against the Bank of Bakersfield. From a judgment sustaining defendant's demurrer to the complaint, plaintiff appeals. Reversed.

See, also, 29 Cal. App. 153, 154 Pac. 869.

C. C. Cowgill, of Sonoma, and Peter A. Breen, of San Francisco, for appellant. J. W. Wiley, of Bakersfield, for respondent.

SLOSS, J. Plaintiff appeals from a judgment entered upon the sustaining of the defendant's demurrer to the second amended complaint.

The complaint in question alleged that on July 21, 1910, one Planz drew his check for $3,799.66 on the defendant, the Bank of Bakersfield, payable to "Kern Valley Bank or bearer." Negotiable paper, so drawn, is payable to the bearer. Civ. Code, § 3102. On the same day the check was certified by the defendant bank. On May 19, 1911, the plaintiff presented the check to the defendant, but the defendant refused to pay the same, and it has never been paid to plaintiff. On July 20, 1911, the defendant bank commenced an action of interpleader against the plaintiff and Planz in which the plaintiff and Planz "were required to and did interplead together concerning their claims to the said check and to the said money called for thereby." Plaintiff and Planz appeared in said action, and thereafter the court rendered judgment therein in favor of the plaintiff that she, as executrix, was entitled to have paid to her the amount of said check. It is not alleged that this judgment has become final, and the action of interpleader is apparently still pending.

The complaint alleges, further, that plaintiff was compelled to employ counsel in said action, and to expend money for costs and traveling expenses, and has been deprived of the use of said sum of $3,799.66, and of interest thereon, from the 19th day of May, 1911. It is also alleged that the plaintiff has suffered general damages in the further sum of $2,350. The prayer is for judgment for interest on the amount of the check, together with the amount of the various other items of damage alleged.

The demurrer specified as grounds: (1) That the complaint does not state facts sufficient to constitute a cause of action; and (2) that there is another action pending between the same parties for the same cause. This demurrer having been sustained without leave to amend, judgment was entered that the plaintiff take nothing by the action, and that the defendant recover from plaintiff its costs.

[1] By certifying the check the bank became bound as a direct and original promisor to the payee. 1 Morse on Banks and Banking (4th Ed.) § 414; 5 R. C. L. 523, 524.

[2] Its obligation was one "to pay money only," and the measure of damages for the breach of such obligation is "the amount due by the terms of the obligation, with interest thereon." Civ. Code, § 3302.

[3] The complaint alleges that the check, payable to bearer was presented by plaintiff to the certifying bank, and payment refused.

Clearly, therefore, the pleading stated a cause of action for the recovery of the face of the check, with interest from the date of presentation. The sufficiency of the complaint as stating a cause of action is, of course, not impaired by the fact that the plaintiff may have asked for more items of damage than are recoverable.

[4] Nor was the demurrer properly sustained upon the second ground specified. The plea of another action pending is dilatory in its nature, and is not favored. 1 C. J. 28; Thompson v. Lyon, 14 Cal. 42; Larco v. Clements, 36 Cal. 132. It may be raised by demurrer (Code Civ. Proc. § 430, subd. 3), but not unless the complaint shows affirmatively that the prior action possessed such characteristics as to make the plea available. One of these requisites is that the causes of action and the issues in the two suits must be substantially the same. 1 C. J. 61; Martin v. Splivalo, 69 Cal. 615, 11 Pac. 484; Heilbron v. Canal Co., 75 Cal. 433, 17 Pac. 535, 7 Am. St. Rep. 183; Hall v. Susskind, 109 Cal. 203, 41 Pac. 1012; Howard v. Hewitt, 139 Cal. 614, 73 Pac. 414. The former action here relied upon, one of interpleader, was begun some two months after a cause of action had, under the facts alleged in the present complaint, accrued to the plaintiff in this action. So far as appears from the face of the complaint, the plaintiff then had a right to recover two months' interest. It cannot be determined from the record before us whether this right was involved in the interpleader suit. In interpleader suits—

> "there may always be a twofold contest: First, as to the right of the plaintiff to bring the suit and to force the defendants to interplead; and, if such right is maintained, the litigation among the defendants. * * * Whether the plaintiff shall be permitted to maintain such an action is first determined, and, if his right is sustained, an interlocutory decree is entered, requiring the defendants to litigate their claims inter sese." S. F. Savings Union v. Long, 123 Cal. 107, 55 Pac. 708.

[5] The only question that can be litigated between the plaintiff and the defendants in such action is whether the plaintiff is entitled to compel the defendants to interplead with respect to their conflicting claims to the fund or debt alleged by plaintiff to be in his hands, or due from him. The defendants cannot litigate in the interpleader suit any other claim against the plaintiff. 23 Cyc. 27; Adams v. Dixon, 19 Ga. 513, 65 Am. Dec. 608; Williams v. Matthews, 47 N. J. Eq. 196, 20 Atl. 261. "Defendants are entitled to aver and prove any facts which show that the complainant is not entitled to maintain his bill" (23 Cyc. 27), but they cannot, by counterclaim or cross-complaint, seek affirmative relief against the plaintiff concerning matters not embraced within his bill. Wakeman v. Kingsland, 46 N. J. Eq. 113, 18 Atl. 680. "The only relief which a defendant can have against the plaintiff in such a suit is to have the action dismissed." Los Angeles v. Amidor, 140 Cal. 400, 73 Pac. 1049.

[6] It is entirely consistent with the allegations of the complaint in this case that the bank, in beginning the interpleader suit against this appellant and Planz, conceded no liability on its part beyond the principal sum of the check. If the defendants had come in and consented to an interlocutory order requiring them to interplead, and to the consequent dismissal of the bank, each of them might have been precluded from asserting that the bank was under any further liability arising out of the check. S. F. Savings Union v. Long, 123 Cal. 107, 55 Pac. 708; Woodmen of the World v. Rutledge, 133 Cal. 640, 65 Pac. 1105.

[7] But it does not appear that there was any such consent. For all that the complaint shows, this appellant may have resisted an order of interpleader upon the very ground that the bank owed her interest on the check from the date of presentation by her, and that the bank had not tendered payment of such interest. If this was the situation, the interpleader suit did not involve the entire cause of action presented by the present complaint. An inspection of the record of the former action would be required to determine how far the causes of action and the issues in the two suits are identical. The plea should therefore in this case be raised by answer rather than by demurrer to the complaint.

[8] Furthermore, the judgment here given was one on the merits. The defense of another action pending does not authorize such a judgment. The only relief to which a defendant is entitled upon establishing this defense is a judgment that the action abate. Larco v. Clements, 36 Cal. 132; Casey v. Jordan, 68 Cal. 246, 9 Pac. 92, 305; Coubrough v. Adams, 70 Cal. 374, 11 Pac. 634; Leonard v. Flynn, 89 Cal. 535, 26 Pac. 1097, 23 Am. St. Rep. 500.

The judgment is reversed.

We concur: SHAW, J.; LAWLOR, J.

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174 Cal. 407

MILLER v. OLIVER et al. (Sac. 2272.)

(Supreme Court of California. Feb. 13, 1917.)

1. QUIETING TITLE 🔑32 — RECEIVERS — APPOINTMENT—STATUTE.

In view of Code Civ. Proc. § 564, subd. 1, allowing the appointment of receiver in certain instances, and subdivision 6, providing that a receiver may be appointed where receivers have heretofore been appointed by the usages of courts of equity, where the plaintiff was in actual possession of property, claiming ownership and the right of possession and full control, no receiver could be appointed in an action to have plaintiff adjudged owner of the property but sole remedy of defendant corporation claiming ownership and the right to possession is at law to recover possession in which a receiver may not be appointed.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 68.]

2. QUIETING TITLE ⚷32—INJUNCTION AND RECEIVER—APPOINTMENT—STATUTE.

In view of Code Civ. Proc. § 564, subds. 1, 6, plaintiff claims to be the owner of real estate, and seeks the cancellation of the deed under which it is claimed that the defendant corporation is the owner and entitled to immediate possession. Defendants' proof is that defendant corporation is in actual possession and management, except as complete actual possession is impaired by the occupancy by plaintiff of a dwelling house and his use of the barns, all under permission and as an occupant merely by sufferance. Plaintiff claims to be the owner and entitled to control. It was alleged that plaintiff was interfering with the management of the property by the corporation, even to its practical exclusion therefrom, to the great injury of the property and the corporation. *Held* that, even although the facts warranted an injunction to prohibit plaintiff from interfering with the control and management of the property, defendants were not entitled to the appointment of a receiver.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 68.]

In Bank. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by Charles E. Miller against Harriett A. Oliver (née Madigan) and others. From an order appointing a receiver pendente lite on application of defendants, plaintiff appeals. Order reversed.

See, also, 163 Pac. 357.

Webster, Webster & Blewett, of Stockton, for appellant. Clary & Louttit and A. H. Ashley, all of Stockton, for respondents. A H. Carpenter, of Stockton, amicus curiæ.

ANGELLOTTI, C. J. This is an appeal by the plaintiff from an order appointing a receiver pendente lite on the application of defendants. The order was one appointing W. J. Herson receiver "of the real and personal property mentioned" in the pleadings for the purpose of protecting and caring for the same, and to manage the same as directed by the court. It was provided in the order that the plaintiff and his wife should not be removed from the premises unless so required by a subsequent order, and that plaintiff might be employed, if the receiver so elects, to assist him in such care and protection. The order summarized the purpose as follows:

> "In other words, the receiver is to protect and substantially preserve in statu quo the property of the parties to this action, but, unless necessary or unless ordered by this court, not to interfere with the residence of the plaintiff and his wife on said premises."

The action was instituted by plaintiff for the purpose of having it adjudged that he was the owner of the real property described in the complaint; that a conveyance thereof made by him to defendant Miller Farm Company on June 21, 1907, was made without consideration, and upon its promise and that of defendants Oliver that the premises would be reconveyed to him upon demand, and by reason of undue influence on the part of said Olivers. He asked for a decree declaring him the owner of such property and canceling the deed to the Miller Farm Company. The allegations of the complaint were denied in the answer filed by the three defendants, and in that portion of the answer styled a "further and separate defense herein," embracing 55 pages of the printed transcript, defendants set up many matters upon which they asked, in addition to a judgment that defendant corporation is the absolute and unqualified owner in fee of such real property, for affirmative relief of various kinds including relief as to certain personal property used in connection with the realty, which was farm property, and also in the matter of determining the relative rights of defendant J. E. Oliver and plaintiff in the shares of stock of the Miller Farm Company. To prevent interference pending the litigation by plaintiff and his wife with the real and personal property alleged to belong to the corporation both a receiver and an injunction were asked. It was upon these allegations and certain affidavits which add nothing that is material to the question before us that the order appointing the receiver was made.

We are unable to find in the record legal support for the order appealed from.

The matter of the relative rights of J. E. Oliver and the plaintiff in the shares of stock of defendant corporation and the proper disposition of said shares is, of course, not material in this connection. Nothing in regard thereto assists in determining the question whether a receiver should have been appointed to take charge and management of the real property claimed by the plaintiff and defendant corporation and the personal property of the latter located thereon. The "property or fund" which Oliver was seeking to subject to his alleged claim against plaintiff was the shares of stock in defendant corporation, and not the real and personal property of the corporation. Nothing in subdivision 1 of section 564, Code of Civil Procedure, authorized the appointment of the receiver on the application of the defendants, and the order must be sustained, if at all, as one authorized by subdivision 6 of said section, by which it is provided that a receiver may be appointed "in all other cases where receivers have heretofore been appointed by the usages of courts of equity."

[1, 2] So far as we can see from the record, the situation as to the real and personal property, so far as material, is as follows: The plaintiff claims to be the owner of all the property, and seeks the cancellation of the deed under which defendants claim that the corporation is the owner and entitled to the immediate possession. Defendants' show-

ing is substantially that the defendant corporation was in actual possession and management of all the property except in so far as complete actual possession was impaired by the occupancy by plaintiff of the dwelling house on the realty as a dwelling place, and the use of the barns, all under permission of defendant corporation and as an occupant merely by sufferance. Being so on the property, he was claiming to be the owner and entitled to control it. In great detail it was alleged that he was interfering in various ways with the management of the property by the corporation, even to its practical exclusion therefrom, to the great injury of the property and the corporation owning it. We may assume for the purposes of this decision that the showing in this behalf was of such a nature that it would have sufficiently warranted the granting of an injunction to prohibit this alleged occupant by sufferance from thus interfering with the control and management of the property, on the same theory that any mere trespasser whose unlawful acts were of such a nature and so continuous as to warrant equitable relief might be enjoined. But it does not follow that a receiver might properly be appointed. Of course, if the plaintiff were in actual possession of the property, claiming ownership and the right of possession and full control, no receiver could lawfully be appointed in view of our well-settled law. The sole remedy of the corporation claiming ownership and the right to possession would be at law to recover possession, and it is settled that in such a case, under our statute, a receiver may not be appointed; for it is not a case where a receiver has "heretofore been appointed by the usages of courts of equity," or one in which such an appointment is specially authorized by any statute. See Bateman v. Superior Court, 54 Cal. 285; San Jose, etc., Bank v. Bank of Madera, 121 Cal. 545, 54 Pac. 85. The appointment of a receiver cannot be justified upon any theory that plaintiff is in actual possession of the property. So far as we can understand the theory of defendants as to the facts, the corporation is seeking to protect its property, of which it is actually in possession, from interference to its great injury and loss at the hands of another who is merely living on the land with its permission. So far as the right to a receiver is concerned, its relation to him is simply the relation of any owner in possession to an unlawful trespasser. By reason of his living upon the land, he may have greater opportunity to impede and interfere with the owner in the enjoyment of its rights of ownership and possession, but this does not affect the question. We are at a complete loss to find any good basis for a conclusion that in such a situation a receiver may be appointed on the application of the owner to take over the custody and management of the property, and protect it against such trespasses and interference.

It is thoroughly settled that, except in cases where receivers have heretofore been appointed by the usages of courts of equity, a situation expressly covered by subdivision 6 of section 564, Code of Civil Procedure, a receiver may be appointed only in such cases as the statute expressly specifies. We find no warrant for a conclusion that the usages of courts of equity support an appointment in such a situation as we have here, and it seems very clear to us that no statute authorized the appointment. Something is said about the transaction between J. E. Oliver and plaintiff constituting a trust, but the trust, if any, was one solely in relation to the shares of stock in Oliver's name claimed by plaintiff.

The order appointing a receiver is reversed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

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174 Cal. 404

MILLER v. OLIVER et al. (Sac. 2325.)

(Supreme Court of California. Feb. 13, 1917. Rehearing Denied March 15, 1917.)

1. Appeal and Error 🔑766—Briefs—Statute.

In view of Code Civ. Proc. § 953c, which provides that the parties must print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court, where appellants did not print in their opening brief any portion of the record, and respondents in their brief call attention to this omission and object to consideration of any part of the record except the judgment roll printed in such brief, and in their reply brief appellants ignore this objection and again fail to print any part of the record, the court would be justified in affirming the judgment without further consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3101, 3126.]

2. Costs 🔑260(4) — Vexatious Appeal — Damages.

In an action to cancel a deed on the ground that plaintiff was inexperienced and induced to execute it without consideration by his mother, a defendant, who controlled him, when the findings were for defendants in all issues, and it is not claimed that the findings were not supported by substantial evidence, it is evident that there was no merit in the appeal, and that it was taken to vex, hinder, and delay, so that it was a proper case for the imposition of damages.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 986–991, 996.]

Department 1. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by Charles E. Miller against Harriet A. Oliver and others, in which plaintiff's wife was made a party by defendants' cross-complaint. Judgment for defendants, and plaintiffs appeal. Affirmed.

See, also, 163 Pac. 355.

A. H. Carpenter, of Stockton, for appellants. A. H. Ashley and Clary & Louttit, all of Stockton, for respondents.

SHAW, J. The plaintiff and his wife, who was made a party to the action by the defendants' cross-complaint, appeal from the judgment.

[1] The transcript of the record presented in support of the appeal was prepared in typewriting as provided in sections 953a, 953b, and 953c of the Code of Civil Procedure. Section 953c provides that:

> "In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court."

The appellants did not print in their opening brief any portion of the record. The respondents in their brief call attention to this omission and object to our consideration of any part of the record except the judgment roll printed in said brief. In their reply brief the appellants ignore this objection and again fail to print any part of the record.

In the face of this contumacy, the court would be justified in affirming the judgment without further consideration. We have, however, examined the judgment roll and we find therein no good cause for the appeal. The complaint alleges that the plaintiff owns a farm of 629.19 acres; that he is the son of the defendant Harriet A. Oliver, and has always reposed special confidence and trust in her, and has always been guided, influenced, and controlled by her; that he was "a young man of inexperience"; that on June 21, 1907, he, his mother, then Harriet A. Madigan, and the defendant J. E. Oliver formed a corporation with the corporate name of "Miller Farm Company," and filed its articles of incorporation in the county clerk's office; that on June 22, 1907, said articles were filed in the office of the secretary of state; that on June 21, 1907, his mother persuaded him to execute a deed purporting to convey said farm to Miller Farm Company; that it was made without consideration and upon the promise of the other defendants that the farm would be reconveyed to plaintiff upon his demand; that said corporation at that time did not exist. He asks that he be adjudged to be the owner of the farm and that said deed be canceled and the farm reconveyed to him.

[2] The findings are that plaintiff is not, and has not been since said deed was executed, the owner of the farm; that he was not at that time "a young man of inexperience"; that he did not then repose special trust and confidence in his mother; that she did not then guide, influence, or control him, or persuade him to execute said deed; that it was not made without consideration, nor upon any promise to reconvey to him the farm; that although it was dated on June 21, 1907, it was not delivered, and consequently not executed, until July 10, 1907; that the consideration thereof was the issuance of all except 3 of the 250 shares of stock of said corporation to J. E. Oliver, as trustee, to hold in trust for said plaintiff, to be returned to plaintiff as soon as certain moneys paid and to be paid by J. E. Oliver for the payment of plaintiff's debts and expenses were repaid to said Oliver. It is not claimed that there was not substantial evidence sufficient to support these findings.

The judgment is that plaintiff has no interest in the farm; that the deed conveyed it absolutely to said corporation; and that plaintiff take nothing. As to the stock, it declares that J. E. Oliver still holds the 247 shares of stock in trust for plaintiff and has a claim thereon for advances to and for plaintiff and for expenses regarding the trust, amounting to $15,610.61, and that, if said sum is not repaid to him within 180 days, said stock shall be sold to pay the same. These and other matters concerning the trust in the stock were put in issue by a cross-complaint and are fully supported by findings. We do not think it necessary to state these findings. Plaintiff gives no data to show that they are not supported by the evidence.

It is evident that there was no merit in the plaintiff's case, nor in this appeal. No object for taking it is apparent, except to vex, hinder, and delay the defendants. It is a proper case for the imposition of damages.

It is ordered that the judgment be affirmed, and that the defendants recover of plaintiff the sum of $100 as damages, together with costs of appeal.

We concur: SLOSS, J., LAWLOR, J.

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174 Cal. 417

In re MANCHESTER'S ESTATE.

(S. F. 7691.)

(Supreme Court of California. Feb. 15, 1917.)

1. SIGNATURES ⟹1—REQUISITES—SIGNING—"SIGN."

To "sign" a document is to affix a signature thereto, to ratify by hand or seal, or to subscribe in one's own handwriting. Citing Words and Phrases, Sign.

[Ed. Note.—For other cases, see Signatures, Cent. Dig. §§ 1–4.]

2. WILLS ⟹133—OLOGRAPHIC—EXECUTION—"SIGNED" BY TESTATOR.

An olographic will containing testatrix's name at beginning of document, and closing with, "whereunto I hereby set my hand, etc.," but not subscribed, was not "signed," as required by Civ. Code, § 1277, in view of section 13, which provides that words are to be construed as ordinarily used and according to context.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 342–344.]

3. WILLS ⟹133—OLOGRAPHIC—EXECUTION.

Where olographic will was not signed as required by Civ. Code, § 1277, indorsement "my will," with decedent's signature, on the envelope containing it, did not cure the defect, merely showing her belief that it was a valid will, and the envelope not being a part of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 342–344.]

4. WILLS 🔑108—EXECUTION—SUFFICIENCY.

The power and method of testamentary disposition is within legislative control, and, in determining whether a will is properly executed, testator's intention cannot be considered.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 248–259.]

5. SIGNATURES 🔑1—REQUISITES—"SIGNING" —"SIGNATURE."

To "sign" a document is to make any mark upon it in token of knowledge, approval, acceptance, or obligation, and the "signature" is the sign thus made, and, wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the document's face.

[Ed. Note.—For other cases, see Signatures, Cent. Dig. §§ 1–4.

For other definitions, see Words and Phrases, First and Second Series, Sign.]

6. WILLS 🔑111(2) — SIGNATURE — LOCATION OF.

Where a signature is at end of will, universal custom creates the conclusion that it was appended as an execution; if elsewhere, it is for the court to say from inspection of whole document, as to language as well as form and relative position of parts, whether that was the intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 268, 269.]

In Bank. Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Petition by Henry R. Woltman to probate the will of Ida Matilda Manchester, deceased. From order admitting will to probate, Walter Manchester, heir of decedent, appeals. Order reversed.

L. P. Forestell, of San Francisco, for appellant. William A. Powell, of Oakland, and Earll H. Webb, of San Francisco (George W. Chamberlain, of counsel), for respondent.

SHAW, J. The court below, upon the petition of Woltman, duly made an order admitting a certain document to probate as the last will of the decedent. From this order Walter Manchester, a brother and heir of the decedent, appeals.

The document referred to was wholly in the handwriting of the decedent. The only objection presented upon this appeal is that it was not signed by the decedent.

The document began as follows:

"January 14th, 1914.

"I, Matilda Manchester, leave and bequeath all my estate & effects, after payment of legal, funeral & certain foreign shipment expenses (as directed) to the following legatees, viz."

Then followed a statement of devises and bequests to divers persons. It ended as follows:

"Whereunto I hereby set my hand this fourteenth day of January, 1914."

The name of the decedent does not appear in or on the paper anywhere, except in the opening clause as above shown. This document was folded by the decedent and placed in an envelope, which was then sealed and indorsed by the decedent, in her own handwriting, with the words, "My will, Ida Matilda Manchester." In that condition it was, by her direction, placed in her safe deposit box, where it was found after her death. These are all the facts bearing upon the question of its execution as a will.

"An olographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed." Civ. Code, § 1277.

[1, 2] The will in question fits this description in all respects except the signing thereof. It was not "signed" according to the meaning of that word in ordinary usage. To "sign," as applied to a document, is defined as follows: "To affix a signature thereto; to ratify by hand or seal; to subscribe in one's own handwriting." Webster's Dic. Unquestionably, as used in the above-quoted section, it means the signature of the testator in his own handwriting written somewhere in or upon the document, with the intention by so writing it to authenticate the document. The name written at another place than the end of the document, and not for the purpose of authenticating it and indicating its completion, but merely to identify the person who is making the will, cannot be deemed to be a name "signed" to the document, unless that word is given a meaning entirely different from that which it is generally understood to have. 7 Words and Phrases, p. 6508. The Civil Code itself provides that words "are construed according to the context and the approved usage of the language." Civ. Code, § 13. If this be done, a document in which the name of the person making it appears only in the beginning thereof, and by way of recital to designate that person as the maker, in the manner above shown, cannot be said to have been signed by the maker. Estate of Walker, 110 Cal. 393, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104. We have here the additional indication of lack of that completion essential to a will in the closing words, "whereunto I hereby set my hand this," etc. These are apt words to precede a signature in attestation of a will or deed, and they tend to show that the decedent intended to sign immediately below, but failed to carry out that intention.

[3, 4] The defect is not cured by the words "My will" indorsed on the envelope and signed by the decedent. The manifest purpose of that indorsement was to state that the paper within the sealed envelope was the will of Ida Matilda Manchester. It shows that the decedent believed that the inclosed document was her will, and indicates that she believed that it was lawfully executed and valid. But her belief that it was a valid will, properly executed, does not make it so. The

power to dispose of one's property by will and the mode by which it may be exercised are matters under legislative control, and the mode prescribed by the statute must be followed, or there is no will.

"For the purpose of determining whether a will has been properly executed, the intention of the testator in executing it is entitled to no consideration. For that purpose the court can consider only the intention of the Legislature as expressed in the language of the statute, and whether the will as presented shows a compliance with the statute." Estate of Seaman, 146 Cal. 460, 80 Pac. 701, 106 Am. St. Rep. 53, 2 Ann. Cas. 726; Estate of Walker, 110 Cal. 391, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104.

If the decedent had used a printed form of will, filled the blank spaces as she desired, and had duly signed it, without attesting witnesses, the document would show her testamentary intentions as satisfactorily as the document she here prepared; but it would not have been a valid will. Estate of Billings, 64 Cal. 427, 1 Pac. 701. The act of signing is essential. An intention proven by other means will not serve the purpose.

There is no force in the argument that the indorsement on the envelope can be treated as a part of the document inclosed, as if it were an additional page attached thereto to give room for the signature. The circumstances are utterly inconsistent with the idea that the indorsement was made for any such purpose. They show that it constituted no part of the paper designated as "my will" within the sealed envelope. Warwick v. Warwick, 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775.

It is claimed that the decisions in Estate of Stratton, 112 Cal. 513, 44 Pac. 1028, and Estate of Camp, 134 Cal. 233, 66 Pac. 227, are opposed to the foregoing conclusions. In Estate of Stratton the olographic will was duly signed at the end, but below the signature were the words "my husband Thomas Stratton." Discussing the effect of these words as part of the document, the court held that they were intended to name the husband as a legatee; that they were merely displaced by the testator, and should be read as though written at the beginning or end of the last clause, in which the legatee was designated only by the pronoun "he." In this discussion the court said:

"The statute does not require that an olographic will shall be 'subscribed by the testator at the end thereof.' It is sufficient that it be 'signed' by him, and this signing may be at the beginning or in any part of the document"—citing Estate of Walker, supra.

In Estate of Camp, proof that the final clause of an olographic will, including the signature of the testator at the end thereof, had been torn off and destroyed after the testator's death, was duly made by two credible witnesses, as required by section 1339, Code of Civil Procedure, and this was held to be sufficient proof of the authenticity of the will. The initial clause also contained the name of the testator. The court said that this also established the fact that the document was intended by him to be his last will, and that "the writing by him of his name in that clause was itself a sufficient signature."

[5, 6] The declarations in these cases are entirely consistent with the rule stated in Estate of Walker, supra, that:

"To sign an instrument or document is to make any mark upon it in token of knowledge, approval, acceptance, or obligation. The signature is the sign thus made."

In neither of them was there any discussion, or need of discussion, as to the kind of proof permissible to establish the fact that the signature appearing in an olographic will, though not at the usual place at the end of the document was nevertheless intended as a signature in execution thereof. They do not in the least control our decision of this question. The true rule, as we conceive it to be, is that, wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself. If it is at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears. If placed elsewhere, it is for the court to say, from an inspection of the whole document, its language as well as its form, and the relative position of its parts, whether or not there is a positive and satisfactory inference from the document itself that the signature was so placed with the intent that it should there serve as a token of execution. If such inference thus appears, the execution may be considered as proven by such signature.

This rule has the support of the better reasoned decisions of other jurisdictions. Thus, in Waller v. Waller, 1 Grat. (Va.) 474, 42 Am. Dec. 564, where the subject is elaborately discussed, the court says that the signing of the will is required as proof "that the act is a complete, concluded act," and that "the signing must be such as, upon the face, and from the frame of the instrument, appears to have been intended to give it authenticity. It must appear that the name, so written, was regarded as a signature; that the instrument was regarded as complete without further signature and the paper itself must show this." In Warwick v. Warwick, supra, the will began as follows: "I, Abraham Warwick, declare this to be my last will and testament," But the testator's name did not occur elsewhere in the will, and there was no declaration in the document that the signature at the beginning was written for the purpose of authentication or execution. The court held that the signature was not "affixed in such a manner as to make it manifest that the name was intended as a signature." To the same effect are Catlett v. Catlett, 55 Mo. 339; Crutcher v. Crutcher, 30 Tenn. (11 Humph.) 384; Armant's Succession, 43 La. Ann. 310, 9 South. 50, 26 Am. St. Rep. 183; In re Tyrrell's Estate, 17 Ariz. 418, 153 Pac. 767; French v. French, 14 W. Va. 479. And in the recent decision in Estate of Dombrowski, 163 Cal. 295, 125 Pac. 235, we said:

> "No doubt a subscription or signing of any kind will not constitute a valid execution of a will unless made with the intention, on the part of the testator, of finally and completely authenticating the will."

This was said of an attested will, but that it was not supposed to state a rule confined to attested wills is shown by the fact that Waller v. Waller, supra, is cited as an application of it.

The few decisions to the effect that, where the name of the testator appears only in the initial clause of an olographic will, the will may be considered as "signed" within the meaning of statutes similar to ours, are all based on the supposed authority of the English case of Lemayne v. Stanley, 3 Lev. 1, 83 Eng. Reprint, 545, decided in 1681. The will there considered was an attested will. The subsequent cases following it take it as absolute authority, and do not properly distinguish or limit the scope of its language. The case has been criticized in England and limited strictly to cases where witnesses saw the will written or where it was subsequently acknowledged before them. Morrison v. Turner, 18 Ves. Jr. 175; Coles v. Trecothick, 9 Ves. Jr. 234, 32 Eng. Reprint, 598. To overcome its effect in England the statutes of 1 Vict., 15 Vict., and 16 Vict. were enacted, changing the law so as to require that "all wills be signed at the end thereof." In view of this consequence of that decision, it is obvious that its authority should not be considered as controlling. The rule we have stated is, in our judgment, supported by sounder reasons and is less likely to produce evil results.

Our conclusion is that the document in question was not signed by the testator, as required by section 1277, and that it is not entitled to probate.

The order is reversed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.; LAWLOR, J.

(174 Cal. 426)

WEBSTER v. ORR et al. (S. F. 7002.)

(Supreme Court of California. Feb. 17, 1917.)

1. MUNICIPAL CORPORATIONS 🔑706(4)—INJURIES ON STREETS—ADMISSIONS.

In an action for personal injuries against the owner of a truck alleged to have been caused by negligent driving in street, that after accident owner discharged driver is not competent evidence of negligence of driver.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.]

2. WITNESSES 🔑352—CROSS-EXAMINATION—IMPEACHMENT.

Under Code Civ. Proc. § 2051, providing that a witness may be impeached by contradictory evidence or evidence of his reputation for truth, etc., but not by evidence of particular wrongful acts, a witness cannot be impeached or discredited by showing that he was discharged by his employé for negligence, where liability is sought to be placed upon employer for such negligence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1152.]

3. APPEAL AND ERROR 🔑1170(7)—REVERSAL—PREJUDICIAL ERROR.

In an action against an employer for negligence of his truck driver, the evidence of negligence being contradictory, admission of evidence, to effect that shortly after accident employer discharged driver for such negligence, cannot be disregarded under Const. art. 6, § 4½, providing that no judgment will be set aside for improper admission of evidence not resulting in a miscarriage of justice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4066, 4543.]

In Bank. Appeal from Superior Court, Alameda County; N. D. Arnot, Judge.

Action by Ernest C. Webster against C. M. Orr and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

Charles A. Beardsley and Fitzgerald, Abbott & Beardsley, all of Oakland, for appellants. Gehring & Wyman, of Oakland, for respondent.

HENSHAW, J. Plaintiff brought his action against defendants to recover damages for injuries sustained through the negligence of the driver of a truck owned by defendants. He received a verdict at the hands of the jury. From the judgment which followed and from the court's order denying defendants' motion for a new trial they have appealed.

The evidence, as is usual in such cases, is in sharp conflict. That offered by plaintiff was to the effect that he was carrying a friend upon his two-passenger motorcycle and was proceeding eastward upon a street in the city of Oakland. Suddenly and unexpectedly the driver of defendants' truck, with his horses trotting or galloping and apparently not under perfect control, cut across his path, the pole struck the motorcycle, and he and his companion were thrown to the ground and trampled upon by the horses. The conflicting evidence of defendants was that the heavy truck was proceeding at a walk, the motorcycle was going at a rapid rate of speed, and was passing vehicles moving in the same direction without due care, that while so being driven it collided with the tongue of the truck wagon, which was crossing this street in an orderly manner, and that by reason of this collision thus occurring, plaintiff, without negligence upon the part of defendants, sustained his injuries.

The driver of defendants' truck was called as a witness on behalf of defendants, and gave his version of the accident. Upon cross-examination he was asked the following questions. To them defendants' counsel objected. The objections were overruled, and the answers given as follows:

"Q. How long ago was the accident? A. It was on the 20th of July, 1911. Q. When you were employed by Orr & Breedlove? A. Yes, over a year ago. Q. Did you leave their employ after the accident? A. Yes, sir. Q. Were you discharged because of the accident? A. Yes, sir. Q. Was that the reason given? A. I expect so. Q. Was any reason given? A. Yes. Q. Did he (Mr. Doyle) give as the reason for your discharge the fact that you had been drinking? A. That was the reason he gave. Q. What was the reason of the discharge? A. It was for drinking. That was why they discharged me. Q. Nothing said about the collision; is that right? A. I cannot remember anything being said about it."

[1] The value to the plaintiff of this evidence, if properly admitted, the injury to the defendants of this evidence, if improperly admitted, are made the more conspicuous by the fact that defendants were contending that the physical condition of their truck and the harness of the horses demonstrated that the pole of the truck did not strike the motorcycle as plaintiff contended, but to the contrary that the motorcycle was driven at headlong speed into the pole of the truck. In support of this they offered evidence to show that the strong pole of this two-ton truck was gouged out and the forward end broken and shattered, an injury which, so they argue, could not have resulted if the pole had struck the motorcycle, but which could, and would, naturally have resulted if a speeding motorcycle had been driven against the pole. Still further in this connection it was shown that the hames straps of the harness were broken, an accident which it is argued could not have occurred if plaintiff's version of the occurrence was the true one. This is said in emphasis of the fact that this evidence so admitted was of a very real and vital consequence in this controversy, amounting as it did to an admission by the defendants of the negligence of the driver who was dismissed from his employment because of that negligence arising from his condition of intoxication. As evidence designed to fix an admission of negligence on the part of defendants after knowledge of the accident it was indisputably incompetent and manifestly injurious. Sappenfield v. Main Street R. R. Co., 91 Cal. 48, 61, 62, 27 Pac. 590; Hager v. Southern Pacific Co., 98 Cal. 309, 311, 33 Pac. 119; Turner v. Hearst, 115 Cal. 394, 401, 47 Pac. 129; Limberg v. Glenwood, 127 Cal. 598, 604, 60 Pac. 176, 49 L. R. A. 33; Helling v. Schindler, 145 Cal. 303, 311–315, 78 Pac. 710; 29 Cyc. 616; Armour & Co. v. Skene, 153 Fed. 241, 82 C. C. A. 385; Hewitt v. Taunton St. Ry. Co., 167 Mass. 483, 46 N. E. 106.

[2, 3] It is sought, therefore, to justify, the admission upon other grounds, and, should the justification fail, then to excuse it as an immaterial error under section 4½ of article 6 of the Constitution. The argument in justification comes to this: That the witness was an important witness for the defense and was a hostile witness to plaintiff, and that plaintiff therefore had the right affirmatively to establish the hostility of this witness against himself by showing that he had been discharged by the defendants. We do not clearly apprehend the force of this, since rationally it would seem that if he had been unjustly discharged, his animosity would have been against the defendants, instead of against the plaintiff, but, putting this aside, we have never been advised of any rule of evidence, nor cited to any authority holding that evidence that an employé was discharged after an accident could be used (in an action such as this where the witness is called by the defendant employer) to establish that witness' hostility either to the plaintiff or to the employer. Still further, under the argument of justification, the proposition is advanced that, the witness' version of the accident being such as to exonerate himself from culpability and his former employers from liability, evidence of his discharge was legitimate for impeachment, but the legitimate methods of impeaching or discrediting a witness are pointed out in section 2051 of the Code of Civil Procedure, and it would certainly be an innovation in the law of evidence to add, in effect, to that section a provision that a witness may be impeached or discredited by a showing that he was discharged by his employer for reasons growing out of the transaction in question, and this where liability is sought to be cast upon the employer because of the employé's part in the transaction.

The conflicting character of the evidence has been indicated. Also it has been pointed out that the effect of the objectionable evidence, if believed, was to establish before the jury an admission by defendants that their driver was culpably negligent, and had been discharged for that reason. It left the jury little more to do than to fix the amount of their award. For this reason respondent cannot successfully invoke the application of section 4½ of article 6 of the Constitution. The error was both serious and prejudicial.

The judgment and order appealed from are therefore reversed.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; LORIGAN, J.; LAWLOR, J.

174 Cal. 430

E. CLEMENS HORST CO. et al. v. TARR MINING CO. et al. (Sac. 2245.)

(Supreme Court of California. Feb. 17, 1917. Rehearing Denied March 19, 1917.)

1. Waters and Water Courses 🔑142 — Prescriptive Rights — Diversion of Stream.

Where defendants took water from a river, diminishing its flow below their dam down to plaintiffs' lands, plaintiffs being entitled to the full flow of the stream by their lands, the taking was an invasion of their rights, whether they used the water or any part of their lands or not, regardless whether the water remaining in the stream was sufficient for plaintiffs' needs and uses, and so was adverse to plaintiffs' rights, and a continuance of such taking for five years established in defendants a right to continue the diversion of the quantity taken, a right held by a perfect title in fee, good against all lower riparian proprietors.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 15, 152.]

2. Waters and Water Courses 🔑145 — Prescriptive Rights—Extent — Mode of Diversion.

That defendants, by means of new and more perfect dams, and by repairing their canals, were enabled to divert more water than before, did not affect their right to continue to divert the quantity which they had previously acquired the right to divert.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 20.]

3. Waters and Water Courses 🔑143 — Prescriptive Rights—Quantity.

The fact that a small quantity of the water diverted from a river into canals and dams always escaped from the canals through leaks in the flumes and thus returned to the stream did not deprive the parties taking the water of the right to the quantity actually kept out of the stream.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 152.]

4. Waters and Water Courses 🔑152(5) — Prescriptive Rights — Establishment — Pleading Limitations.

In an action by a riparian owner to establish his water rights, an answer by defendant that the action is barred by the statute of limitations, by reference to the appropriate section of the Code of Civil Procedure, is a sufficient pleading of the prescriptive right to the quantity of water claimed by defendant, and justifies the taking of evidence and the making of findings with respect to such prescriptive right.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 156.]

5. Waters and Water Courses 🔑152(11)— Prescriptive Rights—Quantity.

The proper form of judgment would have been to declare the right of the respective defendants to make diversions from the river up to the quantity as to which their prescriptive right was found to be established, and to permit them to continue the diversion of such quantity, but to enjoin them from making any greater diversion by means of improved dams, canals, or otherwise, and a judgment was improper which allowed defendants to continue their diversion so long as the quantity flowing by plaintiffs' land was not reduced thereby below specified quantities, since the right of the owner of a prescriptive right to water is absolute.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 156.]

6. Waters and Water Courses 🔑152(10)— Prescriptive Rights — Action to Establish—Duty of Court to Find the Facts.

In an action by riparian owners to establish water rights, the fact that witnesses differed in their evidence as to the capacity of diverting canals of defendants did not relieve the court of the duty of finding the facts; it being the duty of the court to compare and weigh the evidence and reach a conclusion thereon according to its best judgment.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 156.]

7. Waters and Water Courses 🔑152(8) — Prescriptive Rights—Proof.

In an action by riparian owners to establish water rights, wherein defendants set up prescriptive rights by diversion, defendants' proof did not need to extend over the whole period from the beginning of the diversion to the beginning of the action, and a failure of proofs as to some intervening period would not defeat defendants' claim.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 156.]

8. Waters and Water Courses 🔑143 — Right of Action for Diversion.

Where the owners of land adjacent to a river for 40 years diverted and used thereon practically all the water of the stream that reached a point opposite the upper boundary of their land, doing so continuously and under claim of right, they were entitled to maintain an action against any wrongful diversion above of the water of the stream that would diminish it at their place of diversion, so that it would not afford them their usual quantity.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 152.]

In Bank. Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by the E. Clemens Horst Company and others against the Tarr Mining Company, the South Yuba Water Company, and others. From a judgment for plaintiffs, defendants, except the Tarr Mining Company, appeal. Judgment reversed.

Wallace Dinsmore, of Marysville, and Wm. B. Bosley, of San Francisco, for appellants. W. H. Carlin, of Marysville, George & Hinsdale, of Sacramento, Samuel C. Wiel, of San Francisco, and White, Miller & McLaughlin and C. E. McLaughlin, all of Sacramento, for respondents.

SHAW, J. This appeal is taken by the defendants South Yuba Water Company, United Water & Power Company, James D. Stewart, and Pacific Gas & Electric Company from a judgment in favor of the plaintiffs. Judgment was given against the Tarr Mining Company, but it has not appealed therefrom.

The plaintiffs, respectively, own farms aggregating about 3,500 acres alleged to be bordering upon Bear river. They claim the right to the use of the water of the river as riparian owners. They also claim that, during each irrigating season for more than five years before the beginning of the action they continuously, adversely to all persons and under a claim of right, have diverted from the river and used upon their lands for the irrigation thereof quantities of water amounting in the aggregate to 3,400 miner's inches of water, whereby they have gained the right to continue to take and use on said lands said quantity of the water of the stream. They charge that in the year 1910 the defendants entered upon Bear river and its tributaries, above their said lands, obstructed the flow thereof, and diverted therefrom the waters thereof to such an extent that the plaintiffs have been thereby deprived of at least one-third of the water which they had formerly taken and used and were entitled to take and use from said river as aforesaid. The action was begun on March 17, 1911. The prayer is that the defendants be enjoined from obstructing the flow of the river, or diverting water therefrom, in such a manner as to prevent the water thereof from flowing down the channel to plaintiffs' land for plaintiffs' use, and that the defendants' dams be abated and removed.

The Pacific Gas & Electric Company and the South Yuba Water Company, in a joint answer, aver that neither of them has ever taken water from the river or its tributaries except such water as it has owned and has had the right to take, under appropriations completed prior to those of any of the plaintiffs, and that the right of each of them to take therefrom and use such water as it has taken therefrom and used is "prior in time and superior in law" to the alleged rights of the plaintiffs. This answer also alleges that the respective causes of action of the plaintiffs set forth in the complaint are each barred by the provisions of sections 318, 319, 312, 335, 339, subd. 1, and section 343, of the Code of Civil Procedure. The defendants United Water & Power Company and James D. Stewart join in a separate answer. This answer "admits" that the United Power & Water Company and its predecessors in interest for more than 40 years have maintained a dam in Bear river and have by means of said dam and a ditch called the Miners' ditch taken from said river 2,200 miner's inches of the waters thereof, and have put the same to beneficial uses. (The complaint contains no allegation to that effect.) The answer further alleges that said water company is now the owner, and that its predecessors in interest have been, for more than 40 years before the action was begun, the owners and in possession of the right to divert from said river by means of said dam and said Miners' ditch all the water that said ditch will carry. It also pleads the statute of limitations, as in the other answer.

This form of pleading gives little information as to the defense relied on. We must look to the evidence to understand the real nature and character of the water rights asserted by the defendants at the trial. The South Yuba Water Company has no present right in the water of Bear river. Such rights as it had were conveyed by it to the Pacific Gas & Electric Company on December 31, 1910. We assume that it was made a party defendant because said conveyance was not recorded until after the action was begun. Stewart was and is the president and manager of the United Water & Power Company, and he is not otherwise interested in the controversy.

The Pacific Gas & Electric Company claims three distinct and separate rights to divert water from Bear river. These are as follows: (1) The right to maintain a dam, known as "Bear River dam," at a point in the river about 36 miles above the lands of the plaintiffs, and thereby to divert from the river into a flume or canal, known as the "Bear River canal," a sufficient quantity of the water of the river to fill said canal, claimed to be 1,800 miner's inches, and devote the same to public use for irrigation or other purposes; (2) the right to maintain a dam, known as the "Gold Hill dam," at a point in said river about 17 miles above the lands of the plaintiffs, and thereby to divert into a flume or canal, known as the "Gold Hill canal," sufficient of the waters of the river to fill said canal, claimed to be 840 miner's inches, and to devote it to the same public uses; (3) the right to maintain a dam, known as "Bear Valley dam," at a point in the river about 50 miles above the lands of the plaintiffs, and thereby to divert into a flume or canal, known as the "Boardman canal," from a storage reservoir there maintained by said company, which collects and stores the flood and storm waters of said river, a constant flow of 2,800 miner's inches of water, and to devote it to the same public uses.

The United Water & Power Company claims the right to maintain a dam in Bear river at a point 2 miles below the above-mentioned Bear Valley dam and 48 miles above plaintiffs' lands, known as the "Head dam," and a ditch leading therefrom known as "Miners' ditch," and thereby, to divert from said river all the waters thereof that said ditch will carry, claimed to be 2,100 miner's inches, and to devote the same in part to public use and in part to the private use of the owner of the said dam and ditch.

It would have served to clarify the issues and would have led to more definite findings than those that were made regarding the defenses pleaded if, instead of the general statements of the answer, the defendants had set forth the facts relating to each of their several asserted prescriptive water rights, stating definitely the quantity of water they claimed for each right. The general form of the answer may have led to the erroneous theory which we find in the decision and judgment.

The findings relating to the flow of water in Bear river state that during every year since 1845 up to the year 1910 there flowed naturally in said river at the easternmost line of plaintiffs' land, for the use of said land, during the months of April, May, and June, a minimum of 4,000 miner's inches of water, during July, 3,000 miner's inches, during August, 2,200 miner's inches, and during September and October, 2,000 miner's inches; that these months comprise the irrigating season for plaintiffs' lands; that plaintiffs, up to the year 1910, had always used during said months said quantities of water on their lands; that the said amounts were, are, and in the future always will be necessary for use on said lands; that during the said irrigating season of 1910 the defendants, by means of the dams and canals aforesaid, naming them, did divert, ever since have diverted, and threaten to continue to divert from said river and carry out of its watershed "more than one-third of the said waters of said Bear river to which plaintiffs and their said lands are entitled as aforesaid." There are further findings that none of the causes of action of the plaintiffs, or any of them, is barred by the provisions of any or all of the sections of the Code of Civil Procedure specified in the answer; that the defendant Pacific Gas & Electric Company and its predecessors in interest have not, and never have had, any right to divert any of the waters of Bear river, the flow of which the plaintiffs have been found to be the owners of and entitled to the use of as aforesaid, and that said defendant and its predecessors in interest have not heretofore diverted from said river or used any of said waters so found to be owned by the plaintiffs and have not acquired any right to do so, and that as to said defendant the right of the plaintiffs to the water so found to be owned by them is paramount to any right thereto of said defendant; that the United Water & Power Company and its predecessors in interest have never, through the Miners' ditch or otherwise, until 1910, diverted any water adverse to the rights of the plaintiffs to the water of which the plaintiffs are found to be the owners as aforesaid; and that said defendant is not the owner nor in the possession of any right to divert from said river during the irrigating season of any year any of the waters thereof so found to be owned by the plaintiffs.

The judgment makes no provision as to the use or diversion of water except during the months above named. It declares merely that the plaintiffs have the right to the continued flow in Bear river every year at their eastern boundary, during the months above named, of the quantities of water stated in the findings as flowing in said months at said boundary, and that the defendants be enjoined from diverting any water from Bear river "at any time when the waters flowing in said Bear river at said easternmost boundary of plaintiffs' said lands, in any year at any time during the months of April, May, and June, shall be less than 4,000 inches; during the month of July, less than 3,000 inches; during the month of August, less than 2,200 inches; and during the months of September and October, less than 2,000 inches."

The several claims of the defendants to the ownership of the above-described water rights are supported by evidence similar in character. A statement of that relating to the diversion at the Bear River dam aforesaid will illustrate them all sufficiently for the purposes of this decision. The Bear River dam and the flumes and ditch leading therefrom, now owned by the Pacific Gas & Electric Company, were constructed about the year 1852. They have been maintained and operated continuously, without substantial change, from that time down to the time of the alleged diversions of water from Bear river by the defendants in 1910. This was done by the successive predecessors in interest of the gas company; the South Yuba Water Company being in the ownership and control from the year 1890 until December 31, 1910. The Bear River canal at its head is of a size sufficient to carry more than 1500 inches of water. The lowest estimate of its capacity made by any witness was 1,520 miner's inches. At least that quantity of water has been diverted from the river by means of said dam and canal by the predecessors of the gas company, and put to public use for beneficial purposes continuously during the above-named months of each year prior to 1910, for many successive periods of five years, whenever there was enough water of the river there flowing to fill the canal, and when there was less flowing all was diverted. It is not questioned that this diversion and use, whatever the quantity, was made under a claim of right to do so. This diversion and use was continuous for so many years, was so openly made, so notorious, and embraced so large a portion of the waters of the stream and extended over so wide a territory that it could not be, and is not, contended that the plaintiffs and their predecessors in interest were without knowledge thereof, if such knowledge were necessary to the inception of the period of limitation and prescription. There was no substantial conflict in the evidence with respect to these facts.

[1] The taking of the 1,520 inches of water from the river diminished its flow to that extent below the dam down to the plaintiffs' lands. As the plaintiffs were then entitled to the full flow of the stream by their lands, this taking was an invasion of their rights, whether they used the water, or any part thereof, on their lands or not, and regardless

of the fact that the water remaining in the stream may have been sufficient for their needs and uses. It was therefore adverse to plaintiffs' rights, and a continuance thereof for five years established in the predecessors in interest of the gas company a perfect right to continue the diversion of the quantity so taken. Moore v. Clear Lake W. W. Co., 68 Cal. 150, 8 Pac. 816; Gallagher v. Montecito, etc., Co., 101 Cal. 244, 35 Pac. 770; Anaheim, etc., Co. v. Fuller, 150 Cal. 335, 88 Pac. 978, 11 L. R. A. (N. S.) 1062; Gould v. Eaton, 117 Cal. 543, 49 Pac. 577, 38 L. R. A. 181; Stanford v. Felt, 71 Cal. 250, 16 Pac. 900. This right was thereafter held by a perfect title in fee, good against all lower riparian proprietors, including the plaintiffs. Arrington v. Liscom, 34 Cal. 381, 94 Am. Dec. 722; Cannon v. Stockmon, 36 Cal. 540, 95 Am. Dec. 205; Alhambra, etc., Co. v. Richardson, 72 Cal. 600, 14 Pac. 379. Under the evidence, therefore, the South Yuba Water Company, on December 31, 1910, when it conveyed its water rights to the gas company, held a complete and perfect title to the right to divert at Bear River dam the quantity of water which had been there diverted continuously for so many years. Its conveyance transferred that right and title to the gas company. This right was therefore established by the evidence, and the findings that plaintiffs' causes of action were not barred by the statute of limitations and that the right of the plaintiffs to have flow at their lands in Bear river and to use the amounts of water above specified during the months stated is paramount to the right and title of the gas company are contrary to the evidence, so far as this prescriptive right and title, and others of like origin and character, and sustained by like proofs, are concerned. The plaintiffs' causes of action are barred with respect to these prescriptive rights. These include the diversions at Gold Hill dam, at the Bear Valley dam, and at the Head dam of Miners' ditch, each of which is in pursuance of a prescriptive right as well sustained by the evidence as that at Bear River dam.

[2, 3] The fact that the defendants, by means of new and more perfect dams, and by repairs to the canals, completed within three years prior to 1911, were enabled to and did, in the year 1910, divert more water than before, did not affect the rights to continue to divert the quantity which they had previously acquired the right to divert. And if a small part of the water so taken into the canals at said dams has always escaped from the canals through leaks in the flumes, and thus has been returned to the stream below, this does not deprive defendants of the right to the quantity actually kept out of the stream. It would only diminish by that much the quantity which they are entitled to continue to divert by reason of the taking at the dam. It would not affect the right to the remainder after allowing for these leakages.

[4] In an action by the riparian owner to establish his riparian rights, an answer by the defendant that the action is barred by the statute of limitations, by reference to the appropriate section of the Code of Civil Procedure, is a sufficient pleading of the prescriptive right to the quantity of water claimed by the defendant, and justifies the taking of evidence and the making of findings with respect to such prescriptive right. Alhambra, etc., Co. v. Richardson, 72 Cal. 600, 14 Pac. 379; Churchill v. Louie, 135 Cal. 610, 67 Pac. 1052. Consequently the court should have made findings relating to these several claims of water rights by the defendants, notwithstanding the general character of the answer.

[5] The proper form of a judgment in such a case would be to declare the right of the respective defendants to make the diversions of water from Bear river to the quantity as to which the prescriptive right was found to be established and to permit them to continue the diversion of such quantity, but to enjoin them from making any greater diversion of the water of the river by means of improved dams or canals or otherwise. It would appear that the court endeavored to accomplish this object by declaring that they should make no diversion whatever when the water flowing at the plaintiffs' land was less than the quantities designated in the judgment during the respective months of the irrigating season. This, in effect, would allow the respective defendants to continue their respective diversions so long as the quantity flowing by the plaintiffs' land was not reduced thereby below the quantities specified. The objection to this form of judgment is that it puts upon the defendants a burden which the law does not attach to their prescriptive rights. The defendants' rights were positive as to quantity, and they existed regardless of the effect on the stream below. The owner of a prescriptive right thus acquired is under no obligation to go below to ascertain or inquire whether those who there have rights in the water are receiving the usual quantity or not. His right is absolute. The consequences of his diminution of the stream must be suffered by those below. Under the judgment in this case the defendants could not safely divert the quantity of water to which their prescriptive rights extend without first ascertaining each day that such diversion would not reduce the stream at plaintiffs' land below the minimum quantity established by the judgment. Of necessity this would be very difficult, if not impossible. All diversions and uses by riparian owners and others in the intervening space, 17 to 50 miles, must be taken into the account; also the state of the weather and of the atmosphere, the possibility of rain to vary the flow of the stream, and the losses by seepage in the stream as depleted compared with its loss if not di-

minished. The right which the defendants had acquired is a right to take a positive quantity continuously, and it is not burdened by any such duties or obligations as would be imposed upon it by this judgment.

There is no force in the claim that the evidence is too indefinite and uncertain to support findings as to the quantity of water covered by the prescriptive right at the several dams. It is true that the transcript indicates that little importance was attributed to this point. Apparently it was obscured by other matters during the trial. But there was evidence with respect to each of the diversions, showing the capacity of the several canals and the quantity of water carried therein; that is, that they were run full when there was water enough, and that when there was less all the water was diverted.

[6] The fact that witnesses differed in their evidence as to the capacity did not relieve the court of the duty of finding the facts. In proving a prescription the evidence must relate to conditions and acts occurring at a period many years before the trial, and it is seldom harmonious in the details. It is the duty of the court to compare and weigh such evidence and to reach a conclusion thereon as to the truth, according to its best judgment. A continuous adverse diversion and beneficial use of a given quantity for a single period of five years establishes the title to that quantity.

[7] The proof need not extend over the whole period from the beginning of the diversion to the beginning of the action. A failure of proofs as to some intervening period would not defeat the defendants' claim.

The important principle in the case, we may, in conclusion, repeat, is that the rights of the defendants in the stream, with regard to quantity of water, are not to be measured by the quantity which has hitherto flowed or may hereafter flow therein at plaintiffs' lands, but by the quantity which has been adversely diverted at their dams and beneficially used continuously for a period of five years, under claim of right, by them and their predecessors in interest.

It is perhaps necessary to add that we refer to the water naturally flowing in Bear river, and not to such waters as may have been carried into it from the Yuba or American rivers. It appears that such additions have been made in the past by the defendants and their predecessors. They have the right to retake these waters at their pleasure. The court must take account thereof and deduct the same in computing the adverse diversions from Bear river, allowing only the natural flow taken. This will make its task more difficult, but we cannot say that it will be impossible to distinguish them.

The appellants at the trial insisted and on this appeal they still insist that none of the lands of the plaintiffs are riparian to Bear river, except the tract known as the Daniel P. Durst ranch, belonging to plaintiffs Ralph H. and M. H. Durst and the estate of Daniel Durst. It is admitted that all of the lands originally abutted upon the river, but it is claimed that by reason of changes in the course of the stream before the action was begun all of it except the above-named tract has ceased to abut thereon, except during times of extreme high water, and has thereby lost the riparian right. It is unnecessary to consider the question. So far as the last-named plaintiffs are concerned, the riparian character of their land enables them to maintain the action and would sustain an injunction in their favor if they were otherwise entitled thereto. Watson v. Lawson, 166 Cal. 241, 135 Pac. 961.

[8] As to the other lands it appears that the owners thereof have for more than 40 years next before the action was begun diverted and used thereon practically all the waters of the stream that reach a point opposite the upper boundary of the land continuously and under claim of right. This would entitle the plaintiffs to maintain the action against any wrongful diversion above that would diminish the stream at their place of diversion so that it would not afford them their usual quantity. Under these circumstances, the question as to the riparian character and rights of this land is not of sufficient importance to this appeal to require consideration.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.; LAWLOR, J.

174 Cal. 376

BOND v. SUPERIOR COURT OF ALAMEDA COUNTY. (S. F. 8120.)

(Supreme Court of California. Feb. 6, 1917.)

CONTEMPT 🔑66(2)—RE-ENTRY AFTER EVICTION—APPEAL.

Code Civ. Proc. § 1210, as amended, did not change the law with respect to the right of appeal from a judgment of contempt for re-entering land from which one has been ejected, nor grant any right of appeal in such matter.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 223–228.]

Sloss, Melvin, and Lawlor, JJ., dissenting.

In Bank. Application by Mary Bond for writ of review to the Superior Court of Alameda County. Part of order complained of in proceeding annulled.

Decided from the bench February 5, 1917, on the conclusion of the oral argument.

F. A. Berlin, of Oakland, for petitioner. George W. Reed and L. D. Manning, both of Oakland, for respondent.

PER CURIAM (speaking through the Chief Justice). The court is of the opinion that the case is not distinguishable from Huerstal v. Muir, 62 Cal. 479; that the amendment to section 1210 of the Code of Civil Procedure has not changed the law in the respect suggested, and does not grant or confer any right of appeal in such a matter, that under these circumstances Huerstal v. Muir, supra, controls, and the portion of the order complained of in this proceeding should be annulled.

It is so ordered.

SLOSS, J., MELVIN, J., and LAWLOR, J., dissented.

(174 Cal. 411)

NAPA VALLEY ELECTRIC CO. v. CALISTOGA ELECTRIC CO. (S. F. 8193.)

(Supreme Court of California. Feb. 13, 1917.)

Appeal and Error 🔑477—Supreme Court—Powers—Temporary Restraining Order.

The superior court having by order dissolved a temporary restraining order and denied an injunction pendente lite against defendant, the Supreme Court has no power to grant a restraining order against defendant pending an appeal from the order of the superior court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2247–2249.]

In Bank. Action by the Napa Valley Electric Company against the Calistoga Electric Company. From an order of the superior court dissolving a temporary restraining order and denying an injunction pendente lite, plaintiff, having appealed, makes application to this court for a temporary restraining order pending appeal. Application denied.

U'Ren & Beard, of Napa, for plaintiff.

PER CURIAM. The plaintiff commenced an action in the superior court to enforce specific performance of an alleged contract for the sale of certain property, and sought an injunction pendente lite restraining the defendant from disposing of the property pending the determination of the action.

The superior court having granted a temporary restraining order, on the hearing of the application for an injunction pendente lite made its order, denying the same and dissolving the temporary restraining order. It refused the request of the plaintiff to continue in force the temporary restraining order pending the determination of the appeal from the order denying an injunction pendente lite.

The plaintiff has appealed from such order, and now seeks from this court an order restraining the defendant, pending such appeal, from disposing of the property; in other words, it seeks from this court, pending the determination of the appeal, precisely the relief it sought to obtain from the superior court by an injunction pendente lite.

It was determined by this court in Hicks v. Michael et al., 15 Cal. 107, 112, 114, that this court has no authority to grant such relief. At the time of that decision our law, both constitutional and statutory, was substantially the same as it is now in all material respects. This decision has ever since its rendition been regarded by this court as determining this question, and it has been consistently followed by denying applications in all respects similar to this. In the case of Platt v. City and County of San Francisco, S. F. No. 5562, the question was squarely presented and given consideration. No opinion was filed by this court in that matter, but the application was denied because the court was satisfied with the correctness of the doctrine declared by Hicks v. Michael, supra. We see no reason to question the correctness of the decision in Hicks v. Michael, supra.

The application is denied.

(174 Cal. 441)

FRESNO CANAL & IRRIGATION CO. et al. v. PEOPLE'S DITCH CO. et al. (S. F. 6933.)

(Supreme Court of California. Feb. 21, 1917.)

1. Waters and Water Courses 🔑78 — Rights of Riparian Owners—as Against Nonriparian Owners.

Riparian proprietors are entitled, as against nonriparian proprietors, to the natural and usual flow of all the waters in the stream, except as such right has been limited or divested by agreement or by prescription.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 67–69.]

2. Waters and Water Courses 🔑158(2) — Agreement—Construction.

Plaintiff had a right in a stream to take water at a certain point. It also had rights in the stream as a riparian owner at a lower point. It made an agreement with defendants, nonriparian owners, taking water from a point opposite its lower riparian holdings, as to its upper stream rights, that when there was flowing in the river 1,900 cubic feet of water per second, 599 cubic feet should be allowed to flow down to the defendants, and further that, when over 1,900 cubic feet per second was flowing, there should be allowed to flow down to defendants 300 additional cubic feet and no more. *Held*, that contract rights of defendants did not extend to more than 899 cubic feet per second, and if the plaintiff, at such upper point, allowed more water to flow down, such contract did not give the defendants the right to appropriate such excess.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 187.]

3. Appeal and Error 🔑954(3)—Discretion of Lower Court — Preliminary Injunction.

In order to affirm an order granting temporary injunction, it is merely necessary that the appellate court find in the evidence sufficient basis to support the discretion which the trial court exercised.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3818.]

4. Injunction 🔑158 — Preliminary Injunction—Effect.

The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy, but merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendants should or that he should not be restrained from exercising the rights claimed by him.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 341.]

5. Waters and Water Courses 🔑85—Diversion of Stream — Temporary Injunction—Discretion.

Grant of temporary injunction to riparian owners, restraining nonriparian proprietors from taking water from a stream beyond a certain amount, *held* not an abuse of discretion by the trial court.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 84–88.]

6. Waters and Water Courses 🔑85—Diversion of Stream — Temporary Injunction—Objections.

The temporary injunction was not open to the objection that it restrained defendants at all times without reference to the stage of the river, and even when water might be going to waste in flood times from diverting more than the specified quantity of water, where the complaint praying the injunction was filed in May and the order issued the following December, since the court's order was merely temporary, and it appeared probable that the defendants had ample opportunity to bring the action to judgment before the spring floods referred to by them, or in any event to apply to the court for a further order.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 84–88.]

7. Injunction 🔑147—Temporary Injunction—Opposing Affidavits.

The affidavits in opposition to application for temporary injunction have no effect as an answer to deny, admit, or allege facts, but should state probative facts, and not legal conclusions, and the latter, if contained therein must be disregarded.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 320–322.]

8. Waters and Water Courses 🔑48 — Riparian Rights—Loss by Disuse.

Riparian rights are not lost by disuse, provided that no adverse prescriptive rights are acquired.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 38.]

9. Waters and Water Courses 🔑158½(1)—Contracts—Actions.

In action in one county to quiet title to water rights, except as divested by agreement with defendants embodied in a consent judgment in another county the objection that the effect of the action is to enforce in one county a decree of superior court of another county is without merit.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 189.]

10. Waters and Water Courses 🔑85—Unlawful Diversion—Injunction.

It is not a defense to application for injunction to prohibit diversion of water that such relief, if granted, would dispossess defendants of water shown by the pleadings to be in their possession; for, although the right to have water flow from a river into a ditch and the water flowing therein is real property, such water is not reduced to possession until actually taken into the ditches by the appropriator, and the wrongful diversion is a continuous act, and the court has authority to restrain a repetition or continuation of the injury.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 84–88.]

11. Injunction 🔑135 — Preliminary Injunction—Discretion.

Granting a preliminary injunction is a matter in the sound discretion of the court, to be exercised according to the circumstances of the particular case.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 304.]

12. Appeal and Error 🔑954(1)—Review—Discretion—Injunction.

The action of a trial court upon an application for injunction will not be disturbed on appeal unless it clearly appears there was an abuse of its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818, 3819, 3821.]

Department 1. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by the Fresno Canal & Irrigation Company and another against the People's Ditch Company and others. From an order granting a temporary injunction pendente lite, defendants appeal. Affirmed.

E. C. Farnsworth, of Visalia, L. L. Cory, of Fresno, and H. Scott Jacobs, of Hanford, for appellants. Short & Sutherland and M. K. Harris, all of Fresno, for respondents.

LAWLOR, J. Appeal from an order granting a temporary injunction pendente lite in an action begun in Fresno county, enjoining defendants from appropriating from Kings river at any time water in the aggregate in excess of 900 cubic feet flowing per second. The order was made on notice to show cause and after argument. It was based upon a verified complaint in an action to quiet plaintiffs' title to the said waters, supported by affidavit. Certain counter affidavits were offered by the defendants in opposition to the relief sought.

The complaint sets out the following facts: In the year 1897 the Fresno Canal & Irrigation Company, one of the plaintiffs, was the owner of a large tract or grant of land commonly known as the Laguna de Tache rancho, containing about 68,000 acres, which extended along the northern borders of the Kings river for a distance of about 25 miles. The rancho is practically all located in Fresno county, and is wholly riparian to the river, which is a natural stream. During 1897, and prior thereto, the Fresno Canal & Irrigation Company had also been engaged in the business of appropriating and diverting waters from the Kings river for the purpose of irrigating portions of Fresno county. Its canals connected with the river at a point where it leaves the foothills of the Sierra Nevada Mountains about 30 miles above the eastern and nearest line of the rancho. None of the waters diverted at this point, however, was supplied to the rancho. At the same time the People's Ditch Company, the Last Chance Water Ditch Company, and the Lower Kings River Water Ditch Company, defendants herein, were diverting water through certain other canals owned by themselves from points on the river in Fresno county, and, for the most part, opposite the upper portion of the rancho. The water thus diverted was distributed by the defendants in Kings county for domestic, irrigation, and other purposes. Litigation having arisen between the parties mentioned, on October 4, 1897, they entered into an agreement to compromise their differences, by which it was agreed, in part, to divide the waters of the river among themselves in accordance with a certain scheme set forth therein, and that also "a judgment shall be obtained and entered in the superior court of the state of California in and for the county of Tulare fixing and determining the rights of the parties to this agreement as to their rights hereunder in reference to the right to the flow, use and diversion of the waters of said Kings river." The decree of the Tulare court was not entered until October 18, 1905. Its provisions are substantially identical with those of the agreement. The Lemoore Canal & Irrigation Company is the successor in interest to the Lower Kings River Water Ditch Company. This action is commenced by plaintiffs as owners of the rancho to which riparian rights attach, and also as owners by prescription of a water right for public use, to quiet plaintiffs' title to the waters flowing in the river; the contention being made that the defendants are diverting and appropriating waters greatly in excess of the quantity to which they are entitled.

According to the terms of the agreement, a gauge for the measurement of all waters diverted from the river by the Fresno Canal & Irrigation Company was established at a point near the intake of its canals, about 30 miles above the rancho. It is provided that, when there is 100 cubic feet or less of water per second flowing in the river, the said company "shall be entitled to divert all thereof." When there is over 100 cubic feet and not exceeding 449 cubic feet flowing per second, the company "shall be entitled to divert" the first 100 cubic feet, "and there shall be allowed to flow down said river for said Lower Ditch Companies" 349 cubic feet per second, or such portion thereof as is then flowing in the river. Other provisions, in like manner, provide for the division of the waters at higher stages of the river, until 1,900 cubic feet of water per second should be flowing therein. The provision which follows reads:

> "When there is flowing in said river 1,900 cubic feet of water per second at the aforesaid point of measurement, 599 cubic feet of water per second, and no more, shall be allowed to flow down said river for said Lower Ditch Companies."

The next paragraph provides that the Fresno Canal & Irrigation Company may take a certain larger proportion of the waters in the river during the dry months of August and September of each year. Then follows the provision principally pertinent to the present controversy:

> "Provided also that, when said Kings river shall be carrying, or there shall be flowing therein, over 1,900 cubic feet of water per second, as indicated and ascertained at said point of measurement, * * * of the additional quantity of water in said river, there shall be allowed to flow down for said Lower Ditch Companies to the extent of the next 300 additional cubic feet of water per second flowing in said river, and no more."

One other provision should be mentioned, wherein it is set forth that:

> "Nothing in this agreement shall be taken to waive the right of the Laguna de Tache rancho to the first 30 cubic feet of water flowing per second in said river for use upon said grant."

The plaintiffs allege that for more than 20 years last past the Fresno Canal & Irrigation Company, on behalf of itself, the Laguna Lands Limited, and the other owners of the rancho, had appropriated 450 cubic feet of the waters of the river flowing per second for irrigation and beneficial uses upon the rancho, and that said appropriation was made under claim of right, openly, notoriously, continuously, and uninterruptedly. In connection with the allegations setting forth the riparian nature of the rancho, it is alleged that:

> There are now growing upon it, "many thousands of acres of trees, vines, alfalfa, grain, vegetables, and other growing crops needing and requiring the waters of Kings river aforesaid for the irrigation thereof, and, unless so irrigated, all of said crops, trees, vines, and alfalfa and other crops would be wholly lost, wither, and die, and become valueless."

Referring to the terms of the agreement made in 1897 and the decree of the superior court of Tulare county, it is alleged that the defendants have never diverted through their respective canals for irrigational or other beneficial uses an aggregate quantity of water in excess of 636½ cubic feet of water flowing per second, and that this quantity of water is ample and sufficient for all the necessary irrigational and other beneficial uses of the lands supplied by their canals, but that, notwithstanding these facts, the defendants have, within three weeks prior to the filing of the complaint, commenced to divert waters not only in excess thereof, but in excess of 900 cubic feet flowing per second, "to wit, aggregating 1,100 cubic feet flowing per second, or upwards." It is also stated that the defendants assert the right and intention of diverting, consuming, and wasting the waters to the full extent of the capacity of their respective canals, which, it is alleged, they claim aggregate 1,300 cubic feet flowing per second. The complaint also sets out the alleged dryness of the season, the inadequacy of the waters in the river to supply defendants' excessive demands without wholly depriving plaintiffs of water which is needed to irrigate the rancho, and contains other allegations common to such form of complaint which need not be particularly mentioned. The agreement itself appears in the affidavit filed by the plaintiffs, while the decree of the Tulare court is given in full in one of the defendants' affidavits.

[1, 2] Assuming that the facts alleged are true, as riparian proprietors, the plaintiffs

would be entitled, as against the defendants, to the natural and usual flow of all the waters in the river, except as such right had been limited or divested by the agreement referred to, or by prescription. The defendants, it is to be noted, are not claiming any riparian rights. It has been said that:

> Riparian proprietors "may restrain such a taking [referring to a taking of waters from a natural stream by nonriparian proprietors] without showing damage, upon the broad doctrine of riparian rights, that the taking itself is an interference with his freehold which he is entitled to restrain lest it ripen into a prescriptive right." Miller & Lux v. Enterprise Canal, etc., Co., 169 Cal. 415, 443, 147 Pac. 578.

The defendants say:

> "All the counter affidavits filed on behalf of the defendants show that it was the understanding of the parties to the agreement that the defendants (the Lower Ditch Companies mentioned in the agreement) have the right to use all the waters of Kings river in excess of 2,200 cubic feet of water flowing per second at the point of measurement. * * * That was the practical construction placed upon the contract by the parties to it. * * *"

The terms of the agreement, however, are not equivocal as the defendants suggest. When there is flowing more than 1,900 cubic feet of water per second, it is definitely provided that, in addition to the quantity of water which "shall be allowed to flow down" at the 1,900 feet stage, namely 599 cubic feet "and no more," an additional quantity to the extent of the next 300 cubic feet flowing per second shall be allowed to flow down, "and no more." Under such conditions there would flow down 899 cubic feet per second. It would be difficult to express in clearer terms the obvious intention of the parties—the Fresno Canal & Irrigation Company, so far as the parties to the agreement were concerned, "shall be entitled to divert" through their canals at the point of measurement, 30 miles up the river, the remaining waters. Indeed by a further provision the defendants expressly agreed that:

> They "shall not * * * claim, or demand any greater quantity of water than is herein provided for, to be allowed to flow to them."

The defendants claim:

> "There is nothing anywhere in the language of said agreement which would deprive defendants of the right to divert any additional quantity of water from said Kings river over and above the 2,200-foot stage."

But the practical difficulty here is that the Fresno Canal & Irrigation Company has first the right of not permitting such additional quantity to flow down to the said defendants. And, on the other hand, if it does allow the excess waters to flow down, it is also to be noted that the agreement contains no word or clause which gives the defendants the right to appropriate them.

But it is insisted that, inasmuch as the Fresno Canal & Irrigation Company did actually permit more than 900 cubic feet of water per second to flow past its own canals, such excess waters at least became again a part of the natural stream, and the company has no further control as to who should thereafter divert such waters. If it were important for us to determine this point, we would doubtless agree with the defendants that, regarding the Fresno Canal & Irrigation Company purely as a party to the agreement and owner of the upper canals, it would probably have no just cause of complaint on account of such lower diversion. But the company appears as owner of the rancho, riparian property, to which, according to the allegations of the complaint, it is supplying water for irrigational and other beneficial purposes. Such waters do become a part of the natural stream. Yet this point does not help the defendants; for, while passing the rancho, the waters, not included in the agreement as expressly belonging to the defendants, are subject to the riparian rights appurtenant thereto.

[3-5] In matters of this kind it is merely necessary that the appellate court find in the evidence sufficient basis to support the discretion which the trial court exercised.

> "The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the rights claimed by him." Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A. (N. S.) 391.

If it is reasonable to assume from the record here that the trial court made its order upon the basis suggested, this court cannot say that it abused its discretion. But that the court did so base its order cannot even be left to question. Its order was to restrain defendants "pending the trial of this action, and until the further order of this court, from appropriating, diverting, or taking from the said Kings river described in the complaint on file herein, at any time, water in the aggregate in excess of 900 cubic feet flowing per second. * * *" The defendants, apparently overlooking the riparian rights appurtenant to the rancho, lay stress upon the fact that the plaintiffs set out prescriptive rights to only 450 cubic feet of water, and contend that the court's order should be reversed for the reason that it did not at least allow the defendants to divert, in addition to the first 900 cubic feet of water, all the waters in excess of the next 450 cubic feet belonging to the rancho. The allegations touching the rights by prescription, however, were not essential to the action. It was proper to regard such allegations as only additional evidence of the equities entitling the plaintiffs to the injunctive relief sought.

[6] The defendants also point out that the preliminary injunction "restrains these defendants at all times without reference to the stage of the river, and even at flood times when there may be thousands of cubic feet of water going to waste past their head gates, from diverting more than 900 cubic feet of

water," and contends that an injunction of such a nature cannot issue, citing Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424. As the court's order is merely temporary, the point is not well taken. The complaint praying for the injunction was filed in May, and the order issued the following December. It is altogether likely that the defendants had ample opportunity to bring the action to judgment before the spring floods referred to in their affidavits, or in any event, when such floods were threatening, to apply to the court for a "further order." The court's order is directed wholly to the protection of the rights of the plaintiffs to the waters appurtenant to the rancho, except as the same were limited by the quantity of water which the defendants could take under the agreement, and is in no way concerned with or directed against the appropriation by the defendants of extraordinary flood and storm waters.

[7, 8] It is not necessary to refer to all the matters set up in the affidavits filed by the defendants. The affidavits are six in number, elaborate in detail, and substantially alike in form. What has already been said disposes of most of the averments. The affiants vigorously deny various equities set up in the complaint. But "clearly, the affiant had no power to admit, deny, or allege any fact, and until an answer was filed how could he know what defendant admitted, denied, or alleged?" Marks v. Weinstock, Lubin & Co., 121 Cal. 53, 53 Pac. 362. There was no answer introduced at the hearing in the instant case. It is important to note, however, that the defendants do not deny that the rancho is possessed of riparian rights, as alleged. Many averments refer to the alleged interpretation placed upon the agreement by the parties thereto. They are, in many respects, legal conclusions which are to be disregarded. Porters Bar Dredging Co. v. Beaudry, 15 Cal. App. 751, 115 Pac. 951. The most significant averments are those in which it appears that from 10 to practically 40 years, varying as to the respective defendants, they have been diverting and using water from the Kings river peacefully, notoriously, and under a claim of right to the full capacity of their ditches, aggregating 1,800 cubic feet of water flowing per second, whenever, during the usual irrigation seasons of each year, there was that quantity of water flowing in the river; that the district supplied through their respective irrigation systems consists in the aggregate of about 135,000 acres of improved land devoted to valuable horticultural, agricultural, and viticultural products; that this district supports a "large and prosperous community," embracing Hanford, Lemoore, Armona, and other towns; "that the inhabitants of Kings county are absolutely and entirely dependent upon this source of supply for their water for irrigation, domestic and other purposes;" and that 900 cubic feet flowing per second "is not sufficient under any circumstances" to properly supply and irrigate such lands. The court, having regard to the allegations of the complaint, may not have believed the truth of the averments upon which it is sought to establish such prescriptive rights. Under the circumstances giving rise to the agreement and the other facts alleged in the complaint, which the court may well have believed, it is difficult to conceive how it could have reached any other conclusion. Yet it is more reasonable to assume that, in its opinion, the defendants made their claims to 1,800 cubic feet of water per second under a misunderstanding as to the terms of the agreement, and without any intention on their part of asserting and establishing prescriptive rights therein as against the riparian or other rights appurtenant to the rancho. Without passing upon the merits, it is sufficient to say it was within the discretion of the court to conclude that no prescriptive rights were gained under the showing made. Even if it be assumed, as averred, that the plaintiffs, with full knowledge that the defendants were appropriating more than 900 cubic feet of water per second, did acquiesce therein, it does not follow that the plaintiffs have no right to injunctive relief. Riparian rights are not lost by disuse, provided, of course, no adverse prescriptive rights are acquired. Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 335, 88 Pac. 978, 11 L. R. A. (N. S.) 1062.

[9] The point is raised that the sole object and effect of this action is to enforce in Fresno county a decree of the superior court of Tulare county, a proceeding which the defendants characterize as "sui generis and unique." This claim is obviously without merit. Rowe v. Blake, 99 Cal. 167, 33 Pac. 864, 37 Am. St. Rep. 45. As regards the further contention that the plaintiffs should have submitted the controversy to arbitration in accordance with the procedure prescribed by the agreement, it is sufficient to note that, irrespective of section 3390 of the Civil Code, the agreement fails to provide that the parties, if they so desire, may not commence an action in the courts without resorting to arbitration. 5 C. J. p. 42.

[10] It is further urged that the court had no authority to dispossess the defendants of water, the title to which was in dispute, where the pleadings show that it was in their possession, citing, inter alia, San Antonio W. Co. v. Bodenhamer, 133 Cal. 248, 251, 65 Pac. 471. Although it may be conceded that the right to have water flow from a river into a ditch, and the water flowing therein is real property (Stanislaus W. Co. v. Bachman, 152 Cal. 716, 725, 93 Pac. 858, 15 L. R. A. [N. S.] 359), such water is not reduced to possession until actually taken into the ditches by the appropriator. The wrongful diversion of the waters was a continuous act, and the court had authority to restrain a repetition or con-

tinuation of the injury being done to the plaintiffs.

[11, 12] The defendants claim throughout that:

> "The court should not have granted the temporary injunction as plaintiffs were not the parties most likely to be injured by the granting or denial thereof."

The answer to this, as well as to many other similar points insisted upon by the defendants, is contained in the well-settled rule that the matter of granting a preliminary injunction is addressed to the sound discretion of the court, which is to be exercised according to the circumstances of the particular case; and its action upon such application will not be disturbed on appeal unless it shall clearly appear that there was an abuse of its discretion. Lagunitas W. Co. v. Marin C. W. Co., 163 Cal. 332, 125 Pac. 351; Marks v. Weinstock, Lubin & Co., 121 Cal. 53, 53 Pac. 362; Porters Bar Dredging Co. v. Beaudry, 15 Cal. App. 751, 115 Pac. 951. This disposes of all the material points, and it is our opinion that the defendants have failed to show, in any particular, that the court abused its discretion in issuing the temporary injunction.

The order is affirmed.

We concur: SHAW, J.; SLOSS, J.

(32 Cal. App. 533)

PEOPLE v. COATES. (Cr. 370.)

(District Court of Appeal, Third District, California. Jan. 17, 1917.)

INTOXICATING LIQUORS ⚿=236(9)—KEEPING LIQUOR PLACE—SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to sustain a conviction of keeping in no-license territory, in violation of Wyllie Act (St. 1911, p. 602) § 14, a place where liquors are sold, served, or distributed, or kept for purpose of sale or distribution, as against contention, the place being defendant's home, that the liquors were kept and served by him "to members of his family or to his guests, as an act of hospitality," within the exception of section 16.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 311.]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

G. H. Coates was convicted, and appeals. Affirmed.

M. T. Brittan, of Marysville, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was charged by information filed in the superior court of Tehama county by the district attorney of said county with the violation of the provisions of section 14 of the local option law, known as the "Wyllie Act," and upon his trial for said offense was convicted by the jury. He appeals from the judgment and the order denying his motion for a new trial.

The transcript on appeal was filed in this court on the 19th day of August, 1916. The defendant has not, however, filed a brief or points and authorities in support of his appeal, nor was he represented by counsel when his cause was regularly called for oral argument in this court. The Attorney General, therefore, submitted the case upon the record.

Section 14 of the Wyllie Law provides:

> "It shall be unlawful for any person, corporation, * * * within any no-license territory, to keep, conduct or establish, as principal or agent, any place where alcoholic liquors are sold, served or distributed, or kept for the purpose of sale or distribution, except as provided in section 16 hereof; and every day that such place shall be kept, established or conducted shall constitute a separate offense."

The evidence shows that the defendant, at about the hour of 11 o'clock on the night of April 16, 1916, was arrested at his place of residence in the city of Red Bluff, which, it was admitted, is situated within the boundaries of no-license territory; that, when the arrest was made, there were three persons under the influence of intoxicating liquor in the front room of the house; that two of these persons were sitting at a table, with a bottle of beer before them; that in the house were found several cases of beer, a number of bottles of whisky, and an ice chest; that there were also found drinking glasses and a number of empty bottles and beer cases. These facts were brought out through the testimony of four witnesses, who were the officers making the arrest. It further was made to appear that the defendant had occupied the premises for about two weeks prior to his arrest, and that, during that period, different people had been seen, on divers occasions and at various hours of the day, entering and leaving the house. The witnesses further testified that they found some money, amounting to a little more than $2 in silver in a "little pitcher," fixed and attached in some manner to the wall of the room in which the men above referred to were found by the officers.

The defendant did not himself take the witness stand, but introduced some testimony for the purpose of showing that the place or house wherein the liquors were found was his home. The proof of this fact may be conceded.

The evidence is, we think, amply sufficient to preclude this court from declaring that by it the verdict was not justified. Giving the testimony presented by the people full credit, as we are bound to do, since the jury presumptively did so, it is clear that therefrom the jury were justified in finding that, notwithstanding that the place where the liquors were found was, as was the theory of the defense, the home of the defendant, said liquors were not kept and served by the accused "to members of his family or to his guests, as an act of hospitality" (section 6, Wyllie Law), but that he dispensed and served the same for money, and that thus his "home" became "a place of public resort" within the intent of the law. There was no claim made at the trial that the defendant's act or acts came within any of the other exceptions enumerated in section 16 of said law.

The instructions and the rulings of the court touching the evidence have been carefully examined, and in them no errors have been found. The charge of the court with clearness explained to the jury every principle of law pertinent to the issues.

The defendant appears to have been accorded a perfectly fair and impartial trial.

The judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

PEOPLE v. MAGRI. (Cr. 356.)

(District Court of Appeal, Third District, California. Jan. 17, 1917.)

ASSAULT AND BATTERY ⚿92—ASSAULT WITH DEADLY WEAPONS — SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to sustain a conviction of assault with a deadly weapon.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 137–139.]

Appeal from Superior Court, Shasta County; James G. Estep, Judge.

Andrea Magri was convicted, and appeals. Affirmed.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The conviction complained of here is of the crime of assault with a deadly weapon and was obtained under an information, filed by the district attorney of Shasta county, in the superior court thereof, charging the defendant with the crime of assault with a deadly weapon with the intent to kill and murder one P. Della. The appeal is from the judgment and the order disallowing the defendant's motion for a new trial. The clerk's transcript was filed in this court on May 1, 1916, and that of the court reporter, prepared in accordance with sections 1247 and 1247a of the Penal Code, was likewise filed on June 7, 1916.

The defendant has filed no brief or points and authorities, and was not represented by counsel when the cause regularly came on and was called up for hearing and oral argument before this court. Under these circumstances there was open to the Attorney General either one of two courses only, viz.: (1) To move, upon notice, for a dismissal of the appeals; (2) the submission of the cause for decision upon the record. The latter course was adopted by the Attorney General, hence an examination of the record is required.

The assault charged occurred at a place called Motion, in Shasta county, on the 16th day of December, 1915. There is testimony disclosed by the record which, if believed by the jury, as from their verdict it must be assumed that it was, warranted the finding of these facts: That the prosecuting witness, one P. Della, had been working in a mine located a short distance from Motion; that he ceased working in said mine on the 14th day of December, 1915, received from the company owning the mine a check for the sum of $25 in the payment for wages due him, and, on the 15th day of December, 1915, accompanied by a mine laborer named O'Hara, left Coram, to which place he went from the mine on the day he quit work, started to go by foot to Iron Mountain, in said county; that, on their way to Iron Mountain, the two men stopped at Motion, where the defendant was then engaged as a bartender in a saloon; that the defendant and his wife lived in the building in which said saloon business was carried on; that Della and O'Hara had a number of drinks at the saloon, being waited on by the accused, and also were served with a lunch by the defendant; that, shortly after eating the lunch, O'Hara proceeded on his journey, while Della, who is an Italian, remained at the saloon; that the defendant, also an Italian, and Della thereafter had several drinks and conversed about the "old country"; that Della asked Magri to cash his check for $25, saying that he would then pay for the drinks and lunch with which he had been served; that, at about this time, Della made some reference to the defendant's brother, with whom Della claimed some acquaintance, and that thereupon the defendant became very angry and ordered Della to leave the saloon; that Della then turned toward the front door through which exit from the saloon was necessary, his back being toward the bar and the defendant; that the latter thereupon fired at Della with a shotgun, the shots entering the upper part of Della's body and inflicting two wounds, to wit, one just at the edge of the shoulder blade, and the other at the upper edge of the collar bone, both wounds being round or in circular form and one measuring 1¾ inches in diameter; that immediately after being shot Della left the saloon and was finally taken on a train to Redding, thence to the county hospital, where he remained and was treated for several weeks. Thus it is manifest that no claim could well be urged in this court that the verdict does not receive sufficient support from the evidence.

The court's charge to the jury has been examined with care, and such examination has convinced us that it was full, fair, and faultless in the statement of all the principles of law essential to an enlightened consideration by the jury of the evidence and all the issues of fact developed thereby.

Nor have we in our examination of the record (which has been just as thorough as if the case had been briefed or otherwise argued in behalf of the accused) found justification for declaring that any of the rulings of the court admitting and excluding testimony involved substantial or prejudicial error. On the whole, the defendant seems to have been accorded a fair and impartial trial, and, we may add, was, under the evidence as it appears to us, exceedingly fortunate in securing a verdict adjudging him guilty of an offense of less gravity and carrying with it a penalty of much less severity than that of the crime specifically charged in the information.

The judgment and the order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(32 Cal. App. 510)

HARRELL v. FRESNO TRACTION CO.

(Civ. 1883.)

(District Court of Appeal, First District, California. Jan. 12, 1917. Rehearing Denied by Supreme Court March 12, 1917.)

1. EVIDENCE ⚷597—VERDICT — WEIGHT OF EVIDENCE.

Where plaintiff's testimony is supported in some degree by testimony of another witness and other circumstances in the case, it cannot be said that there is insufficient evidence to support verdict, even though the greater number of witnesses testified otherwise.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2449.]

2. CARRIERS ⚷343—INJURIES TO PASSENGERS —CONTRIBUTORY NEGLIGENCE—PLEADING.

In an action for injuries sustained by plaintiff in alighting from a street car, an answer consisting of a general denial and allegation of contributory negligence, which was specifically alleged to consist in plaintiff's injuring himself by his own act after he had fully alighted, is not a plea of contributory negligence, not being a plea in confession and avoidance.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1398.]

3. CARRIERS ⚷333(1)—INJURIES TO PASSENGERS — CONTRIBUTORY NEGLIGENCE IN ALIGHTING FROM STREET CAR.

In an action to recover for injuries due to starting a street car before passenger had alighted, contributory negligence cannot be based upon the manner in which passenger alights from car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1385.]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by R. G. Harrell against the Fresno Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Everts & Ewing and Short & Sutherland, all of Fresno (Carl E. Lindsay, of Fresno, of counsel), for appellant. Harris & Hayhurst, of Fresno, for respondent.

RICHARDS, J. This is an appeal from a judgment in the plaintiff's favor for the sum of $1,500 and costs of suit in an action brought to recover damages for personal injuries.

The plaintiff alleged in his complaint that he was a passenger for hire upon one of the cars of the defendant operated along and upon the streets of Fresno; that when the car had proceeded along its route to a certain street it stopped to enable the plaintiff and other passengers to alight therefrom; that while the plaintiff was in the act of alighting from said car, and while partly thereon, having his left foot upon the ground and his right foot upon the running board, and while still holding on to the upright stanchion with his right hand, the employés of the defendant in charge of the car negligently caused the said car to be suddenly and violently started forward, causing the plaintiff to be thrown to the ground, breaking his left leg and causing other injuries and damages as detailed in the complaint.

The answer of the defendant admitted that the plaintiff had been a passenger upon its said car, but denied that the car had been started until after the defendant had fully alighted and separated himself from the car. The answer also undertook to set up that the plaintiff had been guilty of contributory negligence, which was specifically alleged to have consisted in the plaintiff having fallen and injured himself by his own act after he had fully alighted from the car and ceased to be a passenger thereon.

Upon the issues as thus defined the cause went to trial, which resulted in the judgment in plaintiff's favor, from which this appeal has been taken.

[1] The first contention of the appellant is that the evidence is insufficient to support the judgment; but in view of the fact, as shown by the record, that the plaintiff testified circumstantially to the manner in which his injuries had occurred, and in which they were caused by the negligence of the defendant's employés in starting the car while he was in the act of alighting from it as set forth in his complaint—in which testimony he was supported in some degree by the testimony of another witness and by certain other circumstances in the case—it cannot be said that the verdict would not be sufficiently supported by such evidence if the jury saw fit to give greater credence to it than to that of the greater number of the defendant's witnesses. There is no merit therefore in the plaintiff's first contention.

[2] The appellant further contends that the court erred in giving certain instructions to the jury relating to the subject of contributory negligence. Passing for the moment the question of the alleged defects in these instructions, we have failed to find anything in the record which would require the giving of any instructions whatever upon the subject of contributory negligence. It is true that the defendant in its answer undertook to plead that the plaintiff had been guilty of contributory negligence; but in so

doing it had set forth specifically wherein such alleged contributory negligence consisted, viz. that the plaintiff had fallen and injured himself by his own act and after his contact with the car had ceased and his relations to the defendant as a passenger upon said car had been fully terminated. It is clear that these alleged acts of the plaintiff could not by any possibility be contributory negligence for the simple reason that contributory negligence on the part of the plaintiff is in its very essence predicated upon conceded negligence on the defendant's part while the plaintiff's relation to it as a passenger, and its resulting duty to him as such, were still existent. The plea of contributory negligence is, in other words, a plea of confession and avoidance, and hence could not arise under the circumstances set forth in the defendant's answer. Crabbe v. Mammoth Channel G. M. Co., 168 Cal. 500, 143 Pac. 714.

[3] The appellant, however, insists that the plaintiff himself introduced the element of contributory negligence into the case by his testimony detailing his manner of alighting from the car. The plaintiff in that respect testified that in getting off the car he placed his left foot first upon the ground and had his right foot upon the running board of the car, with his right hand holding its stanchion, at the time the car started. He was thus facing backward instead of forward while in the act of alighting. But the undisputed evidence both of the plaintiff and of the witnesses for the defendant was that he was otherwise using great care in getting off the car, which the plaintiff swore was due to the fact that his left leg long years before had been injured during the Civil War, and was therefore shorter and weaker than the right leg. which cause him customarily to put his left leg down first in getting off cars, and hence to face backwards in alighting.

We fail to perceive how the manner of the plaintiff in alighting from the car would constitute contributory negligence on his part. It was the duty of the defendant to hold its car in a standing position until he had fully alighted from it, and the plaintiff in getting off the car had a right to rely upon the full performance of that duty on the defendant's part; and this being so, his act in getting off the car in the manner in which he did, due to his crippled physical condition, could not be contributory negligence on his part. We are still therefore in the position of being unable to perceive how the subject of contributory negligence could be an issue in the case so as to require the giving of any instructions upon that subject.

In spite of this condition of the case, however, both of the parties submitted instructions to the court upon the subject of contributory negligence, and the court gave the instructions asked by both of the parties to the case. We have examined the entire body of the instructions thus given to the jury, and are of the opinion that taken as a whole they fairly set forth the law of contributory negligence; and we are also of the opinion that even if they did not quite fully and fairly do so the defendant was not prejudicially affected by that fact in view of what has heretofore been said as to the absence of such an issue in the case.

There being no other error complained of, the judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(32 Cal. App. 531)

Ex parte SAUL. (Cr. 534.)

(District Court of Appeal, Second District, California. Jan. 17, 1917.)

1. CONTEMPT 🔑64—PUNISHMENT—CONTINUING ORDER—POWER TO OBEY COURT.

A continuing order of imprisonment for contempt, conditional upon a compliance with the direction of the court, can only be lawfully entered where it appears that it is within the power of the party to comply with the court's mandate, and that he willfully refuses to do so.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 202–209.]

2. HABEAS CORPUS 🔑25(1)—RIGHT TO RELIEF—IMPRISONMENT FOR CONTEMPT—ATTEMPT TO COMPLY WITH COURT'S ORDER.

Where a father had been committed for contempt in refusing to deliver to his divorced wife the child whose custody was awarded to the wife until he should comply with the court's order, showed that the child was in a foreign country with his sister, and that he had sent money for her transportation and requested that she be sent back, it appears that he can no longer comply with the order of the court, and he is entitled to his discharge on habeas corpus under Pen. Code, § 1487, authorizing the discharge where the imprisonment was at first lawful, but by some act, omission, or event since, the party has become entitled to discharge.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 21, 28, 30.]

Application by John E. Saul for a writ of habeas corpus to procure his discharge from custody under an order committing him for contempt of court. Petition granted, and petitioner discharged from custody.

Arthur E. T. Chapman, of Los Angeles, Precilla L. Randolph, and William Lewis, of Los Angeles, for petitioner. H. G. Redwine, of Los Angeles, for respondent.

JAMES, J. Petitioner is a defendant in a divorce action brought by his wife. There were several children of the marriage, among them a girl Dinah Saul, aged 13 years. The superior court, after making an order giving the custody of Dinah Saul to the mother, took proceedings in contempt against the petitioner because of his alleged act in refusing to deliver the custody of the said Dinah Saul to the mother as ordered. In the contempt proceeding it was determined that this petitioner had then the ability to produce Dinah

Saul, but that he willfully refused so to do, and the judgment was that he be imprisoned by the sheriff until he should comply with the order of the court. Petitioner was so imprisoned and has remained in jail for a period of about six months, having made various applications for his discharge heretofore by habeas corpus. As appears from the petition filed herein, he lately made an application to the superior court to be discharged on the ground that he had not now the ability to obey the order, and upon the denial of that petition he came here under a like showing, upon which we issued the writ. At the hearing hereof petitioner offered in evidence letters and cablegrams which showed that Dinah Saul was in England, and that there had been sent to her on petitioner's behalf money with which to pay for her return passage, together with urgent requests that she come back to Los Angeles. Petitioner orally testified that before the order committing him for contempt was made, the minor with his knowledge had left the state and country and had gone to Southport, England, to live with petitioner's sister.

[1] It is questionable as to whether, if the superior court was furnished with the evidence that the child was, at the time the commitment was made, out of the country and in England, it would have had authority to make the order which was made, because it would then have been clear that the then present ability of Saul to produce the child was lacking. The court might well have punished the petitioner for contempt of its order in procuring the child to be sent out of the country, but no judgment of that kind is here involved. A continuing order of imprisonment in a contempt proceeding, conditional upon a compliance being made with the direction of the court, can only be lawfully entered where it appears that it is within the power of the party to obey the court's mandate, and that he willfully refuses so to do. Ex parte Overend, 122 Cal. 201, 54 Pac. 740.

[2] Passing the question, however, as to whether the original commitment was made in a proper case (and conceding that it was), it now appears that the petitioner has made every reasonable effort to comply with the order of court, and that his failure to now produce the child is due to conditions which he cannot control. It places the case directly within the provisions of section 1487 of the Penal Code as entitling the petitioner to discharge, where "the imprisonment was at first lawful, yet by some act, omission, or event which has taken place afterwards, the party has become entitled to a discharge." If the petitioner were required to continue in custody of the sheriff there appears no means within his reach by which he can furnish evidence of any condition which will satisfy the judgment of the superior court. There is no doubt at all of the power of the superior court to punish for contempt in such cases and to enforce its judgments, but it cannot cause the imprisonment of a person indefinitely where he has not the ability to make compliance with an order of court, however reprehensible may have been his conduct in the first instance in creating the very condition which renders such compliance impossible.

It is ordered that the prayer of the petition be granted, and that petitioner be discharged from the custody of the sheriff. This order is made without prejudice to the right of the superior court to further deal with the matter of the custody of Dinah Saul, or enforce by contempt proceedings any orders properly made in that relation.

We concur: CONREY, P. J.; SHAW, J.

(32 Cal. App. 514)

PEOPLE v. RIPPE. (Cr. 653.)

(District Court of Appeal, First District, California. Jan. 12, 1917. Rehearing Denied Feb. 9, 1917. Denied by Supreme Court March 12, 1917.)

1. FALSE PRETENSES 🔑34—SUFFICIENCY OF INFORMATION.

Information charging defendant with obtaining property by false pretenses by inducing the signing of a note, but not alleging note to have ever been delivered to payee, failed to charge any offense.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 46.]

2. INDICTMENT AND INFORMATION 🔑161(5)—AMENDMENT OF INFORMATION—OBTAINING PROPERTY BY FALSE PRETENSES.

Where information charging defendant with obtaining money by false pretenses by inducing the signing of a note, but not alleging note to have been delivered to payee, amendment alleging that defendant delivered it to payee, to bring it within definition of the crime under Pen. Code, § 532, and of personal property by section 7, subd. 12, was permissible, and did not charge a different offense, it being founded upon the same preliminary examination.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 519.]

3. CRIMINAL LAW 🔑376—EVIDENCE—PRESUMPTION OF DEFENDANT'S GOOD CHARACTER.

The good character of an accused person is presumed, and cannot be contradicted, unless the defendant first puts it in issue, but this does not apply where defendant offers himself as a witness; Code Civ. Proc. § 2051, then making him subject to the same rules as other witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836–839, 841, 843.]

4. CRIMINAL LAW 🔑829(1)—INSTRUCTIONS—REQUESTS—MATTERS COVERED BY CHARGE.

Where a requested instruction in so far as it was correct was covered by the general charge, it was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Herman H. Rippe was convicted of obtaining property by false pretenses, and appeals from judgment and from order denying new trial. Affirmed.

D. T. Winne, J. O. Traber, and A. Ellenburg, all of Fresno, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LENNON, P. J. [1] The information originally filed against the defendant in this case attempted to charge him with the crime of felony, viz., obtaining money by false pretenses. The charging part of the information in substance alleged that the defendant willfully and knowingly by certain false and fraudulent representations induced certain parties to sign a promissory note, payable to the Farmers' National Bank of Fresno, in the sum of $250, and that they were thereby "defrauded, damaged, and prejudiced." It will be noted that the information did not allege nor attempt to allege that the note in question had ever been delivered to the payee. No demurrer, however, was interposed to the information, and upon his arraignment the defendant pleaded "not guilty." When the case came on for trial and before the impanelment of the jury the district attorney called the attention of the trial court to the fact that the information failed to allege that the defendant had actually obtained possession of the note which was the subject-matter of the alleged false pretenses, and thereupon asked leave to file an amended information, which would cure the obvious defect in the original information, by an additional allegation to the effect that the note in question when signed was delivered to the defendant, and by him in turn delivered to the payee therein named. The application to thus amend was resisted upon the ground that the proposed amendment would operate to charge the defendant with an offense different from that charged in the original information and not shown by the evidence taken at the preliminary examination, and therefore in contravention of the provisions of section 1008 of the Penal Code. Upon the overruling of this objection the amended information was filed, and upon his arraignment the defendant again pleaded "not guilty," with the privilege of later withdrawing his plea and interposing a demurrer if his counsel deemed such a course advisable. The case was then continued for trial to a day and date satisfactory to counsel for the defendant, and ultimately came to trial with no demurrer interposed, and the plea of "not guilty" still standing. Upon his trial the defendant was convicted, and he appeals from the judgment and from an order denying a motion for a new trial.

That the evidence is sufficient to support the judgment and verdict is not disputed, and the only points urged for a reversal are that the court erred in permitting the amended information to be filed and in refusing a certain requested instruction.

[2] While the information as originally filed did not state facts sufficient to constitute an offense known to the law (People v. Cassou, 27 Cal. App. 23, 148 Pac. 810), nevertheless it did attempt to charge the crime of "obtaining property by false pretenses," and the amended information did no more than show by a proper allegation that the note which was the subject-matter of the false pretenses had become "property" within the meaning of section 532 of the Penal Code, which defines the offense of obtaining property by false pretenses (People v. Cassou, supra; Pen. Code, § 7, subd. 12). Obviously, therefore, the amended information did not charge an offense different from that attempted to be charged in the original information, which was admittedly founded upon the evidence taken at the preliminary examination, and consequently the filing of the amended information neither prejudiced the defendant nor contravened the provisions of section 1008 of the Penal Code.

[3] The contention that the trial court over objection permitted evidence of the generally bad reputation of the defendant in the absence of an endeavor on his part to establish in evidence his general good reputation is not sustained by the record, which in this behalf shows that solely for the purpose of impeaching the testimony of the defendant, who took the stand as a witness in his own behalf, the district attorney called and interrogated several witnesses concerning the general reputation of the defendant for "truth, honesty, and integrity." Ordinarily it is the rule that the good character of a defendant is presumed, and cannot be impaired by evidence to the contrary, unless the defendant elects and is permitted in the first instance to put it in issue by introducing evidence of good character in aid of the presumption (People v. Fair, 43 Cal. 137, 149); but that rule has no application where the defendant, as he did here, offers himself as a witness, for he then puts in issue his character for truth, honesty, and integrity, and thereby subjects himself as a witness "to the same rules for testing his credibility before the jury by impeachment or otherwise as any other witness." Code Civ. Proc. § 2051; People v. Arnold, 116 Cal. 682, 48 Pac. 803.

[4] The requested instruction which was refused by the trial court was, in so far as it correctly stated the law, covered by the charge of the court, and conceding that the defendant was entitled upon request to an instruction upon the subject-matter not covered by the charge of the court, nevertheless it was conceded upon the oral argument of the case that the requested instruction which attempted to cover that particular subject-matter was so ambiguous as to render it a defective statement of the law and meaningless. This being so, it was rightfully refused. People v. Carroll, 92 Cal. 568, 28 Pac. 600.

The judgment and order appealed from are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(32 Cal. App. 520)

PEOPLE v. TUGWELL. (Cr. 496.)

(District Court of Appeal, Second District, California. Jan. 16, 1917. Rehearing Denied by Supreme Court March 15, 1917.)

1. CRIMINAL LAW 🔑1186(4) — APPEAL — HARMLESS ERROR—MISCONDUCT OF JUROR.

The action of a juror in a prosecution for murder in visiting, after the court had refused to make an order permitting a view of the premises by the jury, the scene of the crime, the condition of which had so changed between the commission of the crime and the trial that no information substantiating or contradicting the witnesses for the people could then be gained, while an irregularity deserving of severe censure, does not, under Const. art. 6, § 4½, prohibiting reversal for errors from which the court is convinced no miscarriage of justice resulted, require a reversal of the conviction for manslaughter.

2. CRIMINAL LAW 🔑635 — PUBLIC TRIAL — ORDER TO CLEAR COURTROOM—DISTURBANCE.

Where the court, because of a disturbance among the spectators which interfered with the orderly conduct of a trial for murder, ordered the gallery to be cleared, which was done, leaving about 15 spectators in the courtroom, and thereafter the door from the main hall to the courtroom was locked and kept locked until after a noon recess, but another door was left open, through which persons could and did go and come, the accused was not deprived of his right to a public trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1452.]

3. CRIMINAL LAW 🔑635—CONDUCT OF TRIAL —REMOVING SPECTATORS.

The right of accused to a public trial does not prevent the court from removing spectators who create a disturbance which interferes with the orderly conduct of the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1452.]

4. CRIMINAL LAW 🔑660—RIGHT TO PUBLIC TRIAL—WAIVER.

The right of accused to a public trial is one for his benefit which he can waive, and which he does waive where his counsel, knowing that the door to the courtroom had been locked after the removal of spectators who had created a disturbance, made no objection thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1536, 1537.]

5. CRIMINAL LAW 🔑517(4) — CONFESSION — PROOF OF CORPUS DELICTI — DEGREE OF PROOF.

The rule that the corpus delicti must be established before the alleged confession of accused is admissible in evidence does not require such proof to be of the convincing character necessary to support a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1147.]

6. CRIMINAL LAW 🔑517(4)—CONFESSIONS—FOUNDATION — SUFFICIENCY — EVIDENCE OF SUICIDE.

In a prosecution for murder, evidence aside from confessions of accused *held* sufficient to show that deceased did not commit suicide so as to establish the corpus delicti and render the confessions admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1147.]

7. HOMICIDE 🔑309(5) — INSTRUCTION—MANSLAUGHTER—MURDER BY POISON.

Where the only evidence as to defendant's guilt showed homicide by poison for the purpose of robbery, which is defined by Pen. Code, § 189, as murder in the first degree, it was error to instruct the jury on manslaughter, though that crime is by Pen. Code, § 1159, included in the crime of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 654.]

8. CRIMINAL LAW 🔑1186(4)—HARMLESS ERROR — INSTRUCTIONS — "MURDER" — "MANSLAUGHTER"—LOWER DEGREE OF OFFENSE.

Where the only evidence tending to show defendant's guilt of homicide showed murder in the first degree, error in instructing the jury as to manslaughter, of which offense he was convicted, is favorable, not prejudicial, to accused, in view of Pen. Code, § 187, defining "murder" as the unlawful killing of a human being with malice aforethought and section 192, defining "manslaughter" as the unlawful killing of a human being without malice, since the jury, to convict of manslaughter, must have found that accused unlawfully killed deceased, and therefore it must be assumed they would have convicted of murder, if no instructions as to manslaughter had been given, and the giving of such instructions does not require the reversal of the conviction under Pen. Code, § 1404, providing that a verdict shall not be set aside and a new trial granted on the motion of the defendant except for some omission or error prejudicial to his substantial rights, especially since the conviction for manslaughter would bar a subsequent prosecution for murder so that accused would escape punishment altogether.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Manslaughter; Murder.]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Percy Tugwell was convicted of manslaughter, and he appeals from the judgment of conviction and from the order denying his motion for new trial. Affirmed.

Earl Rogers, H. L. Giesler, and Frank E. Dominguez, all of Los Angeles, for appellant. U. S. Webb, Atty. Gen., Robert M. Clarke, Deputy Atty. Gen., Thomas Lee Woolwine, Dist. Atty., and W. C. Doran and Ewald Selph, Deputies Dist. Atty., all of Los Angeles, for the People.

SHAW, J. Upon a charge of committing the crime of murder, in that he did willfully, unlawfully, and with malice aforethought kill one Maude Kennedy, defendant was convicted of manslaughter. He prosecutes this appeal from the judgment and an order of court denying his motion for a new trial.

There was a former trial of the case which resulted in defendant being convicted of murder in the first degree, following which sentence of imprisonment for life was pronounced upon him. On appeal that judgment was reversed. 152 Pac. 740. As presented by the record herein, the facts concerning the homicide and the circumstances pointing to defendant as the one who committed the crime are substantially the same as exhibited by the record on the former appeal, wherein a full and complete statement of the case is set forth in the opinion there filed. See People v. Tugwell, 28 Cal. App. 348, 152 Pac. 740. Referring to that opinion for a statement of the case, we shall here, in discussing the errors assigned, confine ourselves to such reference to the evidence as may be necessary to illustrate the points made by appellant.

The theory of the prosecution, and which the evidence tended to prove, was that defendant was in need of money to enable him to marry and accompany his bride to San Francisco; that to obtain the needed funds he planned to rob Mrs. Kennedy, a woman twice his age, of diamonds of which he knew she was possessed; that for the purpose of using it in the perpetration of the crime he procured from a clothes-cleaning establishment, where he had been employed, a bottle of chloroform of the kind there used; that by a request made by telephone he induced his intended victim to go to the lonely place appointed therefor, where he met and murdered her by forcing chloroform into her mouth, and took the diamonds which she had in a chamois bag fastened around her neck.

[1] One of the grounds upon which the motion for a new trial was based was misconduct of the jury. It appears from affidavits filed that after the court had refused to make an order permitting the jury to visit and view the premises, where the homicide occurred at about 9 o'clock on the evening of August 31, 1914, a juror during the trial, on March 31, 1916, in the daytime, visited and viewed the place and surroundings. That the visit of this juror was an irregularity constituting serious misconduct and deserving of severe censure admits of no question. People v. Mitchell, 100 Cal. 332, 34 Pac. 698; People v. White, 20 Cal. App. 159, 128 Pac. 417. But misconduct of a juror per se will not justify the granting of a defendant's motion for a new trial. People v. Hope, 62 Cal. 291; People v. Kramer, 117 Cal. 647, 49 Pac. 842. Prejudice to his substantial rights must be shown to have resulted from such act of misconduct. People v. Yee King, 24 Cal. App. 511, 141 Pac. 1047. The scene of the alleged crime and place where the body of Maude Kennedy was found on the morning of September 1st was at or near an alleyway surrounding which at the time were vacant and unimproved lots and lands. Two witnesses testified that at about 9 o'clock on the evening of August 31, 1914, while passing near this point, at or near which there was an electric light burning, their attention was attracted to a man and woman who at the place in question appeared to be engaged in a struggle. Neither of these witnesses pretended to identify defendant as the man whom they saw. It appears from the affidavits filed that the juror visited the place in midday some 18 months after the date of the alleged murder, at which time the vacant lots in the vicinity had been improved by the erection of buildings thereon, thus changing the condition and aspect of the location. Hence it is claimed that the juror in visiting the scene could not obtain an adequate or correct impression of the conditions existing under which the witnesses for the people testified. This doubtless is true, and suggests the reason why the court refused to make an order allowing the jury to visit the premises. Since by reason of the changed conditions the juror could obtain nothing in the way of impressions calculated to corroborate the evidence of the witnesses in question, how could defendant be injured by the unwarranted visit? It is inconceivable upon the record presented that defendant could have been prejudiced in his substantial rights by the misconduct of the juror. A consideration of the entire cause, including the evidence, convinces us that no miscarriage of justice resulted therefrom, without which, under section 4½ of article 6 of the Constitution, the order denying defendant's motion for a new trial upon this ground should not be reversed.

[2] It is next claimed that the defendant was, by an order of court, deprived of his constitutional right to a public trial. In support of this contention, affidavits were filed which, notwithstanding some conflict therein, tended to prove that during the trial, while the evidence was being introduced, there was a disturbance and disorder among the spectators sitting in the body of the courtroom; that about 11:30 a. m. the court ordered the bailiff to "clear the galleries"; that thereupon the bailiff caused the persons sitting in that part of the courtroom reserved for spectators (the number of whom is not shown) to leave the room and, without any order so to do made by the court, locked the main door thereto, which door remained locked until the noon recess, which occurred about 12:10 p. m., and thus during said period prevented egress and ingress through the same; that during that time a number of persons—at least 15, as shown by one of the affidavits—other than those connected with the trial remained in the room, and while persons who sought entrance through the main door of the courtroom found it locked, some of these, and indeed all who sought the same, entered through the witness room, the doors of which, unlocked, afforded an entrance from the main hall to the courtroom. According to the affidavit of one of defendant's counsel, he, during the period of 45 minutes while the door was locked, went from the courtroom through the reporter's room into the main hall some three or four times, at all of which times he examined and found the main entrance door to the courtroom locked, and that on each of these visits he saw persons come to the door of the courtroom, who, upon finding it locked, went away. Nevertheless, counsel, whose duty it was to see that defendant was accorded his constitutional rights, and knowing that the door was not locked by order of the court, not only failed and neglect-

ed to call the court's attention thereto, but on behalf of his client made no objection to the closing of the door; on the contrary, as shown by his affidavit, he was unusually alert and active in his efforts to see that it was continuously closed until the noon recess.

[3] As stated, there is some conflict in the affidavits as to the number of persons remaining in the courtroom; nor is it made to appear how many were required to leave the room. It does appear, however, that their removal was due to a disturbance and disorder among the spectators, and if, as we must assume to be the case, such disturbance interfered with the orderly conduct of the trial, no question exists as to the right of the court to order them excluded from the room. People v. Kerrigan, 73 Cal. 222, 14 Pac. 849; People v. Swafford, 65 Cal. 223, 3 Pac. 809; State v. Nyhus, 19 N. D. 326, 124 N. W. 71, 27 L. R. A. (N. S.) 487; Grimmett v. State, 22 Tex. App. 36, 2 S. W. 631, 58 Am. Rep. 630. Further, it appears without conflict that persons other than those connected with the court and engaged in the trial remained in the courtroom, which, according to the affidavit of the bailiff, were as many as 15. There was no discrimination as to the presence of those so permitted to remain. Under these circumstances, we are of the opinion that the trial as conducted did not lose its character in the sense that it was public, as distinguished from a secret or star-chamber trial.

[4] However this may be, and conceding that the action of the bailiff in locking the door, whether or not with the knowledge of the court, was, as shown by the record, wholly unwarranted, appellant is in no position to complain of the bailiff's action. The Constitution, both federal and state, provides that a party accused shall have the right to a speedy and public trial. This requirement, says Judge Cooley in his work on Constitutional Limitations, "is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether." This right so accorded by the Constitution, like the right to a speedy trial, being for the benefit of the defendant, may be waived by him. "It is a well settled maxim that a party may waive the benefit of any condition or provision made in his behalf, no matter in what manner it may have been made or secured." Broom's Legal Maxims, 547; Knarston v. Manhattan Life Ins. Co., 140 Cal. 57, 73 Pac. 740. As said in Goit v. National Pro. Ins. Co., 25 Barb. (N. Y.) 191, "The law will not compel a man to insist upon any benefit or advantage secured to him individually," whether such benefit be constitutional or statutory. Like the record in the case of People v. Swafford, supra, that here presented is silent in showing whether or not defendant in express terms consented to the closing of the door. From aught that appears to the contrary, he may have done so. At all events, he did not, as did defendant in the case of People v. Hartman, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108, upon which appellant relies, enter any objection to the action of the bailiff, nor call the attention of the court thereto, until during the noon recess, after which there appears to have been no cause for complaint. Under these circumstances, we are constrained to hold, even if the conduct of the trial was lacking in the character of being public in the ordinary sense, that defendant must by his conduct as shown be deemed to have assented thereto and waived any objection on account thereof. There is nothing said in People v. Letoile, 159 Pac. 1057, which lends support to appellant's contention as based upon this record.

[5] It appears that after his arrest defendant made to several persons statements in the nature of confessions, evidence of which was admitted over the objection interposed upon the ground that the corpus delicti had not been established. This ruling, it is insisted, constituted prejudicial error. That the corpus delicti must be established before the alleged confession of the accused is admissible in evidence is a fundamental principle. People v. Simonson, 107 Cal. 346, 40 Pac. 440; People v. Frank, 2 Cal. App. 284, 83 Pac. 578; People v. Tapia, 131 Cal. 649, 63 Pac. 1001. The rule, however, does not require that such proof shall be of that convincing character necessary to support a conviction of the crime charged. People v. Wagner, 29 Cal. App. 366, 155 Pac. 649; People v. Jones, 123 Cal. 65, 55 Pac. 698.

[6] In the case at bar, the death of Mrs. Kennedy, together with prima facie proof that her death was due to violence at the hands of some other person—in other words, that it was not due to suicide, accident, or natural causes—was a necessary prerequisite to the admission of defendant's confession that he had killed her. Excluding all proof as to motive and the statements made by defendant, the evidence clearly tends to show that Mrs. Kennedy, in response to a message by telephone, left her home soon after 8 o'clock on the evening of August 31st; that on the morning of September 1st her dead body was found in the alleyway hereinbefore referred to. She was lying on her back, her clothing dusty and disarranged, her waist open in front, and a chamois bag, in which she was accustomed to carry her

diamonds, was found open in the bosom of her dress. One shoe and one glove were off, both of which were found some distance from the body; and some beads, a hatpin, and a cork were found scattered upon the ground in the vicinity where her body was found. The condition of the ground and her clothing indicated that the body had been dragged for some distance. That a short time prior to August 31st defendant had procured from a boy employed at the dyeworks where defendant had formerly worked a bottle of commercial chloroform; that the cause of the death was due to a corrosive, volatile poison forced into the mouth, the irritating effect of which caused strangling and inflammation of the epiglottis, larynx, and trachea; and that commercial chloroform would cause the condition found. It further appeared that at about 8:45 o'clock on the evening of August 31st, one Doris Widemeyer, passing in the vicinity where the body was found, saw two figures in the vacant lot adjoining said alley, one of which appeared to be bending over the other, and heard groans; that another witness at about 9:30 p. m., in passing the vicinity where the body was found, saw a man and a woman struggling, and heard a mumbling and gurgling sound, and saw a man drag some object down the alley; that they appeared to be engaged in an altercation. In our opinion, the foregoing, leaving out of consideration other circumstances of a probative character, constitutes substantial evidence tending to prove that the death of Mrs. Kennedy was not due to suicide, accident, or natural causes, and hence was the result of criminal violence.

[7] The crime with which the defendant was charged was that of murder. The court instructed the jury touching the question of manslaughter, and submitted, with other forms of verdict, one adopted by the jury based upon such instruction, to which no objection was interposed. While admitting that manslaughter, though defined as a separate and distinct offense by section 192 of the Penal Code, may be included in the crime of murder (section 1159, Pen. Code) as to which, where there is any substantial evidence tending to show the commission of such crime, instructions thereon should be given, and that upon a charge of murder a conviction of manslaughter is deemed an acquittal of the higher offense (People v. Gordon, 99 Cal. 227, 33 Pac. 901; People v. Muhlner, 115 Cal. 303, 47 Pac. 128) counsel for appellant insist that upon the evidence adduced in the case at bar, since it tends only to prove that defendant committed the crime by means of poison for the purpose of robbery, which is defined in section 189 of the Penal Code as murder in the first degree, the instructions should properly have been limited to such degree of the crime. In support of their contention they cite, among other cases, that of People v. Wright, 167 Cal. 1, 138 Pac. 349, where the question involved death resulting from the performance of an unlawful abortion, the court saying:

> "Under our law, where death results from the performance of an unlawful abortion, the crime is murder in the second degree. Pen. Code, sec. 189. So if a defendant thus charged rests simply upon a denial of the offense, and no evidence of a lesser offense is before the court and jury, the instructions should go simply to murder in the second degree, and the verdict should be either guilty as charged or not guilty."

And People v. Rogers, 163 Cal. 482, 126 Pac. 143, and that of People v. McNutt, 93 Cal. 659, 29 Pac. 243, in the last of which it is said that section 1159 of the Penal Code "contemplates the conviction of a defendant for the lesser offense, when the evidence is insufficient to justify a conviction for the greater offense charged." Upon these and other authorities cited by appellant, we are of opinion that the court erred in giving to the jury the instruction complained of; indeed, it may be conceded that had the court refused at the request of defendant to give an instruction touching the question of manslaughter, the ruling upon review of the record would have been sustained. People v. Turley, 50 Cal. 470; People v. Lee Gam, 69 Cal. 555, 11 Pac. 183, and People v. Rogers, supra.

[8] The error in giving the instruction, however, does not entitle defendant to a reversal of the order appealed from, for the reason that section 1404 of the Penal Code provides that a verdict shall not be set aside and a new trial granted on the motion of a defendant, except for some omission or error prejudicial to his substantial rights. Murder is defined as "the unlawful killing of a human being, with malice aforethought" (section 187, Pen. Code); while "manslaughter is the unlawful killing of a human being, without malice" (section 192, Pen. Code). The unlawful killing, while the sole essential element of manslaughter, is an essential element of murder, to which, however, to constitute the latter crime, must be added that of malice aforethought. The greater offense, that of murder, includes all of the elements of the lesser, namely, that of manslaughter. The sufficiency of the evidence to prove that defendant unlawfully killed deceased is not and cannot be questioned. This being true, and conceding, as claimed by appellant, that if defendant was guilty of the unlawful killing, such act was by the evidence conclusively shown to have been accompanied by malice aforethought, thus making it murder in the first degree, how can it be said that he was prejudiced because the jury, due to the erroneous instruction, did not, as it should have done, find him guilty of the greater offense? Counsel for appellant say the jury might have disagreed, but we cannot indulge in such presumption. On the contrary, since the jury found that defendant unlawfully killed Maude Kennedy, the presumption is that, had the instruction

complained of not been given, the jury would have found him guilty of murder. Therefore, conceding the effect of the erroneous instruction was to cause the jury to bring in a verdict for a lesser offense, nevertheless defendant is in no position to complain, since he is not prejudiced by reason thereof. It has been repeatedly held in this state that a defendant cannot complain where the determination of his case is more favorable to him than the evidence warrants. People v. Muhlner, 115 Cal. 303, 47 Pac. 128. Appellant insists, however, that this doctrine is based upon cases where the charge was that of burglary, and the evidence conclusively established burglary in the first degree, notwithstanding which the verdict of the jury was that defendant was guilty of burglary in the second degree. People v. Barnhart, 59 Cal. 381; People v. Maroney, 109 Cal. 277, 41 Pac. 1097; People v. Coulter, 145 Cal. 66, 78 Pac. 348; People v. Lowen, 109 Cal. 381, 42 Pac. 32. And he undertakes to distinguish these cases from the one at bar by directing our attention to the fact that the attack made in such cases was upon the ground that the verdict was contrary to the evidence, while here the complaint is based upon an erroneous instruction which brought about the verdict. We are unable to perceive any difference in the effect of the error, whether the unwarranted verdict be due to a want of proper consideration of the evidence by the jury under an instruction, or such lack of consideration without the instruction. The absence of prejudicial effect as to defendant is the same in either case, and if in the one case, as conceded by appellant, the court will not, upon a review of the evidence, set aside a too favorable verdict because defendant is not injured, it must likewise follow, in applying the same principle and for the same reason, the court will not set aside the verdict upon complaint that it followed as a result of an erroneous instruction more favorable to defendant than that to which he was entitled.

In People v. Muhlner, supra, a number of cases from other jurisdictions, together with text-books, are cited in support of the proposition that:

> "A verdict contrary to instructions—for a less degree of the offense than the evidence proves must be received and carried out. A new trial cannot be ordered. * * * A conviction of a lesser offense (necessarily involved in the indictment) than called for by the evidence is not cause for granting a new trial, or for reversal on appeal."

As in the case of People v. Huntington, 8 Cal. App. 614, 97 Pac. 760, counsel for defendant do not claim that the evidence is insufficient to support a verdict of murder, but they in effect insist that the evidence shows the crime to have been murder, as to which charge he has been acquitted. Giving full force and weight to the contention of counsel, it must follow, from a reversal of the case upon the ground that the error brought about the conviction of defendant for manslaughter, that upon a new trial he could not be convicted of murder (People v. Muhlner, supra), and hence might, with advantage to himself, aid the prosecution in establishing the commission by him of a most heinous murder, which would exclude any theory upon which a verdict of manslaughter could be based, and thus, since he could not be convicted of the greater crime, insist upon a verdict of not guilty. As said in the Huntington Case:

> "We do not think it incumbent on the court to give such narrow, technical interpretation as to the true meaning of the statute. If the killing was unlawful, with malice aforethought, it was murder, and it was also manslaughter, because, by the very definition of the statute, it was the unlawful killing of a human being."

Since the jury might very properly, upon the evidence adduced, have found defendant guilty of murder in the first degree, the error redounded to his advantage, rather than to his prejudice.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; JAMES, J.

174 Cal. 467

In re WELLS. (Cr. 2030.)

(Supreme Court of California. March 1, 1917. Rehearing Denied March 29, 1917.)

1. Courts 🔑212 — Constitutional Provisions—Transfer of "Cause."

Const. art. 6, § 2, giving Supreme Court in bank power to rehear any "cause" decided in department, has always been understood as applying to any matter regardless of its character.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 511, 513–515.

For other definitions, see Words and Phrases, First and Second Series, Cause.]

2. Courts 🔑485 — Constitutional Provisions — Transfer of "Cause" — Construction.

Const. art. 6, § 4, amended in 1904, authorizing Supreme Court to transfer any "cause" to or from the District Court of Appeal, must be construed in same manner as Const. 1879, giving power to rehear department "causes"; hence the word "cause" applies to all matters of whatever nature.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1292–1298.]

3. Courts 🔑485—Revocation of Admission to Practice — Jurisdiction — Transfer of "Cause."

A decision by the District Court of Appeal upon application to revoke admission of attorney to practice, on account of fraud, is a transferable "cause" under Const. art. 6, § 4, amended in 1904, giving Supreme Court power to transfer any "cause" to or from District Court of Appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1292–1298.]

4. Attorney and Client 🔑4—Admission to Practice—Qualifications.

In view of Code Civ. Proc. § 287, subd. 5, amended in 1911 (St. 1911, p. 848), providing disbarment for "any act involving moral turpitude," etc., whether or not connected with legal practice, an attorney's application for admission to practice may be rejected for want of good moral character, although not sufficient for disbarment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 4–9.]

5. Attorney and Client 🔑10—Admission to Practice—Burden of Proof.

The requirement that an attorney applying for admission on certificate from another state, shall produce "satisfactory evidence of good moral character" places the burden on him of proving this.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 14.]

6. Attorney and Client 🔑53(1) — Disbarment Proceedings—Burden of Proof.

In disbarment proceedings the burden is on the accuser to prove the moral turpitude necessary under Code Civ. Proc. § 287, subd. 5, amended in 1911 (St. 1911, p. 848).

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 74.]

7. Attorney and Client 🔑10—Admission to Practice—Evidence.

Upon an attorney's application to practice on certificate from another state, his general character as well as particular acts may be inquired into, and any evidence may be received showing his character for integrity and general morality.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 14.]

8. Attorney and Client 🔑10 — Admission to Practice—Subsequent Inquiry.

Where attorney was admitted to practice on certificate and later inquiry suggested fraud in concealing his character, an investigation thereof is not a disbarment proceeding, but subject to the same broad inquiry into character as his original application, and is not limited to acts occurring since passage of the 1911 amendment (St. 1911, p. 848) of Code Civ. Proc. § 287, allowing disbarment for any moral turpitude, such rule not existing theretofore.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 14.]

9. Attorney and Client 🔑4—Admission to Practice—"Good Moral Character."

An attorney who obtained a loan by concealing material facts, and who, in assisting another attorney before admission, advised witnesses to evade giving honest answers, is not one possessing "good moral character," necessary for admission to practice.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 4–9.

For other definitions, see Words and Phrases, First and Second Series, Good Moral Character.]

10. Attorney and Client 🔑52—Admission to Practice—Subsequent Inquiry—Pleading.

In a subsequent inquiry into character of an attorney, where fraud is claimed in his application for admission to practice, the form of the pleadings is not material, and any relevant facts may be inquired into.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 69, 70.]

11. Attorney and Client 🔑4—Admission to Practice—"Good Moral Character."

Where an attorney, after twice withdrawing his application for admission to practice, in one district when confronted with charges against his character, secured a certificate in another state and applied for admission thereon in another district, concealing his former applications, he committed a fraud upon the court and afforded additional proof that he did not possess the "good moral character" required for admission.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 4–9.]

12. Courts 🔑488(4)—Revocation of Admission to Practice—Transfer of Cause.

Since the law has placed upon the District Court of Appeal the duty to investigate applications for admission to practice, the Supreme Court on transfer of the case will not conduct the investigation, but will retransfer the matter.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1322, 1323.]

Angellotti, C. J., dissenting.

In Bank. Petition by the Committee of the Orange County Bar Association to set aside and vacate an order of the District Court of Appeal of the Third District admitting T. Alonzo Wells to practice law. Petition dismissed, and upon petitioner's application cause transferred to the Supreme Court under Const. art. 6, § 4, as amended in 1904. Motion to strike out petition denied, and demurrer to petition overruled, and cause transferred to District Court of Appeal of the Third District for further proceedings.

E. E. Keech, J. C. Burke, S. M. Reinhaus, L. A. West, and R. Y. Williams, all of Santa Ana (Wm. J. Hunsaker, of Los Angeles, of counsel), for petitioners. H. N. Mitchell, of Sacramento, and W. E. Ferguson and M. C. Atchison, both of Los Angeles, for respondent. T. A. Wells, in pro. per.

SHAW, J. On October 20, 1915, T. Alonzo Wells applied to the District Court of Appeal of the Third District for admission to practice law, under section 279 of the Code of Civil Procedure, and in support thereof produced a license purporting to admit him to practice law in the state of Nevada, issued to him by the Supreme Court of that state in October, 1915, and procured one H. N. Mitchell, an attorney at law regularly admitted to practice in this state, to vouch for the good moral character of said Wells, and to move said court that his said application be granted. Thereupon said District Court granted the application and made an order admitting said T. Alonzo Wells to practice law in the courts of this state.

Thereafter, on December 8, 1915, five attorneys, members of the bar association of Orange county and constituting a committee appointed by said association to act in that behalf, filed in said district court a petition to set aside and vacate the aforesaid order admitting said Wells to practice. The basis of this petition, in brief, was that said Wells was not a person of good moral character, as represented to said court upon his admission, but was an untrustworthy person who had committed several acts of corruption, fraud, and bad faith, particularly set forth, which showed him to be unfit for admission as an attorney, that he had twice applied for admission as an attorney to the District Court of Appeal of the Second District in which he resided, upon examination under sections 275 and 277, inclusive, of the Code of Civil Procedure, and on each occasion he had withdrawn his application for admission because of similar objections to his moral character, made on behalf of said bar association to said court, that to avoid these objections, he thereafter, in May, 1915, went to the state of Nevada, where he was not known, and there procured a license to practice law in that state, that he procured the same with the intention of using it as a means of obtaining admission to practice law in California, that to carry out such intent he applied to the District Court of Appeal of the Third District for admission, that the judges of said court had no knowledge of his previous applications to the Second District Court of Appeal, nor of his said bad character or fraudulent purpose, that said Wells, taking advantage of the ignorance of the justices of said court as to said facts, fraudulently concealed the same and did not inform said court thereof, but, as above stated, procured said Mitchell to represent to said court that he was a person of good moral character, and that by means of said fraudulent concealment and practices the said court was misled, and by reason thereof made the order admitting him to practice.

Upon the filing of this petition Wells was cited to appear and show cause why the order admitting him to practice should not be revoked. He appeared and demurred to the petition, and also moved to strike out all the allegations thereof, on the ground that it does not state facts sufficient to authorize any relief or action by the court, and that the matters alleged were irrelevant and immaterial. The District Court of Appeal sustained both the demurrer and the motion, and thereupon dismissed the petition. Within 60 days thereafter, this court granted the application of said petitioners to have said cause heard and determined before it and made its order to this effect.

When the matter came up for hearing in this court, the respondent, Wells, moved to dismiss the proceedings on the ground that the decision and order of the District Court of Appeal sustaining the demurrer and dismissing the petition is final, and that this court has no jurisdiction or power, in such a case, to order a rehearing before it, or to take jurisdiction of such a matter for further hearing and decision. The consideration of this question requires a determination of the meaning and effect of the following clause of section 4 of article 6 of the Constitution, as amended in 1904, creating District Courts of Appeal:

> "The Supreme Court shall have power to order any cause pending before the Supreme Court to be heard and determined by a District Court of Appeal, and to order any cause pending before a District Court of Appeal to be heard and determined by the Supreme Court. The order last mentioned may be made before judgment has been pronounced by a District Court of Appeal, or within thirty days after such judgment shall have become final therein. The judgments of the District Courts of Appeal shall become final therein upon the expiration of thirty days after the same shall have been pronounced."

The particular clause involved here is that which gives the Supreme Court power "to order any cause pending before a District Court of Appeal to be heard and determined by the Supreme Court." The contention is that the matter before the district court was not a "cause" within the meaning of that word as used in the above-quoted clause of the section.

[1] The purpose intended to be secured by this clause, particularly the part thereof now under consideration, may best be ascertained by considering the history of the development of the judicial system of this state. The present Constitution was adopted in 1879. Prior thereto the Supreme Court consisted of five Justices. The accumulation of business had demonstrated that the court was unable to dispose of the increasing business which came to it. It was necessary, therefore, to create a court with greater capacity for the dispatch of business. With that object in view a court of seven Justices was constituted, and, for further efficiency,

it was divided into two departments composed of three Justices, and provision made that each department should have power to hear and determine causes coming before the court. It was foreseen, however, that differences would arise between the departments which, unless controlled, would result in two systems of law on some subjects, one followed by one department and another by the other department. To prevent this it was provided that where a cause had been decided in a department a rehearing might be ordered before the whole court. The clause providing for this reads in part as follows:

> "Where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have the effect to vacate and set aside the judgment." Article 6, § 2.

This provision has always been understood to apply to all cases, matters, and proceedings of every description. It has been the unvarying custom of the court in bank to entertain an application for rehearing of any matter decided in department, regardless of its nature or character. The rule has been applied in original proceedings of all kinds, in motions to dismiss appeals and other matters, as well as in ordinary cases on appeal. The word "cause," in the clause above quoted, was understood to be broad enough to include everything that could possibly come before the department for decision.

In 1903 the judicial business of the state had again increased to such an extent that the Supreme Court and its departments were unable to keep abreast with the work. This condition demanded a remedy and the Legislature set about the task of devising some method whereby the capacity of the higher courts to dispatch business could be increased. To this end the present system was adopted. The Supreme Court was continued with the same powers and departments as before with the exception of some minor changes in its appellate jurisdiction. Three District Courts of Appeal were created, each consisting of three Justices. These courts were given jurisdiction of appeals in certain cases. It was hoped that the division of jurisdiction would equalize the labors of the three District Courts of Appeal and the Supreme Court. It was seen, however, that the division might prove to be unequal. To remedy this the Supreme Court was given power to transfer at will from any one of the courts to another, before hearing or decision, so as to apportion with fairness the burden of the work. Keech v. Joplin, 157 Cal. 6, 106 Pac. 222; People v. Davis, 147 Cal. 348, 81 Pac. 718. Again it was foreseen that in the District Courts of Appeal different conclusions would probably be reached and that different systems of law might thereby gradually become prevalent in the respective districts. In People v. Davis, supra, after stating that the power of transfer before decision was given to enable the Supreme Court to distribute thereby the work among the several courts so as to keep them all busy and thereby "secure a speedy disposition of pending cases," the court, obviously referring to the power of transfer after a decision by the District Court, said that its purpose was "to secure harmony and uniformity in the decisions, their conformity to the settled rules and principles of law, a uniform rule of decision throughout the state, a correct and uniform construction of the Constitution, statutes, and charters, and, in some instances, a final decision by the court of last resort of some doubtful or disputed question of law."

[2] The provision framed to accomplish these objects is similar to that in force respecting department decisions in the Supreme Court. The Supreme Court was given power in any matter decided by the District Court of Appeal to vacate the decision and order it transferred to its own calendar for rehearing and decision. To describe the decisions subject to this power the word "cause" was selected. This was the word used in the clause of section 2 giving similar power over the department decisions, which in that clause, as we have said, has been understood to apply to every matter that could be decided by a department. The familiar rule of construction requires that it be given a similarly broad meaning in the new provision, and to include every matter decided by a District Court of Appeal and operating as a final decision or disposition thereof in that court. It is clear, therefore, that the power to transfer causes from the District Court of Appeal to the Supreme Court, either before or after judgment in the District Court of Appeal, was intended to have this all-embracing application.

[3] We see no reason to doubt that a decision made by the District Court of Appeal upon an application to revoke an order admitting a person to practice law on the ground that the original order was fraudulently procured comes within the purview of this power of transfer. Such a decision may determine important rights of the parties in the particular case, and may also establish important principles and rules of law and practice applicable generally. The same necessity that the law of the state should be harmonious and uniform exists with respect to such matters as with regard to any other branch of the law. Our conclusion is that a matter of this character may be transferred from the District Court of Appeal to the Supreme Court in the exercise of this power by the latter.

The respondent cites, as holding to the contrary, the decision in Ex parte Zany, 164 Cal. 724, 130 Pac. 710, that this clause of section 4 is not applicable to habeas corpus proceedings. That decision was based upon the peculiar nature and effect of the writ of habeas corpus, the fact that a judgment in such cases had never in the history of the state been made subject to review, that it was not a bar where a prisoner was remanded to custody, but that he could immediately, without waiting 60 days, apply to the Supreme Court for a new writ and have his petition tried de novo, that no power of transfer or review was given after a discharge on habeas corpus on a writ issued by a single Justice of the District Court or by a Justice of the Supreme Court, and that no provision whatever was made by the clause for the custody of the prisoner during the 60-day interval; from all of which circumstances it was concluded that it could not have been intended to extend the power to such cases. None of the reasons given applies to cases of any other kind. The Zany Case is not analogous to the present case. The decision of the District Court in this case, if not vacated by this means, will be conclusive of the rights of the parties. It is not necessary and we do not deem it expedient to extend the rule of the Zany Case and make it applicable to other cases different in character and effect. The motion to dismiss the proceeding is therefore denied.

[4] Upon the merits of the case the first question naturally arising is whether or not the acts charged against the applicant, Wells, were sufficient to establish his lack of good moral character. Prior to the year 1911, after an attorney had once been admitted to practice he could not be disbarred or suspended for acts involving moral turpitude, except where they constituted elements of a crime of which he had been convicted, or unless they constituted a violation of his oath as an attorney or of some duty or responsibility resting upon him in his official capacity as an attorney. Code Civ. Proc. § 287; In re Collins, 147 Cal. 14, 81 Pac. 220. In 1911 (St. 1911, p. 848) section 287 was amended by adding subdivision 5 thereto, which reads as follows:

> "5. For the commission of any act involving moral turpitude, dishonesty or corruption, whether the same be committed in the course of his relations as an attorney or counselor at law, or otherwise, and whether the same shall constitute a felony or misdemeanor or not; and in the event that such act shall constitute a felony or misdemeanor, conviction thereof * * * shall not be a condition precedent to disbarment or suspension from practice therefor."

[5-7] It is contended on behalf of the applicant that upon an attorney's application for admission the court cannot reject him for want of good moral character, unless it appears that he had been guilty of acts which would be cause for his disbarment or suspension. We think this proposition cannot be sustained. On his admission on certificate he must produce "satisfactory evidence of good moral character." The burden is on him to do this. In a proceeding to disbar an attorney the burden is on the accuser to prove moral turpitude. The requirement on his admission is to prevent the accrediting of untrustworthy persons as fit to receive the confidence attending upon the relation of attorney and client. The inquiry may extend to his general character as well as to particular acts. It is broader in its scope than that in a disbarment proceeding. The court may receive any evidence which tends to show his character for honesty, integrity, and general morality, and may no doubt refuse admission upon proofs that might not establish his guilt of any of the acts declared to be causes for disbarment.

[8] The fact that the order admitting Wells to practice has already been made does not convert this into a proceeding in disbarment. The charge is that he obtained that order by means of a fraudulent concealment of his real character. The allegations as to his character are necessary in order to show that if there shall be a bona fide inquiry regarding it, the court would be authorized to reject him because of the facts alleged. If the court should conclude that the fraudulent means were sufficiently established to justify a revocation of the order, it would then be its duty to inquire again into his moral character, and that inquiry would have the same scope and be subject to the same rules as if it had been made upon his original application. From this it would follow that the court would not be confined to acts which have occurred since the enactment of the aforesaid amendment of 1911 to section 287, but may consider any acts or conduct occurring at any time, provided they have a legal tendency to prove his present character.

[9, 10] We now come to the consideration of the sufficiency of the allegations relating to the moral character of the respondent. It is alleged, in effect, though not in the best form or manner, that in the year 1903 he obtained a loan of $550 upon the security of a note executed by his wife and himself, and upon the representation by him that his wife owned 25 acres of land free and clear of incumbrances, whereas in truth it was then incumbered by a homestead declaration duly made and recorded by her; that in the year 1914, while acting as adviser and assistant to the attorney for certain defendants in a criminal case in Orange county superior court, he advised and urged certain witnesses that they could testify that they did not remember material facts within their knowledge, without danger to themselves, and thereby induced them to so testify. In a matter of this kind the form of the averments relating to the character of the applicant need not be closely scrutinized. If the case reaches the stage of inquiry on that subject the court may inquire as to any facts bearing on the subject which are brought to its attention in any manner, whether by pleading or otherwise. In addition there are, of course, the facts above recited touching

the manner in which he has sought to gain admission, which, if true, have a bearing upon his character.

While this conduct may not show great depravity of character, we think it must be admitted that it indicates in the respondent a want of that sincerity and integrity which the law demands of those who are to be allowed the privilege of practicing law. One who obtains credit by concealing material facts from the creditor and who, while endeavoring to practice in the superior court by indirection before he is admitted as an attorney, endeavors to induce witnesses to conceal the truth and to evade the giving of an honest answer, is not a person of that high character which the state intends shall be possessed by those who practice as attorneys in the courts.

[11] With regard to the part of the case relating to the fraudulent means by which, as it is alleged, he gained admission and evaded meeting the objections, little need be said except to state some additional facts. It appears that he did not change his residence to Nevada, but went into that state solely for the purpose of there obtaining admission to practice and securing a license from that state. Under the rules of the Supreme Court made for the government of the District Courts of Appeal, persons who desire admission upon examination must apply to the District Court of Appeal of the district in which they reside. Wells resided, and apparently still resides, in Orange county, which is within the second district. The court of that district had made a rule that applications for admission upon examination should be filed ten days before the date fixed for such examination. It was also an established practice there for the clerk to send a copy of the application to the president of the bar association of the county in which the applicant resided. Upon his two previous applications for examination in that court this course had been followed and, as above stated, upon being confronted with the objections now made, he had, on each occasion, withdrawn his application. It is alleged that he realized that he would be unable to secure admission upon examination, under these circumstances, and that with intent to evade the requirements above mentioned, to conceal the existence of the objections to his admission and then by indirection obtain admission, he went to the state of Nevada and secured admission there in October, 1915, and that in further pursuit of his intent to evade our laws and regulations he did not apply to the second district court of appeal for admission upon his certificate from Nevada, but presented the same and asked for admission in the Third District Court of Appeal, where the facts were unknown to the court, and thereby procured the order sought to be vacated. If the allegations are true they tend to show that he was conscious of the fact that he could not gain admission in any forum where he would be met by evidence regarding his character, and that to avoid this necessity and evade the efforts of the bar association to prevent his admission he resorted to the circuitous method above detailed, took advantage of the lack of knowledge by the Justices of the Third District concerning his case, and thus procured the order, notwithstanding his unworthiness. His conduct in this respect not only constituted a fraud upon the court, but it affords additional proof that he is not a fit person for admission to the bar. The courts should be vigilant, not lax, to investigate such charges as are here made in regard to the character of an applicant for admission to the bar.

[12] We do not think it avisable to take up in this court the investigation of these charges. It is proper to say that they are now mere allegations which put the court upon inquiry as to the truth of the matter. The law has devolved that duty upon the District Court of Appeal. The court that should conduct the investigation in this case, both as to the alleged fraud in obtaining the order and as to the good moral character of the applicant, is the District Court of Appeal of the Third District, the court which, it is alleged, was improperly led to make the order sought to be revoked.

The motion to strike out the petition is denied, and the demurrer to the petition is overruled.

It is ordered that the matter be transferred to the District Court of Appeal of the Third District for further proceedings in accordance with this opinion.

We concur: HENSHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.; LAWLOR, J.

ANGELLOTTI, C. J. I dissent. My view is that this matter is not one as to which this court has the power of transfer under the provisions of section 4 of article 6 of the Constitution, that the order purporting to transfer the same to this court after decision by the District Court of Appeal of the Third Appellate District is a nullity, and that we have no jurisdiction whatever in the matter. It may properly be added that it seems to me that what is said in the opinion as to the meaning of the word "cause" as used in the provision quoted in the opinion is contrary to our decision in the Zany Case, 164 Cal. 724, 130 Pac. 710, wherein it was held after most careful consideration, Mr. Justice Shaw alone dissenting, that no such power of transfer exists as to a habeas corpus proceeding. The opinion herein recognizes that decision as settling the law on that question.

174 Cal. 462

WILLIAMSON v. MONROE. (Sac. 2389.)

(Supreme Court of California. March 1, 1917.)

1. FRAUDULENT CONVEYANCES 🔑51(1) — PROPERTY EXEMPT—SALE.

Civ. Code, § 3440, declaring fraudulent a transfer of personal property made by a person having at the time the possession when not accompanied by immediate delivery, but providing that section shall not apply to property exempt, does not apply to a sale of implements of husbandry exempt from execution by Code Civ. Proc. § 690, subd. 3, and such sale is valid in view of Civ. Code, §§ 1140, 1141, 1721, 1739, which do not require immediate delivery.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 114.]

2. EXEMPTIONS 🔑121—PROPERTY SOLD—NECESSITY OF CLAIM.

In the levy on and sale of personal property exempt to seller under Code Civ. Proc. § 690, a claim by buyer, as provided by section 689, without a specific claim that property is exempt to seller, is sufficient; exemption depending upon character of property and not upon assertion of claim.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 146.]

3. FRAUDULENT CONVEYANCES 🔑149(1)—DELIVERY—PROPERTY IN CHARGE OF KEEPER—"POSSESSION."

A sale by debtor of property in charge of a keeper under an execution levy is not a sale "made by a person having at the time possession," within the meaning of Civ. Code, § 3440, and is valid without immediate delivery.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 462, 463.

For other definitions, see Words and Phrases, First and Second Series, Possession.]

Department 1. Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by George G. Williamson against J. W. Monroe. Judgment for defendant, and plaintiff appeals. Transferred from Appellate Court (28 Cal. App. 367, 152 Pac. 567). Reversed.

Williamson & Dibblee and W. F. Williamson, all of San Francisco (A. M. Donovan, of San Francisco, of counsel), for appellant. Philip S. Driver, of Sacramento, and Arthur C. Huston and Harry L. Huston, both of Woodland, for respondent.

SHAW, J. This is an action upon the official bond of J. W. Monroe, sheriff of Yolo county, against said sheriff and his sureties, to recover damages for the alleged conversion by said sheriff of certain personal property, alleged to be of the value of $3,000. The defendants in their answer denied that the plaintiff was the owner of the property alleged to have been converted, and denied that the same was of any greater value than $742.50. On the trial the defendants justified under an execution issued upon a judgment in favor of A. A. Merkley against George S. Holmes and J. Fonnesbeck, in virtue of which execution said sheriff had levied upon the property as the property of said Holmes and Fonnesbeck, and had thereafter sold the same, after due notice, in the manner required by law. The court made its findings to the effect that the plaintiff was not the owner of the property aforesaid, that its value was only $724.50, and that the sale under said execution was lawfully and rightfully made. Thereupon judgment was given in favor of the defendants for their costs. From this judgment plaintiff appeals.

On the 14th of November, 1910, the property belonged to J. Fonnesbeck, and he on that day sold the same to the plaintiff for a valuable consideration and in good faith. It was then under attachment in another action against Fonnesbeck and Holmes, and was in charge of a keeper named Howe. It was situated on a farm in Yolo county of which said Fonnesbeck was in possession under a lease for farming purposes. The lease was originally made to Fonnesbeck and Holmes, but Holmes had transferred his interest to Fonnesbeck before this sale. On the day aforesaid Fonnesbeck and Williamson went together to the farm to consummate the sale. Fonnesbeck there formally turned the property over to Williamson, and Williamson employed one Whitmarsh, who was living on the farm, to remain there and take charge of the property for him. A part of the agreement of sale was that Williamson was to release the attachment then levied on the property. He did so some days afterwards. Whitmarsh remained on the farm and looked after the property for Williamson until the levy and sale complained of. Fonnesbeck resided on the farm, and he also remained there until a short time before the levy and sale. The execution under which the sheriff made the sale was levied on the property in February, 1911. The sheriff levied upon the theory that upon the sale from Fonnesbeck to Williamson there was no immediate delivery nor actual or continued change of possession from Fonnesbeck to Williamson, as required by section 3440 of the Civil Code, and that, consequently, the property still remained subject to execution against Fonnesbeck, notwithstanding said sale. The main controversy at the trial arose over the question whether there had been such delivery and change of possession.

[1] A part of the property, claimed to be of the value of about $1,000, consisted of the farming utensils, implements of husbandry, and other property used by Fonnesbeck upon the farm aforesaid in his farming operations, and was exempt from execution under subdivision 3 of section 690 of the Code of Civil Procedure. Section 3440 provides as follows:

> "Every transfer of personal property * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession; * * * provided further, that the provisions of this section shall not ap-

ply or extend to * * * any sale, transfer or assignment of any property exempt from execution."

The plaintiff contends that, under these provisions, the farming utensils and property used on the farm as above stated are not subject to the provisions of the section, that a sale thereof in good faith, although not accompanied by an immediate delivery to the vendee or followed by an actual and continued change of possession, is not fraudulent or void, as there declared. We can see no escape from this conclusion. The language of the proviso is clear. In the absence of the restrictions placed upon sales of personal property by the opening clause of the section, a valid sale thereof could be made which would pass the title without delivery. Civ. Code, §§ 1140, 1141, 1721, 1739. A bill of sale was duly executed by Fonnesbeck to Williamson on November 14th, and the title passed to Williamson thereby, unless these restrictions applied to prevent it. As the proviso declares that these restrictions do not apply to property exempt from execution against the vendor, it necessarily follows that Williamson's title was perfect to all the property of that class included in the sale, even if there was no immediate actual delivery or change of possession. The sheriff had no right to levy upon this property, even if Fonnesbeck had been openly in possession thereof, if it then belonged to Williamson.

[2] At the time of the levy in 1911 and at the sale, Williamson made a claim to all the property in the manner provided in section 689 of the Code of Civil Procedure, but neither he nor Fonnesbeck ever made a specific claim that any of the property was exempt from execution against Fonnesbeck. Respondents contend that the property was not exempt from execution unless a claim to that effect was made, and that consequently the proviso does not apply in this case. The statute, however (section 690, Code Civ. Proc.), declares in positive terms that such property is exempt from execution. The exemption is not declared to be conditional upon the assertion of a claim of exemption by the debtor. Its status as exempt property comes from its character and use, and not from any claim for exemption. It is true that the right of exemption may be waived, and that, when the officer actually makes a levy upon such property, if the debtor does not claim his right within a reasonable time thereafter, the delay may be sufficient evidence of such waiver. Gavitt v. Doub, 23 Cal. 80. But here, when the sale was made on November 14, 1910, the vendee assumed the burden of the attachment lien then existing, and immediately discharged it. There was no occasion at that time to claim the exemption, and no person to whom such claim could be made. No other execution or attachment was outstanding. The sale then became complete, there was no waiver of the exemption, the title vested in Williamson, and the exempt property was not afterwards subject to execution against Fonnesbeck.

The decision in Barton v. Brown, 68 Cal. 11, 8 Pac. 517, was made prior to the amendment adding the proviso to section 3440. It has no application to sales of exempt property made after that amendment. This was expressly held by this court in considering and denying the petition for rehearing in Meyer v. Perkins, 20 Cal. App. 661, 130 Pac. 206, 208. In that case the District Court of Appeal decided, in effect, that a claim of exemption was not essential to the operation of the proviso. By denying a rehearing with the additional statement above mentioned this court, in effect, approved that decision.

[3] The appellant further insists that the evidence, with respect to the property not exempt, was insufficient to prove that there was not an immediate delivery to Williamson, followed by an actual and continued change of possession. With respect to an immediate delivery this court has held that when there is an execution levy upon property and it is in charge of a keeper, a sale made by the debtor during such possession of the keeper is not a sale "made by a person having at the time the possession or control of the property," within the meaning of section 3440, and is valid without immediate delivery. Williams v. Borgwardt, 119 Cal. 82, 51 Pac. 15; Curtner v. Lyndon, 128 Cal. 35, 60 Pac. 462.

There was a conflict in the evidence upon the question whether Whitmarsh or Fonnesbeck was in possession of the property from the time of the release of the first attachment in November, 1910, until the execution levy in February, 1911. There was also doubt whether the keeper in charge at the time of the sale to Williamson was in actual possession and control of the property at that time so as to bring the case within the rule of the decisions above cited. Under these circumstances, and in view of the fact that the case must be reversed because of the failure to allow the plaintiff damages for the part of the property exempt from execution, as aforesaid, we do not deem it advisable to express any opinion concerning the sufficiency of the evidence with respect to the remaining items of property. The case is somewhat similar to Cahoon v. Marshall, 25 Cal. 201. The question as presented by the record is one of fact for the trial court. Upon a new trial the doubts and uncertainties now existing in the evidence on one side or the other may be removed.

The judgment is reversed.

We concur: SLOSS, J.; LAWLOR, J.

174 Cal. 457

BROWN v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

(S. F. 7591.)

(Supreme Court of California. Feb. 28, 1917.)

1. Master and Servant 🔑361—Workmen's Compensation Act—Status as Employé.

In each case, the question whether a canvassing agent or salesman is an employé within the Workmen's Compensation Act (St. 1913, p. 279) is one of fact, depending for its determination solely upon the particular circumstances which tend to show whether, at the precise time of the accident for which compensation is sought, the employer had the power to exercise over the applicant for compensation such personal control as to attribute to the latter the characteristic of an employé.

2. Master and Servant 🔑3(2) — Terms of Contract—Governance of Relation.

The terms of a contract of employment do not necessarily determine the existing relation between the parties, but such relation may be and often is governed entirely by the subsequent conduct of the parties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 3.]

3. Master and Servant 🔑88(3) — "Independent Contractor."

The test of an independent contractor is that he renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work, but not in the means whereby it is to be accomplished.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 146.

For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.]

4. Master and Servant 🔑367 — Independent Contractor.

The circumstance that the amount of commissions of an agent employed to sell lots was dependent upon the number of lots he sold in itself did not create the relationship of independent contractor between himself and the party for whom he sold.

5. Master and Servant 🔑367—Workmen's Compensation Act—"Employé."

Where a person was employed to sell lots for a commission of 20 per cent. of the selling price, etc., and contracted to devote his whole time and energy to selling his employer's lots, further agreeing not to sell any other real estate in the vicinity for any other person without the employer's consent, the commissions earned by him not being transferable or assignable without his employer's written consent, and such agent was injured in an automobile accident while carrying on his employer's business, he was an employé within the Workmen's Compensation Act, and not an independent contractor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

In Bank. Proceedings for compensation under the Workmen's Compensation Act by Charles E. Skidmore, opposed by Herbert F. Brown, the employer. To review an award of the Industrial Accident Commission, the employer petitions for writ of review. Award affirmed.

Joseph P. Lucey, of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

LAWLOR, J. The Industrial Accident Commission found that Charles E. Skidmore, the applicant, was injured by accident near Cloverdale, Cal., while in the employment of the petitioner, Herbert F. Brown. By the writ of review the petitioner presents a single question for consideration: Are the facts found sufficient to establish between himself and the applicant the relationship of employer and employé? The details concerning the employment are stated in special findings of fact which were made by the Commission upon his request. It was found:

> "That the circumstances surrounding the employment of applicant at the time of his injury were as follows: That the applicant had been in the employment of the defendant for over two years as salesman for the selling of certain Contra Costa real estate properties owned and which were being sold by the defendant through agents for his own benefit; that in payment for his services as salesman the applicant was promised, in a certain written contract, a commission of 20 per cent. of the selling price of each lot sold, this commission to be deducted from each installment due upon each lot, as paid; that the applicant was further to retain $20 upon each initial payment of $25 upon lots sold, such moneys to be used for traveling and living expenses, but to be accounted for as a part of the whole commission due upon such sale; that all future commissions were to terminate, as to any lot, upon the forfeiture of the contract for the purchase of that lot; that the applicant furthermore contracted to devote his whole time and energy to selling the lots of the defendant, and further agreed not to sell any other Contra Costa real estate for any other person without the consent of defendant, and for a violation of such provision it was provided that the applicant was to obtain the balance of his commission on lots sold thereafter only when such lots had been fully paid for, instead of receiving his share of each payment as made; that it was furthermore provided in said contract of employment that commissions earned by the applicant were not to be transferable or assignable by the applicant without the written consent of the defendant; that the defendant exercised the right to designate the territory in which applicant should work for the sale of defendant's real estate properties; that defendant supplied applicant with circulars and instructed him in the manner of selling his properties, required applicant to report all proposed sales and to receive his (defendant's) sanction to the closing of sales of defendant's properties, required applicant to make sales according to terms and conditions described by defendant, wrote applicant general letters of instruction, advanced applicant his expenses at various times, but exercised no further or direct control over applicant's time or the manner of doing his work; that the applicant was steadily engaged in defendant's business for nearly two years without selling real estate for any other party during that time; that the defendant had a large number of similar contracts of other salesmen with varying degrees of attention paid by said salesmen to the rendering of services under such contracts; that the applicant was directed by the defendant in May, 1914, to go to Ukiah, Cal., to sell the defendant's property at this place and was directed by the defendant to accompany one Wellock to Ukiah by automobile, said Wellock to introduce the applicant and to aid him in becoming familiar with the community and people; that while on said trip by automobile to Ukiah to commence his labors with said Wellock, the applicant was injured by the wrecking

of the automobile, receiving the injuries which form the basis of this proceeding."

The award of the Commission was not unanimous. A dissenting opinion was filed by Commissioner Pillsbury, from which we quote the concluding paragraph as it accurately states the contentions which the petitioner urges upon us here:

> "The present case is fairly typical of a general situation, namely, that of real estate agents, book agents, canvassers, aluminum utensil sellers, magazine sellers, etc., or of other persons selling articles upon commission and canvassing the country, very generally confined to particular fields until they have fairly worked out such fields. In my opinion a canvasser selling upon commissions, going to work when he pleases and quitting when he wishes to do so, reporting infrequently and not with reference to how he spends his time, is ordinarily an independent contractor and is not so subject to the control of his principal as to make him an employé within the meaning of the Workmen's Compensation, Insurance and Safety Act."

[1] It is not necessary, however, for us to determine the general proposition whether all salesmen of the class mentioned are employés. In each case, the question is one of fact, depending for its determination solely upon those particular circumstances present which tend to show whether, at the precise time of the accident for which compensation is sought, the petitioner had the power to exercise over the applicant such personal control as to attribute to him the characteristic of an employé. It is pointed out that:

> "Brown had made more than 100 contracts similar to the one made with Skidmore with agents in different parts of California, some of them giving their whole time to the work of selling Brown's properties, and some only selling lots occasionally, and others reporting no sales whatever."

[2] But these facts are material only in throwing light upon the contractual relations commonly entered into between Brown and the salesmen employed by him. The terms of the contracts do not necessarily determine the existing relation of the parties, but such relation may, and often is, governed entirely by the subsequent conduct of the parties. Anderson v. Foley Bros., 110 Minn. 151, 124 N. W. 987. The findings show that Skidmore had worked for Brown for more than two years, devoting all of his time as a salesman for his properties. The contract itself expressly provided that he should do so—"you are to devote your whole time and energy to selling my lots while under this contract." So long as Skidmore elected to receive the commissions he had earned at the times the respective installment payments should be made on the lots sold by him, he was not at liberty to devote to the work only such time as he pleased.

[3] It may be conceded that the test of a contractor is that he renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work, but not in the means whereby it is to be accomplished. Green v. Soule, 145 Cal. 96, 78 Pac. 337. See Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721. But Skidmore did not contract to produce any particular result. The contract was fully performed on his part when he had devoted all of his time to endeavoring to sell Brown's lots, irrespective of the number of sales, if any, which he might make. He could leave the service of the petitioner at any time without being charged with a breach of contract, and was liable to discharge as any employé.

[4] The results obtained, so far as Skidmore was concerned, were important merely as a means of ascertaining the amount of commissions he should receive, a circumstance which in itself does not create the relationship of an independent contractor. Cameron v. Pillsbury et al., 159 Pac. 149. Nor could he delegate others to carry out the terms of the contract. It called for his personal services. Even his commissions were not to be transferred or assigned without Brown's "written consent and approval." On the other hand, the findings show, and they are not questioned, that Brown not only kept in close touch with the means employed by Skidmore in the performance of his work, but exercised a general control over his movements and methods of salesmanship, while especially reserving the right to approve all proposed sales, a reservation which necessarily implies the power of designating and directing in advance the terms upon which each lot must be sold. And at the time of the accident, so Skidmore testified, he was proceeding to Ukiah because Brown had "sent" him there to sell his properties with the assistance of one Wellock who had been directed by Brown to accompany him.

[5] In short, the petitioner had adequate means to control the applicant in the performance of his services (State v. District Court, 128 Minn. 43, 150 N. W. 211), and the case comes within the principles supporting Cameron v. Pillsbury et al., supra. It follows that the Commission was warranted in finding that Skidmore was an employé of the petitioner.

Award affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

SHAW, J. (concurring). Skidmore was engaged by Brown to sell real property. His contract was that he should devote his whole time to that service. At the time he was injured he was acting under Brown's special instructions to go to Ukiah with Wellock to continue his services there. While on that trip he was injured. I am satisfied that during that trip, at least, he was in the service of Brown under a contract of hire, within the spirit as well as the letter of the Workman's Compensation Act. The fact that his compensation was to be a commission on sales made is immaterial. It was none the less a contract of hire. On this ground I concur in the opinion of Justice LAWLOR.

I am not satisfied that a person who is employed to sell real estate on commission and who chooses his own time, place, and manner of seeking purchasers, and who pays his own expenses, would be an employé of his principal in the sense of that act, and I express no opinion on that branch of the case.

I concur: MELVIN, J.

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174 Cal. 451

ALBERT v. McKAY & CO. (S. F. 7111.)

(Supreme Court of California. Feb. 28, 1917. Rehearing Denied March 29, 1917.)

1. MASTER AND SERVANT 🔑101, 102(1)—SAFE PLACE TO WORK.

The duty to furnish an employé with a reasonably safe place to work is limited to the premises where the employé is required to be for the purposes of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 178, 179.]

2. MASTER AND SERVANT 🔑276(10)—DEATH OF SERVANT—SUFFICIENCY OF EVIDENCE.

In action for death of servant, evidence *held* to warrant finding that the servant was acting within the scope of his duties in going to a lower floor of his employer's lumber mill to fasten bolts which held the filing room machinery in place.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 952.]

3. MASTER AND SERVANT 🔑103(2) — SAFE PLACE TO WORK.

The rule requiring a master to provide a safe place for his servant to work does not apply when the place at which the work is to be done, or the appliances for doing it, are to be prepared by the servant himself.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175.]

4. MASTER AND SERVANT 🔑236(12) — INJURIES TO SERVANT — CONTRIBUTORY NEGLIGENCE.

Where the employé of a lumber mill himself removed the guard from a setscrew, and such unguarded setscrew caused his injury and death, his widow could not recover against the employer therefor, since the condition which the employé himself brought about could not be charged against the employer as an act of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 736.]

5. MASTER AND SERVANT 🔑278(17) — INJURIES TO SERVANT—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In action for death of a lumber mill employé, evidence *held* insufficient to show that the machinery of the mill was negligently started after the employé had begun work thereon.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 969.]

6. WITNESSES 🔑397—IMPEACHMENT—PRIOR INCONSISTENT STATEMENTS.

When a witness is impeached by proof of prior inconsistent statements, the effect is merely to discredit him as a witness; the former statements made by him are incompetent for any other purpose, and do not constitute evidence of the truth of the facts so stated by him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1265, 1266.]

7. MASTER AND SERVANT 🔑265(5)—INJURIES TO SERVANT—RES IPSA LOQUITUR.

In an action for death of a servant, where the widow charged that his death was caused by the negligent starting of the machinery after the servant took his position near it, but the testimony was undisputed that the machinery had not been started at all, and therefore could not have been started negligently, the employer's negligence could not be inferred under the doctrine of res ipsa loquitur, which had no application to the facts.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 881, 898, 955.]

8. MASTER AND SERVANT 🔑265(4)—INJURIES TO SERVANT — PRESUMPTION OF FREEDOM FROM NEGLIGENCE—STATUTE.

The presumption, under Code Civ. Proc., § 1963, that a deceased servant exercised ordinary care could not avail to support verdict for his widow against his employer, in the absence of substantial evidence tending to show a breach of duty by the latter.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 880, 899.]

Department 1. Appeal from Superior Court, Humboldt County; Clifton H. Connick, Judge.

Action by Ella W. Albert, as administratrix of the estate of Frank H. Albert, deceased, against McKay & Co. From a judgment for plaintiff, defendant appeals. Reversed.

Denson, Cooley & Denson, of San Francisco, Denver Sevier, and Sevier, Coonan & Ricks, all of Eureka, for appellant. Puter & Quinn, of Eureka, for respondent.

SLOSS, J. For some years prior to March 10, 1913, Frank H. Albert had been in the employ of the defendant, McKay & Co., a corporation owning and operating a lumber mill at Eureka, in Humboldt county. On the day named, Albert's clothing was caught in an appliance attached to one of the shafts used in the transmission of power for the mill machinery, his body was drawn against the rapidly revolving shaft, and he received injuries which caused his death. He was survived by a widow and a minor child. This action was brought by the widow, as administratrix of his estate, to recover damages for the alleged negligent killing of her intestate. Upon the trial the plaintiff recovered a verdict in the sum of $8,000, and judgment was entered accordingly. The defendant appeals from the judgment, bringing up the evidence by means of a bill of exceptions.

Albert's employment was that of a saw filer. He worked in a filing room, which was on the sawing or mill floor of defendant's mill. The engines, together with the shafts, pulleys, and belts for the transmission of power were located upon a lower floor. In the filing room were several machines, which were used by Albert in his work. These were driven by a belt running through the floor and connecting with a pulley attached to a shaft running under the floor of the filing room. One end of this shaft was set in a box or bearing. At the point where the shaft entered the box, a collar was attached to the shaft by means of a setscrew, which projected five-eighths of an inch beyond the collar. Some 12 or 13 inches from this collar a pulley, with a diameter of 30 inches, was attached to the shaft. The shaft in question received its power from the main shaft driven by a belt from the engine. A "tightener" was used in transmitting power to the main shaft. The shaft was set in motion by lowering the tightener so as to bring it in contact with a belt connecting with the engine. Raising the tightener stopped the main shaft and with it the shaft which furnished power to the machines in the filing room.

The precise way in which the fatal accident occurred was a subject for inference from the circumstances shown. No one was with Albert when he was caught in the machinery. A fellow-employé found Albert's lifeless body hanging on the shaft, between the box holding the end of the shaft and the pulley, which we have described as being 12 or 13 inches away.

The complaint was in three counts. In all three it was charged that Albert had occasion, in the performance of his duties, to reach across the shaft in order to adjust one of the machines used by him in the filing room above, this machine being held in place by means of bolts passing through holes in the floor, and fastened by nuts attached and tightened from below. The first count alleged that Albert's clothing was caught in the protruding setscrew which has been described. The averment was that the defendant negligently left this setscrew unguarded, and that this negligence was the cause of Albert's death. The setscrew, it was alleged, could not be seen when the shaft was in motion. The theory underlying this cause of action was that Albert undertook to do his work of adjustment while the shaft, and the setscrew upon it, were revolving.

The second and third counts were framed on the theory that the shaft was not in motion when Albert began, but that while he was engaged in his work, the shaft was set in motion through the negligence of the defendant. The second count alleges that the starting of the machinery was occasioned by the act of the defendant in negligently dropping the tightener on the belt, thereby causing the shaft to revolve. The third charges that the appliances for holding the tightener in place were improperly constructed, and that by reason thereof the tightener fell onto the belt and thus started the machinery in motion.

At the close of the plaintiff's testimony defendant moved for a nonsuit. The motion was granted as to the third count, there being no evidence tending to show that the tightener had dropped as charged in this count. The main question raised by the appeal is whether the verdict can be sustained on either the first or second cause of action alleged.

[1, 2] The appellant urges with much earnestness that the evidence totally fails to show that Albert was acting within the scope of his employment when he undertook to work in the place where he met his death; that in fact the activities in which he was then engaged were undertaken in direct violation of the orders of his employer. This point, if sustained, would answer the plaintiff's claims under both the first and the second count. The negligence charged in the first count is the failure to comply with the employer's duty to furnish his employé with a reasonably safe place to work. The duty is limited to "the premises where the employé is required, for the purposes of his employment, to be." Kennedy v. Chase, 119 Cal. 637, 640, 52 Pac. 33, 35 [63 Am. St. Rep. 153]. So, also (referring to the second count), if Albert, while working in a place where he was not required to be, was injured by the starting of the machinery, such starting would not constitute negligence in the absence of proof that the defendant knew, or had reason to know, that Albert was in a position of danger. There is considerable evidence to the effect that Albert was directed to confine his work to the filing room and not to go on the floor below except when the mill was not in operation. More specifically it was testified that he had been forbidden to change the location of the filing room machinery. But there was evidence of contrary import, and, on the whole case, we think the jury was warranted in concluding that Albert was acting within the scope of his duties in going to the lower floor to fasten the bolts which held the filing room machinery in place.

But, conceding so much, we must still hold that the evidence totally failed to show any negligence on the part of the defendant. The breach of duty charged in the first count was that the defendant improperly left the setscrew unguarded. That it was so unguarded at the time of the accident is clear. But several witnesses testified that the collar and setscrew had been protected by a guard for a considerable time prior to the accident. The protection consisted of a piece of rubber belting over this part of the machinery, and a drip box or pan under it. Four witnesses so stated, and their testimony is uncontradicted. One of them testified, further, that on the Wednesday or Thursday before the accident (which occurred on a Monday), Albert had borrowed a bar from the witness, and had pried off the belting with it, removing the drip pan at the same time. This statement was also uncontradicted. The testimony of these witnesses could not be arbitrarily discarded. There was nothing to throw doubt on its credibility. On the contrary, other evidence tended strongly to fortify the probability of the claim that Albert had removed the protective covering in the process of changing the position of the shaft, a change which was actually made a few days before the accident, and was necessary to the moving of the machine in the filing room.

[3] The rule requiring the master to provide a safe place for the servant does not apply when "the place at which the work is to be done, or the appliances for doing the same, are to be prepared by the servant himself." Callan v. Bull, 113 Cal. 603, 45 Pac. 1017; Peterson v. Beck, 27 Cal. App. 571, 150 Pac. 788.

[4] If the cause of Albert's injury and death was the unguarded setscrew, the condition was one which he himself had brought about, and which could not be charged against the defendant as an act of negligence.

[5] The only remaining basis for sustaining the verdict is that set forth in the second count, i. e., that the machinery was negligently started after Albert had begun to work. Here, too, the evidence totally fails. Testimony of numerous witnesses is unanimous to the effect that the machinery, including the shaft in question, was running before Albert went to the lower floor, and that it was not stopped until the discovery of his body on the shaft. There was no competent evidence in contradiction of this. Two witnesses for plaintiff testified that immediately after the accident they had met Milotte, the master mechanic of the mill, one of the employés charged with the duty of raising and lowering the tightener, and that Milotte was pale and his voice trembled. To one of these witnesses he had said: "Don't talk about it. I cannot stand it. I am sick"—and to the other: "For God's sake go in and take that man off the shaft." This testimony is relied on by the respondent as tending to show that Milotte had lowered the tightener, thus starting the machinery in motion and causing Albert's death. To give it any such effect would be to indulge the wildest surmise and conjecture. Milotte's words and actions may have indicated no more than the horror and distress which any man might feel on seeing that another had met violent death. They certainly contained no basis for the inference that Milotte had been guilty of any wrong, still less that he had committed the act of negligence described in the complaint. The jury could not view the evidence of Milotte's conduct as overcoming the direct testimony that the machinery was running when Albert approached the shaft, without disregarding the instruction of the court that their verdict "must be based upon a fact, or facts, and not on speculation."

[6] The respondent points to one other item of evidence as tending to show that the machinery was not running when Albert went to work. Among the witnesses who testified that the machinery had been running continuously was one Elener, a blacksmith in defendant's employ. The proper foundation having been laid by cross-examination, the plaintiff sought to impeach him by calling in rebuttal a witness who testified that Elener had said, shortly after the accident, that the machinery had not been running, and that somebody must have left the tightener down after Albert had started working. When a witness is impeached by proof of prior inconsistent statements, the effect is merely to discredit him as a witness. The former statements made by him are incompetent for any other purpose. They do not constitute evidence of the truth of the facts so stated by him. 2 Wigmore on Evidence, § 1018; Keyes v. Geary Street, etc., R. R. Co., 152 Cal. 437, 441, 93 Pac. 88; Worley v. Spreckels Bros. Com. Co., 163 Cal. 60, 71, 124 Pac. 697.

[7] In the absence of any conflict, the jury had no right to find a verdict based upon the theory that the machinery had been negligently started after Albert had placed himself in close proximity to the shaft. This is not a case in which such negligence can be inferred under the doctrine of res ipsa loquitur. The rule has no application to the facts of this case. The plaintiff charged, in the count under discussion, that Albert's death was caused by the negligent starting of the machinery. If there had been any evidence to show that the machinery was started after Albert took his position near the shaft, it might be said that the mere occurrence of the accident warranted an inference that the defendant had been negligent in setting the shaft in motion. But such inference cannot, of course, be indulged in face of the undisputed testimony that the machinery had not been started at all, and therefore could not have been started negligently.

[8] The presumption that Albert himself exercised ordinary care (Code Civ. Proc. § 1963; Crabbe v. Mammoth C. G. M. Co., 168 Cal. 506, 143 Pac. 714) relied on by respondent, cannot avail to support the verdict in the absence of any substantial evidence tending to show a breach of duty by the defendant.

The judgment is reversed.

We concur: SHAW, J.; LAWLOR, J.

(174 Cal. 423)

In re McMAHON'S ESTATE. (S. F. 7779.)

(Supreme Court of California. Feb. 16, 1917.
Rehearing Denied March 15, 1917.)

1. WILLS 🔑133—OLOGRAPHIC—EXECUTION.
The face of an instrument offered as an olographic will must establish fact that it is a completely executed document, and, if signed elsewhere than at the end, must show this to have been intended as an executing signature.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 342–344.]

2. WILLS 🔑206—ADMISSION TO PROBATE.
Only a will showing upon its face due and complete execution is entitled to probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 513, 514.]

3. WILLS 🔑133—OLOGRAPHIC—EXECUTION.
Testatrix's belief that her olographic will was duly executed has no weight in considering the question of its legal sufficiency.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 342–344.]

4. WILLS 🔑133—OLOGRAPHIC—EXECUTION—SIGNATURE.
Olographic will, stating in exordium, "This is the last will and testament of Elizabeth R. McMahon," and concluding, "I do hereby publish and declare the foregoing, entirely written, dated and signed by my own hand to be my last will and testament," *held* sufficient to indicate that testatrix adopted her name written in exordium as the executing signature, hence will satisfied Code provisions and was entitled to probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 342–344.]

5. WILLS 🔑133—OLOGRAPHIC—EXECUTION.
Absolute precision of execution is not expected in the case of an olographic will; it being sufficient if will clearly shows upon its face a legal execution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 342–344.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Appeal from decree, probating will of Elizabeth R. McMahon, deceased. Affirmed.

W. A. Breen and Mastick & Partridge, all of San Francisco, for appellant. Herbert Choynski and James Raleigh Kelly, both of San Francisco, for respondent.

HENSHAW, J. In this case a written instrument was admitted to probate as the last will and testament of Elizabeth R. McMahon, deceased. The writing was unwitnessed and unattested. It was therefore olographic in its nature. In its exordium it declared: "This is the last will and testament of Elizabeth R. McMahon." Following this the writing contained certain specific bequests and devises, with a residuary clause, and a clause appointing an executor. It concluded as follows:

> "I do hereby publish and declare the foregoing, entirely written, dated and signed by my own hand, to be my last will and testament, this second day of January, 1912."

No signature followed this declaration. No signature of the testatrix appeared in any other place upon the instrument, saving in the exordium as above noted. Upon this showing the court entered its decree admitting the will to probate, and from that decree this appeal is taken.

[1, 2] This court has very recently been called upon to consider the nature of the evidence permissible and sufficient to establish the due execution of an olographic will, where the signing thereof by the testator is not in the customary place at the end of the instrument. Estate of Manchester, 163 Pac. 358, S. F. No. 7691, filed February 15, 1917. The conclusion there reached and expressed is that it must be established upon the face of the offered instrument that it is a complete and executed document; that notwithstanding that the usual place of signing and so of evidencing this execution and completeness is at the end of the instrument, the signature of the testator found elsewhere than at the end may be, if circumstances warrant it, a signature of execution, but that the only evidence which will warrant this conclusion must be found in and on the instrument itself, or, in other words, that the proof of this cannot rest in parol, for to admit parol evidence (aside from the other legal evils which might readily be pointed out) is also to admit that the instrument in an essential element of its validity is equivocal, and therefore is not complete upon its face. And this admission is itself destructive of the instrument as a completed will, since only a will showing upon its face due and complete execution is entitled to probate. In the Manchester case the opening paragraph of the offered instrument declared: "I, Matilda Manchester, leave and bequeath," etc. It concluded with the following: "Whereunto I hereby set my hand this 14th day of January, 1914." As this court necessarily concluded, such an attempted execution was at least equivocal. The language employed was in terms very similar and in effect identical with that found in the will discussed in Waller v. Waller, 1 Grat. (Va.) 474, 42 Am. Dec. 564.

[3] The language of the instrument here in question is much more definite and convincing, to the effect not alone that the testatrix believed her will to be duly executed, which would, of course, have no controlling weight in the consideration of the question as to whether or not it was in law duly executed, but to the effect that she has sufficiently in law on the face of the instrument adopted the signature written by herself in the exordium of her will as her signature in execution of it. If she has done this and with sufficient exactitude has stated the fact, she has, in legal effect, declared that she has adopted her signature as written in the body of the will as being the signing of it in exe-

cution of it within the meaning of the Code provision, and this would be sufficient to entitle the instrument to probate.

[4, 5] We hold that the testatrix in this case has sufficiently accomplished the object indicated. An absolute precision of execution is not expected in the case of an olographic will. What is required is a clear showing upon the face of the instrument of its execution in conformity with the law. In this case the difficulty arises over the fact that the signature is not found in the usual place at the bottom of the instrument. But the language last employed by the testatrix clearly indicates that the testatrix had concluded her writing and thus had completed the expression of her testamentary intent, and it is a most reasonable construction of that language to say that she adopted her signature in the exordium as her signature in execution of the will when she declares that "the foregoing, entirely written, dated and signed by my own hand" is her last will and testament.

So recently has this court discussed this question and reviewed the authorities that nothing further need be added, and for the reasons given the decree appealed from is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

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174 Cal. 478

CHAFOR et al. v. CITY OF LONG BEACH. (L. A. 4100.)

(Supreme Court of California. March 2, 1917. Rehearing Denied March 29, 1917.)

1. MUNICIPAL CORPORATIONS 🔑734—PUBLIC BUILDINGS—DUTY TO MAINTAIN.

A building constructed by the city under St. 1903, p. 412, authorizing the city to incur indebtedness for a public assembly hall, was not one enjoined upon the municipality by positive law, and the duty of maintenance was not therefore imposed by law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1550.]

2. MUNICIPAL CORPORATIONS 🔑848—PUBLIC BUILDINGS—FAILURE TO MAINTAIN—INJURIES TO PERSONS — "LICENSEE" — "TRESPASSER."

Where a municipal public assembly hall was rented to an organization which invited all interested persons to a celebration of Queen Victoria's birthday, a citizen who attended was not a trespasser, but a licensee by permission or invitation, and if the city was at all responsible for injuries, it was responsible for the exercise of ordinary care.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1804, 1805.

For other definitions, see Words and Phrases, First and Second Series, Licensee; Trespasser.]

3. MUNICIPAL CORPORATIONS 🔑734—TORTS—LIABILITY—PRIVATE OR "GOVERNMENTAL FUNCTIONS."

The true test whether a municipality is liable in tort for injuries to a person is not whether the municipality from renting its auditorium wherein the injury was caused was reaping a profit, and an act does not become governmental merely because the city from its performance reaps no profit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1550.

For other definitions, see Words and Phrases, Second Series, Governmental Functions.]

4. MUNICIPAL CORPORATIONS 🔑724—LIABILITY FOR TORTS — "GOVERNMENTAL FUNCTIONS"—COMMON LAW.

Under common law the municipality is protected from liability only while exercising the delegated functions of sovereignty, which include police regulation, crime prevention, preservation of health, fire prevention, care of the poor, and education of the young.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1545, 1561, 1568.]

5. MUNICIPAL CORPORATIONS 🔑734 — PUBLIC BUILDINGS—INJURIES TO PERSONS—LIABILITY.

While schoolhouses, city halls, jails, and fire houses are governmental instrumentalities for injuries to persons in which the city is not liable the rule does not apply to public auditoriums or other buildings, though for the benefit, convenience, or advantage of the people, and even in the case of strictly governmental buildings if the city rents portion thereof, it is liable to the tenant for negligent maintenance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1550.]

6. MUNICIPAL CORPORATIONS 🔑734—PUBLIC BUILDINGS—INJURIES TO PERSONS—LIABILITY.

When a municipal building is constructed and maintained not for governmental purposes, even though under permission of statute, and though maintained for the benefit of inhabitants or such of them as desired to use it, the city acts in a private proprietary capacity, and is liable for its torts.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1550.]

7. MUNICIPAL CORPORATIONS 🔑848—PUBLIC BUILDINGS—INJURIES TO PERSONS—LIABILITY.

Where the city under St. 1903, p. 412, constructed an auditorium partly over a bay, which it rented to any persons desiring the use of the same at fixed rentals for various classes of entertainments, and during a celebration by a private organization, to which all citizens were invited, the approach to the auditorium collapsed, with injuries to persons, the city was liable to the same degree as if the building had been owned by a private owner.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1804, 1805.]

Angellotti, C. J., and Shaw, J., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by George Chafor and another against the City of Long Beach. Judgment for plaintiffs, and defendant appeals. Affirmed.

Haas & Dunnigan and Byron C. Hanna, all of Los Angeles, Stephen G. Long and Geo. F. Kapp, both of Long Beach, Geo. L. Hoodenpyl, of Los Angeles, and Wilbur F. Downs, of Long Beach, for appellant. William A. Anderson, of Los Angeles, for respondents.

HENSHAW, J. This action was brought by the husband and by the minor son of Edith Chafor to recover damages for the death of Edith occasioned by the negligence of the defendant city. Trial was had before a jury, resulting in a verdict for the plaintiffs. Judgment followed the verdict, and from that judgment and from the order of the court denying defendant's motion for a new trial it prosecutes this appeal.

Long Beach is a maritime city. Prior to the accident it had constructed and was maintaining a wharf or pier extending into the ocean. The superstructure of this pier was supported by piles driven into the beach and ocean bed. Near the outer end of this pier and a little distance from it, the city had built and was also maintaining a structure known as an auditorium. The approach to the auditorium from the pier, a distance of about 40 feet, was by means of a platform. From this platform doors gave entrance onto the main floor of the auditorium. The 24th of May, 1914, was the birthday of Queen Victoria. Certain of the inhabitants of Long Beach and of adjacent territory proposed to assemble in the auditorium for the purpose of celebrating this "Empire Day." A set program for the ceremonies and entertainment had been announced. In effect such part of the public as was interested in the event was invited to attend. Edith Chafor was a resident of the city of Los Angeles, and went to Long Beach for these ceremonies. They were inaugurated by a street parade, headed by the municipal band. This parade was to end at the auditorium. While it was on the march people assembled on the platform, seeking admission to the auditorium. The doors were closed, so that a crowd collected on this platform. It gave way under the weight of this crowd, and carrying with it a part of the underpinning and superstructure of the auditorium building proper, precipitated some 200 of the assemblage onto the beach sands 20 or more feet below. Edith Chafor was one of these, and her dead body was removed from the wreckage.

[1] As the question whether or not the city of Long Beach, which admittedly had built and was maintaining this auditorium and its approach, was doing so in a governmental capacity is the principal question presented on this appeal, it becomes pertinent to point out that the construction and maintenance of this auditorium, which was essentially a hall for public assemblages and gatherings, were not enjoined upon the municipality by positive law. Therefore the duty of maintenance was not a duty imposed by law. The auditorium was constructed under the permission of a statute of 1903. Stats. 1903, p. 412. This statute authorized and permitted a municipality to issue bonds and incur indebtedness for the purpose of constructing and maintaining such "public assembly or convention hall." It provided that the legislative body of the city "shall have power to appoint such officers, or agents, and to make and enforce such rules and regulations as may be necessary for the management, control, letting, and use of such public assembly or convention halls." It further provided that "all moneys derived from the use or hire of such assembly or convention hall shall be deposited in the treasury of the municipality to the credit of said public hall fund." After specifying the first applications to be made of the moneys thus received, it further declares that "any surplus remaining * * * may be appropriated and used for general municipal purposes." It is not in controversy but that this particular assembly hall was maintained under the provisions of this act, and that its management and control, also under the provisions of the act, were in the hands of defendant's board of public works. Control of the actual letting or permission to use the hall was retained by the city council.

[2] The evidence discloses that upon the day in question the right to the use and occupancy of the hall had been given to an organization known as the Sons of St. George, and that the auditorium would be open to the general public after the Sons of St. George with the paraders and their friends had been admitted. The parade was led by a lieutenant of the city's police, with a number of the police force. These were followed by the municipal band. The mayor of the city and his wife were in the first automobile. The destination of all was the auditorium, which, under these circumstances, the mayor himself had entered just prior to the disaster. It cannot be said then that Edith Chafor was a trespasser at the time and place of her death. She was at least a licensee by permission or invitation, and if the city is responsible at all it is responsible for the exercise of ordinary care to see that such a licensee is not injured. Schmidt v. Bauer, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580; Means v. So. Cal. Ry., 144 Cal. 473, 77 Cal. 1001, 1 Ann. Cas. 206; Hontz v. San Pedro, etc., R. R. Co., 161 Pac. 971. With the ground thus cleared of these minor obstructions we can approach unhampered the consideration of the principal proposition: Was the city of Long Beach at the time and on the occasion of this accident managing this assembly hall in its governmental capacity or in a private and proprietary capacity?

To the resolution of this question we now come, prefacing the consideration by the statement, which will hereinafter be abundantly established, that there is no substantial controversy over the governing law. With the decision of the case of Russell v. The Men of Devon, 2 T. R. 667, and the cases which followed it, it became an established principle of the English common law that an individual could not sustain an action against a political subdivision for negligence in its performance of any governmental function, nor of any public function expressly ordained and commanded by law. The reasonings supporting this were various. At times it was declared that it was better for the individual to suffer than for the public to be inconvenienced, and that this principle was stronger than that other and conflicting one which declared that for every injury the law gives a remedy. The city was but a hand of the sovereign, and it was the "right divine of kings to govern wrong." Later it was argued that the moneys of a municipal corporation were designed to be devoted to public ends, and that it would be a misapplication of them to permit any part of them to be used in the liquidation of private damages. But this principle of decision, while firmly established where not abrogated by statute, failed to commend itself alike to jurists and to legislators, and, it was argued that as neither a political subdivision nor yet the state itself could injure a man's property without compensation, it seemed somewhat fallacious and absurd to say that it could negligently injure him or destroy his life without the liability to compensation for its wrongdoing. It was a clear instance, so it was argued, of making the rights of property higher and more sacred than the rights of man. Thus it came about that courts soon made a discrimination in these cases between the purely governmental or ordained functions of the municipality, for remissness in the performance of which it was not liable, and those which, though undertaken and performed for the general benefit of the inhabitants of the municipality, were neither ordained nor in their nature essentially governmental. And recognizing, as has been said, the inherent injustice of the established rule, the disposition of the courts on the one hand was to uphold such actions under a very rigid construction of the phrase "governmental functions," while upon the other hand the Legislatures in many states by positive enactment did away entirely with the distinction and made municipal corporations liable to precisely the same extent for the same acts as were private corporations. And indeed it may be added that even without legislative sanction in at least one instance the highest court of a state has repudiated as unsound the distinction between the governmental and private functions of a municipal corporation, and has declared that in every case the mode and measure of the liability of a public corporation should be that prescribed as to an individual or a private corporation. Bowden v. Kansas City, 69 Kan. 587, 77 Pac. 573, 66 L. R. A. 181, 105 Am. St. Rep. 187, 1 Ann. Cas. 955. And in this state it is not without interest to point out that the Legislature has in terms imposed this liability upon all counties, cities, and cities and counties by a statute enacted in 1911 (Stats. 1911, p. 1115), though by reason of the fact that the substance of this enactment was neither declared nor hinted at in its title it is undoubted that in this respect the act is void. Brunson v. City of Santa Monica, 27 Cal. App. 89, 148 Pac. 950.

[3] Again it is important to note that the true test does not rest upon the determination as to whether or not the municipality is reaping a monetary gain. A very large class of cases arises where this fact is established, as where parts of public buildings, such as a city hall, are leased or rented to private individuals, when it is uniformly held that the city in doing this thing is acting in a private capacity. But while it is true that the exaction of a rent or the making of a private profit is a very potent factor in determining the character of the act, the converse is not true. In other words, the act does not become governmental merely by virtue of the fact that the city from the performance of it reaps no direct pecuniary return. It may be and is equally a private, proprietary act if no financial return at all be exacted, or if the financial return which is exacted does not amount to a profit on the enterprise. The true principle has too often been confounded with the mere question of pecuniary gain. We may be excused, therefore, in elucidating this fact for quoting at some length. Thus in Dillon, Municipal Corporations (5th Ed.) § 109, the principle is thus aptly and admirably stated:

> The powers of a municipal corporation are denominated "governmental, legislative or public; the other, proprietary or private. * * * On distinction of these powers rests the doctrine of the common-law liability of municipal corporations. In its governmental or public character the corporation is made, by the state, one of its instruments, or the local depository of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself. * * * But in its proprietary or private character, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for private advantage of the compact community, which is incorporated as a distinct legal personalty, or corporate individual; and as to such powers and to property acquired thereunder, and contract made with reference thereto, the corporation is to be regarded quoad hoc as a private corporation, or at least not public in the sense that the power of the Legislature over it or the rights represented by it is omnipotent."

The text of the learned author will be found supported by every well-considered adjudication. Noteworthy amongst these is the case of City of Galveston v. Posnainsky, 62 Tex. 118, 50 Am. Rep. 517, where the distinction between governmental and proprietary functions is elaborately considered, and it is said:

> "The tendency of the decisions is evidently to recognize the liability of even quasi corporations to suit not expressly given by statute, when injury results from the negligence of officials or agents exercising powers purely ministerial in reference to matters which cannot be said to pertain to duties purely public; to matters which, though in a restricted sense are public, yet more directly affect the welfare and pecuniary interest of the inhabitants of the quasi corporation, upon whose will rests the determination whether the given act shall be performed and how it shall be performed, and upon whom rests solely the expense of the work put in operation by themselves, through which, at least indirectly, they receive benefit in which the gen-

eral public, if at all, but slightly participates. * * * It would seem that, in so far as municipal corporations of any class, and however incorporated, exercise powers conferred on them for purposes essentially public—purposes pertaining to the administration of general laws made to enforce the general policy of the state—they should be deemed agencies of the state, and not subject to be sued for any act or omission occurring while in the exercise of such power, unless, by statute, the action be given; that, in reference to such matters, they should stand as does sovereignty, whose agents they are, subject to be sued only when the state, by statute, declares they made be. * * * In so far, however, as they exercise powers not of this character, voluntarily assumed—powers intended for the private advantage and benefit of the locality and its inhabitants—there seems to be no sufficient reason why they should be relieved from that liability to suit and measure of actual damage to which an individual or private corporation exercising the same powers for a purpose essentially private would be liable."

We have thus been at pains to set forth the principle determinative of the question as to whether or not a particular act pertains to the governmental rather than to the proprietary activities of a city, because the discussions of some courts, notably those of Massachusetts, have been misconstrued upon the element of pecuniary gain. Hill v. City of Boston, 122 Mass. 344, 23 Am. Rep. 332, illustrates this. It is to be noted that the court is there dealing, and so expresses itself, with the "neglect of a public duty imposed upon it (the municipality) by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage." The particular case was an action of tort against the city of Boston to recover damages for injuries received by a child while attending a public school, under the express duty imposed by general law to maintain such public schools, and it is held that the municipality is not liable. The Supreme Court of Massachusetts did not in any way broaden the definition of governmental functions as applied to municipal acts. It did not rest its decision, as well it might, upon the proposition that the maintenance of public schools, being a duty enjoined upon the municipality, partook of the nature of a governmental function. Nor yet, while recognizing and declaring that it was a duty the performance of which was enjoined upon the city by general law, did it exonerate the city for liability on this account, but held and declared that in the performance of such ordained duties the city would not be liable when the performance of the duty was not connected with any pecuniary benefit to the municipality, thereby plainly implying that even though the duty were ordained by general law, if it contemplated any pecuniary benefit to the municipality it would stand liable as would a private individual. To illustrate the unwillingness of the Massachusetts courts to extend the doctrine of municipal immunity, the case of Dickinson v. City of Boston, 188 Mass. 595, 75 N. E. 68, 1 L. R. A. (N. S.) 664, is instructive. The city of Boston was by law responsible for the negligent maintenance of its public streets. To prevent accidents on those streets it was not required by law to light them at night. However, by a permissive statute the city "was authorized but not required to maintain lamps to light its streets." St. 1825, c. 3. It maintained such lights for the general benefit of the inhabitants, for their general safety, and specifically to lessen the danger of accidents upon the highways. One of its lamp posts, negligently maintained, fell and injured the plaintiff. In his action brought to recover damages these matters are discussed, and it was urged, amongst many other reasons, that the city was not liable in that it was reaping no pecuniary benefit from the maintenance of the lights, but that the benefit was a general public benefit to the inhabitants. The Supreme Court of Massachusetts made answer:

> "It was unnecessary for the plaintiff to show that any direct commercial profit had been derived. The indirect benefit thus conferred supplied a sufficient motive for the defendant's action. Having voluntarily undertaken the enterprise for its private benefit, and not acting in the performance of any public duty, it is liable for negligence in the management of its corporate property when used for such purpose" (citing numerous cases).

Still further, as showing the limits within which the courts circumscribe the meaning of the phrase "governmental function," may be cited Ehrgott v. Mayor of New York, 96 N. Y. 264, 48 Am. Rep. 622, where it is held that it is settled by a long line of decisions that municipal corporations proper, having the powers conferred upon them respecting streets within their limits, owe to the public the duty to keep them in a safe condition for use in the usual mode by travelers, and are liable in a civil action for special injury resulting from neglect to perform this duty. And the City of Kokomo v. Loy (Ind.) 112 N. E. 994, where the Supreme Court of Indiana applies the same doctrine to injuries resulting from the negligent upkeep of a public park as well as public streets.

That the distinction between governmental and private functions has been adopted as the principle governing the adjudications in this state our decisions leave no doubt. Thus in the early case of Touchard v. Touchard, 5 Cal. 307, it is said:

> "A corporation, both by the civil and common law, is a person, an artificial person; and although a municipal corporation has delegated to it certain powers of government, it is only in reference to those delegated powers that it will be regarded as a government. In reference to all other of its transactions, such as affect its ownership of property in buying, selling, or granting, and in reference to all matters of contract, it must be looked upon and treated as a private person."

In Bloom v. San Francisco, 64 Cal. 503, 3 Pac. 129, in the conduct of the municipal hospital the city and county maintained a nuisance. Action was brought to recover damages occasioned by this nuisance, and it was held that "the city and county of San

Francisco had such proprietorship of the city and county hospital as rendered it liable for damages in the case as presented." In South Pasadena v. Pasadena Land, etc., Co., 152 Cal. 579, 93 Pac. 490, it is declared that in the carrying on of a water service for the benefit of South Pasadena the city of Pasadena will not be acting in its political, public, or governmental capacity. And in Davoust v. City of Alameda, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847, this court, reviewing our cases, and drawing the indicated distinction between governmental and proprietary functions, held that the negligent operation of an electric light plant by the city, which light plant was operated for the twofold purpose of lighting the city and furnishing electric light and power to its inhabitants, made the city liable, upon the ground that it was not exercising any governmental power or function.

[4] Nor is it difficult to set forth the definition of governmental functions as applied to a city. Under the theory of the common law, that the municipality is protected from liability only while exercising the delegated functions of sovereignty, the governmental powers of a city are those pertaining to the making and enforcing of police regulations, to prevent crime, to preserve the public health, to prevent fires, the caring for the poor, and the education of the young. And in the performance of these functions all buildings and instrumentalities connected therewith come under the application of the principle. City of Kokomo v. Loy (Ind.) 112 N. E. 994.

[5] But it is of course true that modern cities and towns enter upon many forms of activity, operate utilities for the benefit of the inhabitants, and provide many means for the easing or improving of the condition of the people that were never dreamed of at common law. Nevertheless the uniform holding as to all such activities on principles manifestly just to the people themselves is that no matter how beneficial they may be in a general sense to the inhabitants of the municipality, unless they are governmental in their essence, the municipality's conduct in managing them is controlled by the same rules of liability that apply to an individual. Thus, while schoolhouses, city halls, jails, fire houses, are with much uniformity held to be instrumentalities for governmental purposes, no such rule applies to other buildings constructed by a municipality, though for the benefit, convenience, or advantage of its people. And even in the case of strictly governmental buildings, if the city shall let a portion of one of them to a private tenant, while retaining control of the rest, that tenant is entitled to his recovery for the city's negligent maintenance of his premises. Worden v. New Bedford, 131 Mass. 23, 41 Am. Rep. 185.

[6] But when the building is one constructed and maintained not for governmental purposes, then are the authorities uniform that even though it be so maintained under permission of the statute, and though it be maintained for the benefit of the inhabitants, or for such of them as may desire to use it, the municipality acts in a private, proprietary capacity, and is liable for its torts as would be a private individual. The cases so holding with reference to municipal water plants and their structures, and gas plants and their structures, are so numerous as not even to call for specific citation. The same rule is universally applied to market houses built by the municipality and maintained for the convenience of the people. Barron v. Detroit, 94 Mich. 601, 54 N. W. 273, 19 L. R. A. 452, 34 Am. St. Rep. 366; Town of Suffolk v. Parker, 79 Va. 660, 52 Am. Rep. 640; Weymouth v. New Orleans, 40 La. Ann. 344, 4 South. 218; Baltimore v. Brannan, 14 Md. 227. As instances of the application of the same rule to other buildings may be cited Libby v. Portland, 105 Me. 370, 74 Atl. 805, 26 L. R. A. (N. S.) 141, 18 Ann. Cas. 547, Henderson v. Kansas City, 177 Mo. 477, 76 S. W. 1045, and Cowley v. Borough of Sunderland, 6 Hurlst. & N. 233. In this last case the borough of Sunderland, under the permission of a Victorian statute, maintained baths and washhouses for the use of the inhabitants. The argument was there made that the woman, injured in a mangle, which it was charged was negligently constructed and maintained, was a mere volunteer and licensee, and electing to use the machine could not recover. But answer was made that the statute was passed for the benefit of the poor and more ignorant classes of the population. The corporation chose to avail itself of its powers to erect these washhouses, and in the discharge of the statutory duty thus undertaken it was bound to exercise ordinary care and diligence.

[7] What, then, remains to be said concerning the building here under consideration? It was not a structure, the maintenance of which was enjoined by law. It was not a building used for any of the governmental functions of the municipality. True, it was maintained for the benefit of the municipality in the sense that it afforded the populace a meeting place for many forms of amusement and instruction. But in all these respects it differed no whit from any other auditorium or assembly hall built and maintained by private capital for the same purposes. The city had full charge of it, could let it out, or refuse to let it out at its pleasure. The act under which it was authorized, though not compelled to build it, contemplated that it should be let for profit, and that the proceeds of these lettings should go to defray the expense of maintenance and the cost of construction. That in any individual instance the city allowed it to be used without a rental charge, no more affected the

governing principle than it would be affected if a private proprietor did the same thing. The payment of rent, much or little or none at all, did not transform the particular use of this assembly hall, which use was let or permitted for the celebration of the birthday of a foreign potentate, into a governmental function of the city of Long Beach. Appellant in its brief declares the proposition to be "whether the law authorizing the act was such as authorized a proprietary or governmental institution, and in this respect the design of the act is the main thing to be held in mind and not the result." Contemplating that design, and therein noting that the act provides for a rental charge for the use of the assembly hall, and contemplates that that rental charge should or may be sufficient to pay for the operating expenses, to provide a sinking fund, and even to contribute to the general funds of the city, can it be doubted for one moment that in the contemplation of the Legislature the city was simply empowered to enter into a proprietary business for its personal advantage and financial gain? Upon the other hand, that the city of Long Beach maintained this assembly hall for the very purposes indicated by the legislative permission is made manifest by the offered official resolution of the city, "fixing the charges for the use of the public auditorium in the city of Long Beach." In this resolution we find that conventions or mass meetings not for the purpose of financial gain, whether the assemblage be of the residents or nonresidents of the city of Long Beach, may have the use of the auditorium free. If financial gain enter into the purpose of the convention or mass meeting, then the charge shall be from $25 to $100 per day. When used by nonresidents of the city of Long Beach for purposes of entertainment and amusement the charge is $35 a day. When used by residents of the city of Long Beach for like purposes of amusement the charge is $15 a day. When used by nonresidents of the city of Long Beach for purely charitable or philanthropic purposes, if "an admission is charged, the proceeds to be used outside of the city of Long Beach, the charge shall be $25 a day. If only a collection is taken, the charge shall be $15." Wherein is to be drawn the slightest distinction between the use and operation of the city of Long Beach of this hall and the same use and occupation if it were owned by an individual and let for identical purposes? Nor does the fact that in an individual instance no rental charge was made at all affect the proposition, nor work a modification of the governing principle. A private individual granting the use of his hall for this occasion without rental charge would not be exonerated. The city of Long Beach, doing precisely the same thing, stands in precisely the same legal position. Therefore we consider the conclusion absolutely unescapable, upon principle and under the authorities, that the city of Long Beach was acting in a private and proprietary capacity in the general maintenance of this assembly hall, and was likewise so acting upon the specific occasion here in question when it was there let or its use permitted for the celebration of "Empire Day."

Neither of the California cases relied upon by appellant is at all in point. In Melvin v. State, 121 Cal. 16, 53 Pac. 416, plaintiff sought to recover damages from the state for injuries received at the state fair at Sacramento, and received a verdict which was set aside on motion. This court held that the state was not liable for two reasons: First, that it had distinctly disclaimed liability for the acts of its agents—the state board of agriculture—in declaring that "in no event shall the state be liable for any premium, award, or debt created by said board of agriculture," and it declared that such a liability for injury was within the meaning of this language. Second, it held that the state board of agriculture was a mere corporate agency of the state for public and governmental functions, saying:

> "We find none of the elements of a private corporation in its creation, its powers, or the mode of their exercise. Its objects are public and educational. * * * It exists for the sole purpose of promoting the public interest in the business of agriculture and kindred objects. It is an agency of the governemnt, and in no sense an organization for pecuniary profit to the state."

Denning v. State, 123 Cal. 316, 55 Pac. 1000, was an action by an employé of the harbor commission to recover for injuries received while in the employ of the commission as a night deck hand on a tug belonging to the state. This case is distinguished in Davoust v. City of Alameda, supra, and in the latter case it is pointed out:

> "That the plaintiff, when injured, was employed in a distinct branch of the service, viz. the protection against or extinguishment of fires, which, even in the case of municipal corporations, is uniformly held to be the exercise of a purely governmental function."

The negligent maintenance of the structure was sufficiently established by the evidence to justify the implied finding of the jury.

The conclusion already expressed concerning the general purpose of the construction of this auditorium, and the specific purpose of its use upon the day in question does not at all depend upon the evidence which was introduced to the effect that the city did not charge any rental upon the day in question, and that it did rent portions of the auditorium for purposes of private gain. The fact that no rental was charged upon this particular day is in no wise determinative of the question, and the evidence of the rental for gain of portions of the structure and of the pier, even if excluded, could not have changed the inevitable result.

The appellant sought to introduce evidence to prove that the building was constructed in part upon tide lands belonging to the state, and that its construction and maintenance of the building under these circumstances was ultra vires. We can perceive no possible force to this contention, and state it only that it may appear that it has not been overlooked.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.; SLOSS, J.; LAWLOR, J.

SHAW, J. I dissent from the opinion of the majority of the court. On the main question of the liability of municipalities for the negligence of their officers whereby personal injuries are caused, I am satisfied with the views expressed by Victor E. Shaw, Justice pro tem., upon the decision of the case at the former hearing. The following are the parts of that opinion wherein the question is discussed:

"Conceding negligence on the part of the officers and employés of the city by reason of which Edith Chafor was killed, is defendant liable in damages to the plaintiffs for such loss as they may have sustained by reason of her death? Municipal corporations in the performance of their functions act in a double character. Sections 38 and 1303, Dillon on Municipal Corp. (5th Ed.). In the one they, as subordinate agencies of the state, are intrusted with the exercise of limited governmental powers for the benefit of the local public, in the performance of which, in this state there being no statutory provision, they are not liable for the negligence of their officers, agents and servants through whom they act. See concurring opinion of Justice Shaw in the case of Davoust v. City of Alameda, 149 Cal. 75 [84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847], and authorities there cited. In the other, they may exercise powers conferred, not for the benefit of the public, but for their own private and pecuniary profit, in which case they are, in exercising such powers, liable for damages resulting from the negligence of their officers, agents and employés to the same extent and governed by the same rules as are applicable to corporations or individuals engaged in like business. Davoust v. City of Alameda, supra; Esberg Cigar Co. v. Portland, 34 Or. 282 [55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651]; Western S. F. Society v. Philadelphia, 31 Pa. 183 [72 Am. Dec. 730].

"This distinction is recognized and conceded by counsel for respondents, who insists that the construction, maintenance, and use of this assembly hall was not a governmental function, but that it was maintained, used, and operated purely as a corporate enterprise from which the city in its private or proprietary character received revenue, emolument, and gain, just as a city does in operating a lighting or water plant by means whereof the city distributes to its citizens, for hire and tolls, electric current or water. If respondents' position be sustained, it must follow that the city should be held liable to plaintiffs in damages. In support of their contention, respondents insist: First, that the statute heretofore referred to, pursuant to which bonds were issued for the construction of the hall, fixes the character thereof as private and proprietary; and, second, that the evidence shows that the assembly hall was erected and maintained by the city in its proprietary capacity, and from the letting of which and exacting rentals for the use thereof it derived revenue, gain, and profit.

"Respondents' proposition that the character, use, and maintenance of the assembly hall or auditorium is conclusively fixed as proprietary, as distinguished from governmental, is based upon section 8 of the legislative act referred to (Stats. 1903, p. 412), pursuant to which, as stated, bonds were issued and from the proceeds of the sale of which the building was constructed. This section provides: 'All moneys derived from the use or hire of such assembly or convention hall shall be deposited in the treasury of the municipality to the credit of said public hall fund, and shall be applied, exclusively, to the following purposes, to wit: First, for the necessary expenses of conducting, maintaining, and insuring such hall, and of making all improvements and repairs thereof. Second, for the payment of installments of interest or principal becoming due on said bonds until the whole of said bonded indebtedness shall have been paid. Third, any surplus remaining after providing for the purposes, first and second above specified, may be appropriated and used for general municipal purposes.' At the time in question the city of Long Beach, operating under a freeholder's charter, had a board of public works, which, not only as provided in section 9 of the act, but in the charter as well, committed to said board the control, management, letting, and use of such hall. Save as to these provisions, the act is silent as to the capacity, whether governmental or private, in which the city should construct and maintain the hall. That the city might let the hall for private use, exacting a rental therefor, admits of no question. The act itself, however, does not restrict nor purport to limit the power of the city to such use of the hall. On the contrary, as declared pursuant to section 2 thereof, the public interest and necessity demanded the construction of such hall, which, as we construe it, was intended for use by the city in a dual capacity; that is, both governmental and private. It might be and, as shown by the evidence, was used as a meeting place for its legislative body, for gatherings to discuss questions of public interest, for religious and political conventions, for recreation, amusement, or educational purposes; the function of providing a place for such meetings being purely governmental in character for the general benefit of the public. Clarke v. Inhabitants of Brookfield, 81 Mo. 503 [51 Am. Rep. 243]. On the other hand, as determined by the city, it might, through its proper officers, let all or any part of the structure for private uses, exacting rentals therefor, in which case the revenue derived must be applied as provided by section 8 of the act. In the case of Davis v. Rockport, 213 Mass. 279 [100 N. E. 612, 43 L. R. A. (N. S.) 1139], it is said: 'A municipality has the power to let for profit real estate held for public purposes and not needed for the present for such a purpose. It is not compelled to let the property lie idle. * * * It either could allow the property to remain unused or it could let the same or any part thereof for profit. If it took the former course, it was answerable only as a municipality in possession of property intended for public use. If it took the latter course then it became answerable as a private owner.' Not infrequently cities, anticipating future needs, acquire property for a public use and until devoted to such purpose let the same for private use for hire. The city of Los Angeles furnishes an illustration of the principle here stated. It holds real estate purchased for public purposes which, not presently required therefor, it lets for private uses. In Dillon, Municipal Corporations (5th Ed.) § 1657, it is said: 'It has been held that the maintenance of a city hall for the use of the city officers and employés, as well as for the transaction of the city's business, is the exercise of a governmental function, and that the city cannot impliedly be held liable for negligence on the part of its officers and agents in maintaining and repairing the city hall or in controlling and managing the same. But the liability of the city has been sustained where the city has rented out the city hall building or some considerable part thereof, and the person injured had come to the building to transact business with the city's tenants.' Little v. City of Holyoke, 58 N. E. 170. The principle is further illustrated by city water systems which, like this hall, serve a dual purpose; one being governmental in supplying water through hydrants for fire protection, and the other private in supplying water for profit for the use of its inhabitants. If an individual sustains damage by reason of the negligence of the city in the operation of a plant for supplying water to its inhabitants, it, like an individual, is liable therefor. Denning v. State, 123 Cal. 316 [55 Pac. 1000]; Esberg Cigar Co. v. Portland, 34 Or. 282 [55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651]. On the other hand, if the damage results from the operation of the plant in the exercise of the power of the city in affording protection from fire, then the city is not accountable for such damages. Judson v. Borough of Winsted, 80 Conn. 384 [68 Atl. 999, 15 L. R. A. (N. S.) 91]. Our conclusion is that the act was not designed as requiring the hall to be constructed and maintained by the city in its private corporate character for emolument and gain, but that it was intended for either private or governmental use, varying from time to time as the city, through its proper officers, might determine.

"Since there is nothing in the act of the Legislature which fixed the capacity in which the city held and conducted the hall or restricted the purpose for which it should be used, the question becomes one of fact to be determined from the evidence.

"This brings us to respondents' second proposition, namely, that defendant at all times conducted and operated the assembly hall, not in the exercise of a governmental function, but in the capacity of a private corporation and proprietor thereof, by letting the same for private uses and reserving rental for such use. It does not appear from the record that the board of public works which, under the charter and act of the Legislature, had control of the letting and charge of the hall, ever at any time authorized the use of it for holding the exercises on what was termed 'Empire Day' to commemorate the birthday of Queen Victoria. Indeed, so far as disclosed, the committee of persons in charge of the celebration assumed the right to hold the exercises there, without consulting with defendant or any of its officials. Waiving this informality, however, and conceding that such authority and right were implied, no pretense or claim is made that the hall was let for hire, or that any rental or revenue was exacted for its use on said occasion. Indeed, with the exception of one occasion in March, 1910, when the assembly hall was by the city council, for a consideration of $25 paid to the city clerk, let for the purposes of a lecture delivered therein, the record fails to disclose that the assembly hall proper, as disconnected from two booths or rooms, was ever at any time let for hire for any private purpose whatsoever. On the contrary, during the same period of time, it appears that the city, at large expense for services of janitors and other necessary charges of maintenance, has devoted it to the use of the public, wherein to hold political, religious, and other meetings, concerts by the municipal band, school commencements, and, indeed, all sorts of meetings of a public nature and for the public benefit, for which no rental or charge was exacted. Notwithstanding such fact, however, the trial court, upon the apparent theory that the structure wherein the hall was located, together with the pier and wharf, should be regarded as one unit and the whole thereof be deemed a 'public assembly convention hall,' permitted plaintiffs to introduce evidence showing that since 1908 defendant had received as hire for the two booths, one in the northwest corner and one in the northeast corner of the building, the combined area of which was 1,582 square feet as compared with an area of 17,446 square feet in the hall proper, the sum of $1,461; that for certain booths and rooms erected at the ocean end of the pier extending more than 1,000 feet beyond the assembly hall building, the city had received several thousand dollars revenue for rent thereof, and the sum of $2,000 for a franchise or permit issued to a bathhouse company to construct and maintain a pipe line along the pier by means whereof to obtain water for its bathhouse, besides receipts of other revenues from the use of the pier and wharf. In admitting such evidence the trial court committed prejudicial error. In our opinion, the pier and wharf and booths at the end thereof were no part of the assembly hall building, but entirely distinct and separate therefrom, as much so, indeed, as though the approach or way covering the intervening space between the pier and entrance to the hall had never been constructed. Hence the rental received from this pier and wharf could not be deemed revenue derived from the letting of the assembly hall for hire.

"We perceive no reason why a municipality having a city hall building erected solely for public uses, may not let rooms therein which are not immediately required for such public use, as to which it would occupy the position of a corporate proprietor and as such, like a private owner, be liable for damages sustained by reason of its negligence in connection therewith. 'When a city or town does not devote such building (public hall) exclusively to municipal uses, but lets it or a part of it for its own advantage and emolument, by receiving rents, or otherwise, it is liable while it is so let in the same manner as a private owner would be.' Worden v. City of New Bedford, 131 Mass. 23 [41 Am. Rep. 185]; Little v. City of Holyoke, 177 Mass. 114 [58 N. E. 170, 52 L. R. A. 417]; Chicago v. Selz, 202 Ill. 545 [67 N. E. 386]; Davis v. Rockport, 213 Mass. 279 [100 N. E. 612, 43 L. R. A. (N. S.) 1139]. This being true, the letting for hire of these two small booths, disconnected as they were from the assembly hall, as to which defendant's character was that of a private owner, did not fix or affect its character or function in the maintenance of the assembly hall. They were no part of the hall and, like the wharf, the rental received for the use thereof was not for the letting of the hall for hire. Hence it follows that the ruling of the court in admitting evidence of the letting of these two booths was likewise erroneous.

"Not only was there no evidence of the letting of the assembly hall by the city or its officers, but there was no evidence nor is there any claim or pretense, that any rental was exacted or paid for such use upon the occasion of the accident wherein Edith Chafor lost her life.

"The building or structure abutted a street on the easterly side thereof from which the hall could be reached by a stairway leading to the entrance of the building. The building was a two-story structure, the lower floor being uninclosed and at all times open to any one desiring to go there. The second floor upon which the assembly hall was located was surrounded by an open and covered balcony 11 feet wide, furnished with seats, and open at all times to the general public, the use of which and the lower floor may be likened to the use of a public city park. It thus appears that the building was not only designed and constructed for a double use, but that in the conduct and maintenance thereof the city has in part used it in its private corporate capacity in letting for hire the two small booths referred to; that it has used a part thereof, to wit, the balconies and lower floor, at all times in its governmental capacity, like a public park, and that, with the exception of one occasion, in March, 1910, has used the assembly hall at all times without profit, gain or emolument for the benefit of the general public.

"If correct in our conclusion that the maintenance and use of the hall was not impressed with an exclusive proprietary character, but that the character of the use on the occasion in question must be determined from evidence showing a letting of the hall for private use for hire, as to which the record is wholly silent, it necessarily follows that the court committed highly prejudicial error in, of its own motion, instructing the jury that 'the construction, erection and maintenance of the auditorium building by the city of Long Beach was an act of said city in the exercise of its proprietary or private capacity, and the measure of its responsibility or liability in relation thereto is the same as that of any other individual or private corporation engaged in similar conduct, and no more or no less.'"

For the foregoing reasons, I am of the opinion that the judgment should be reversed.

I concur: ANGELLOTTI, C. J.

(32 Cal. App. 601)

LEGERTON v. CHAMBERS, State Controller. (Civ. 1892.)

(District Court of Appeal, Second District, California. Jan. 26, 1917.)

1. Judges 🔑5—Superior Judge—Election—Necessity of Commission by Governor.

Pol. Code, § 1288, requires a county clerk after election of officers chosen at large and judicial officers to make out a statement of the vote of his county as entered upon the records of the board of supervisors and certify the same to the secretary of state. Section 1290 provides that the secretary of state must make out and file a statement of election and submit a copy to the Governor. By section 1291 the Governor is required to issue commissions to parties elected. Section 907 provides that an officer shall within 30 days after notice take his oath of office. On November 3d petitioner was elected judge of the superior court. On December 6th following he received his commission from the secretary of state signed by the Governor. Prior thereto petitioner sought to qualify by taking his oath and filing a copy with secretary of state; the board of supervisors having completed canvass of returns and declared petitioner elected. *Held* that, until secretary of state had certified the results of the election to the Governor and the Governor issued his commission, petitioner was not entitled to take office.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 21-23.]

2. Officers 🔑95—Compensation—De Facto Officers.

The collection of the salary annexed to the office is an incident to the title, and a de facto officer cannot recover compensation for his services.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 134, 139.]

Petition for writ of mandamus by Curtis C. Legerton against John S. Chambers, State Controller. Writ denied.

Curtis C. Legerton, of Los Angeles, in pro. per. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for respondent.

JAMES, J. Petitioner herein was at the general election held in November, 1914, elected to the office of judge of the superior court in the county of Los Angeles for the "short" term; that is, the term intervening between the end of the term of the incumbent who was appointed to fill a vacancy and the commencement of the regular term next succeeding. In this case the short term ended upon the incoming of the newly elected officer, who was other than this petitioner, in January, 1915. The election took place on the 3d of November, and on the 6th day of December following petitioner received from the secretary of state a commission signed by the Governor. Prior to that date, however, and on the 19th day of November, petitioner sought to qualify for the office by taking the oath and filing a copy thereof with the secretary of state. He did in fact enter upon the duties of the office at that date, and so continued up to the time he received his commission, and afterwards during the short term. On the 18th day of November, 1914, the board of supervisors of the county of Los Angeles completed the canvass of the returns, and petitioner alleges that said board thereupon "declared your petitioner elected to said office of judge of the superior court." These facts are set forth in the petition which was filed herein. The answer as made by the controller in effect raises issues of law, and the matter has been submitted upon the points and authorities filed by petitioner and a brief for respondent.

[1, 2] The two principal questions presented are: (1) Was petitioner, upon the canvassing of the vote as made by the board of supervisors of Los Angeles county, entitled to immediately assume office as an officer de jure? (2) If he was not so entitled, and because of his assumption of the duties of the office he became a de facto officer, was he under such circumstances entitled to the salary attached to the office? In many of the cases cited by the petitioner, all, however, from other jurisdictions, it is held that the issuance of a commission is not a necessary prerequisite to the determination of the fact that an officer has been duly elected. Under our statute, however, the various duties to be performed by not only the canvassing boards at the election, but the certifying officers thereafter, are held to be a part of the machinery of the election, until the performance of which there can be no legal determination as to the results. In the case of a superior judge the board of supervisors is without power to issue a certificate of election, because the office is viewed as a state office. The statute expressly excludes the board of supervisors from any such right when it provides that, after election returns have been canvassed:

"The county clerk must immediately make out and deliver to such person (except to the person elected superior judge) a certificate of election signed by him, and authenticated with the seal of the superior court." Pol. Code, § 1284.

Section 1288 of the same Code requires each county clerk, in the cases of "officers chosen by the electors of the state at large, or for judicial officers," to make out a statement of the vote of his county as entered upon the records of the board of supervisors, and certify the same and transmit the statement to the secretary of state. Section 1290 of the same Code provides as follows:

> "On the fortieth day after the day of election, or so soon as the returns have been received from all of the counties of the state, if received within that time, * * * the secretary of state must compare and estimate the vote, and make out and file in his office a statement thereof, and transmit a copy of such statement to the Governor, except in the cases of senators and members of the assembly."

Section 1291, immediately following, reads:

> "Upon receipt of such copy the Governor must issue commissions to the persons who from it appear to have received the highest number of votes for offices, except that of Governor or Lieutenant Governor, to be filled at such election."

The provision as to the taking of an oath of office contains the requirement that the oath shall be subscribed and filed within 30 days after the officer has "notice" of his election or appointment, or before the expiration of 15 days from the commencement of his term. Section 907, Pol. Code. In People v. Shaver, 127 Cal. 350, 59 Pac. 785, speaking of the requirement that the county clerk shall issue a certificate of election to a candidate, our Supreme Court has declared that this procedure is something more than a mere form for the private advantage of the candidate. The court says:

> "It is the mode prescribed for the orderly announcement of the result of an election, and is as much a part of machinery of the election as are the provisions for the canvassing of the returns and the registration of the result."

The court cites State v. Meder, 22 Nev. 264, 38 Pac. 668, and People v. North, 72 N. Y. 128. The opinions in the cases last referred to fully sustain the quoted portion of the opinion of the court in the Shaver Case. It must be concluded, therefore, that until the secretary of state had certified the result of the election to the Governor, and the Governor had upon examining the same issued his commission, the person elected was not entitled to take office. This is not a case where there was any failure on the part of the certifying officers to act within the time required by law; hence any questions which might be presented affecting such condition do not arise.

It has been repeatedly held that, as the collection of salary or compensation annexed to an office is an incident to the title to the office, de facto officers, whose acts for the sake of public interest may be held legal, cannot recover compensation for their services. People v. Potter, 63 Cal. 127; Burke v. Edgar, 67 Cal. 182, 7 Pac. 488; Anderson v. Lewis, 29 Cal. App. 24, 154 Pac. 287.

It follows as a necessary conclusion that the petitioner is not entitled to the writ, and the prayer of the petition is therefore denied.

We concur: CONREY, P. J.; SHAW, J.

(32 Cal. App. 605)

LEGERTON v. LEWIS, County Auditor.

(Civ. 1884.)

(District Court of Appeal, Second District, California. Jan. 26, 1917.)

1. JUDGES 🔑22(1)—COMPENSATION—DE FACTO JUDGE.

A de facto judge of the superior court is not entitled to collect salary.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 75, 77, 84, 88, 179.]

2. APPEAL AND ERROR 🔑1078(1)—REVIEW—CONSTITUTIONAL QUESTION—ARGUMENT.

In absence of argument or citation of authorities, the appellate court will not pass on a contention that a statute is unconstitutional.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Petition for writ of mandamus by Curtis C. Legerton against Walter A. Lewis, County Auditor. Writ issued, and defendant appeals. Reversed, with costs.

A. J. Hill, Co. Counsel, and Robert B Murphey and David R. Faries, Deputies Co. Counsel, all of Los Angeles, for appellant. Curtis C. Legerton, of Los Angeles, in pro. per.

JAMES, J. An appeal was taken in this case by the county auditor of the county of Los Angeles from a judgment awarding writ of mandate to compel the issuance of a warrant in favor of petitioner for the sum of $131.99 as payment for that portion of the salary of a superior judge payable from the county of Los Angeles for a period from the 19th day of November, 1914, to December 5, 1914. The preliminary facts in this case are the same as those in Legerton v. Chambers (Civil No. 1892) 163 Pac. 678, this day decided. There was interposed in this case a defense additional to that presented in the case referred to, whereby the auditor showed that there had been filed with him an abstract of a judgment rendered against petitioner in the justice's court of Los Angeles township in the sum of $299.77. It is stipulated by counsel that this matter may be submitted upon the briefs and authorities filed in this and in the case of Legerton v. Chambers. The trial judge by his judgment determined that petitioner was a duly elected superior judge and a de jure officer from the 19th day of November to the 5th day of December, and that he was entitled to his salary as such. He determined the issue as to the filing of the abstract of judgment in favor of the county auditor, but in the conclusions of law attached to the finding declared:

"That the provisions of section 710 of the Code of Civil Procedure, in so far as said provisions affect the salary of a judge of the superior court, are unconstitutional."

What is said in the opinion in the case of Legerton v. Chambers disposes of this appeal in favor of the appellant, and it will be unnecessary to repeat what has been in that opinion declared as our view of the law.

[1, 2] Petitioner being held to have acted only as a de facto officer, under the authorities cited he is not entitled to collect the salary. We are furnished with no argument either attacking the constitutionality of section 710 of the Code of Civil Procedure or opposing such a position. From a careful reading of the section, however, there occur to us no constitutional grounds upon which it may be concluded that the officers' salaries subject to the process of garnishment thereunder are salaries of officers other than judges of the superior court. In the absence of argument or citation of authority, it is unnecessary to express any final conclusion as to that matter.

The judgment is reversed, with direction to the superior court to enter upon the findings made a judgment in favor of the defendant auditor; appellant to have his costs.

We concur: CONREY, P. J.; SHAW, J.

(32 Cal. App. 447)

STRAHM v. FRASER et al. (Civ. 1846.)

(District Court of Appeal, First District, California. Dec. 30, 1916. Rehearing Denied Jan. 29, 1917. Denied by Supreme Court Feb. 26, 1917.)

1. Corporations ⟹577—Change of Name—Identity.

The identity of a corporation is not destroyed, nor its legal obligations obliterated, by the mere fact of reincorporation under the same or different name, and the transfer of corporate assets from the old to the new corporation will, where it is sought to escape debts, be considered as done to hinder, delay, and defraud creditors of the old corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2307, 2308.]

2. Corporations ⟹579(2)—Assets—Liability for Debts.

Where there was a reincorporation of an existing company, and a transfer to it of all the assets of the original corporation, the new company is liable to the demands of creditors of the old corporation to the extent of the assets received from it.

[Ed. Note.—For other cases, see Corporations, Cen Dig. §§ 2307, 2309, 2313, 2316.]

3. Corporations ⟹579(2) — Debts — Liability.

Where an existing corporation was reincorporated to carry on the business, the new company receiving assets from the original company, the new company cannot defeat an action by a creditor of the original company without showing that the assets received were not sufficient to discharge the claim; the matter being one peculiarly within the knowledge of the new company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2307, 2309, 2313, 2316.]

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Paul Strahm against George G. Fraser and others, and Fraser Studios, a corporation. From a judgment for plaintiff, the last-named defendant appeals. Affirmed.

Curtis Hillyer, of San Francisco, for appellant. Carl W. Mueller, of San Francisco, for respondent.

PER CURIAM. Plaintiff was employed by Vaughn & Fraser, a corporation, as assistant operator in a photographic studio at a salary of $90 per month. Subsequent to the rendition of his services Vaughn & Fraser transferred all of its properties to the defendant corporation Fraser Studios. Plaintiff sued for labor and services, rendered, joining as defendants George G. Fraser and Mary L. Fraser, individually and as trustees of Vaughn & Fraser, a corporation; George G. Fraser, doing business as Vaughn & Fraser; Vaughn & Fraser, a corporation, and Fraser Studios, a corporation. The trial court rendered judgment in favor of the plaintiff and against defendants, including the appellant, Fraser Studios, a corporation, for the sum of $735, with interest and costs, and this appeal is from said judgment.

The point presented for reversal is that there was no evidence to support a finding that Fraser Studios—which was organized and incorporated subsequent to the termination of the employment of the plaintiff—could be held liable as an original contractor, no showing having been made that it ever assumed the obligation in suit. The sole question, therefore, is whether or not Fraser Studios and Vaughn & Fraser are substantially the same corporation.

[1] As indicating the substantial identity of the two corporations, it appears in evidence that the same premises were occupied by the two corporations, that the same furniture was used in the business of the two corporations, and that the old names were publicly displayed at the original place of business. It is well settled that the identity of a corporation is not destroyed, nor are its legal obligations obliterated, by the mere fact of reincorporation under the same or a different name, and a transfer of the corporate assets from the old to the new corporation will, when warranted by the pleadings and proof, be considered as having been done to hinder, delay, and defraud creditors of the old corporation. Koch v. Speedwell Motor Car Co., 24 Cal. App. 123, 140 Pac. 598, 600; 2 Clark & Marsh on Corp. § 342.

[2, 3] It is insisted, however, by appellant that under the new incorporation a new

stockholder had invested a certain sum for a half interest therein, and that as the evidence fails to show what proportion the property transferred bears to the amount so invested, it would be inequitable to subject the new interest to the satisfaction of the plaintiff's claim. However this may be, the old corporation and its property were liable to the demands of the plaintiff, and the new corporation must respond to the extent of the property thus acquired, which, if it be insignificant, as is claimed on behalf of the appellant, was a matter peculiarly within the knowledge of the new corporation, and no attempt was made by it, in its defense to the action in the court below, to show what was the fact in this behalf. The evidence shows that the old corporation, Vaughn & Fraser, forfeited its charter for the nonpayment of a license tax, and transferred all of its property to the defendant corporation, Fraser Studios, which apparently was but a mere continuation and reorganization of the old corporation of Vaughn & Fraser. Under these circumstances and the authorities cited, plaintiff, we think, was entitled to have the new corporation respond to his demand. Hibernia Ins. Co. v. Transportation Co. (C. C.) 13 Fed. 516.

Judgment affirmed.

(32 Cal. App. 458)

SEELY v. STOLTZ'S, Inc., et al. (Civ. 1528.)

(District Court of Appeal, First District, California. Dec. 30, 1916. On Petition for Rehearing, Jan. 29, 1917. Rehearing Denied by Supreme Court Feb. 26, 1917.)

1. Bills and Notes ⟹526—Actions—Notice of Dishonor.

In an action against an indorser of a note, evidence *held* to warrant a finding that plaintiff by his agent made due and diligent search to locate the residence and place of business of the indorser to serve her with notice of presentment, dishonor, and nonpayment, and hence that notice of dishonor was excused under Civ. Code, § 3155.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1840–1846.]

2. Pleading ⟹236(5) — Amendment — At Trial—Conforming to Proof.

In an action on a note, where the evidence showed facts excusing service of notice of dishonor upon the defendant indorser, it was no abuse of discretion for the court to allow plaintiff at trial to amend his complaint, which originally alleged service of the notice of dishonor, so as to allege facts showing the excuse.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605.]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Action by F. E. Seely against Stoltz's, Inc., C. A. Meyer, and another. From a judgment for plaintiff and order denying new trial, defendant Meyer appeals. Affirmed.

Marshall B. Woodworth, Edward Lande, and Emilio Lastreto, all of San Francisco, for appellant. S. C. Wright, of San Francisco (Nathan Newmark, of San Francisco, of counsel), for respondent.

PER CURIAM. Mrs. C. A. Meyer, one of the defendants in this action, was an accommodation indorser of a negotiable promissory note executed to the plaintiff by the defendant Stoltz's, Inc. Defendant Meyer alone appeals from the judgment entered in favor of the plaintiff, and from an order denying a new trial.

The plaintiff's original complaint, in so far as it purported to state a cause of action against the defendant Meyer as an indorser, proceeded upon the theory that she had been given the notice of dishonor required by section 3116 of the Civil Code, and that such notice had been given in the manner and within the time required by sections 3147 and 3148 of the same Code. During the progress of the trial, however, it developed that the plaintiff had not strictly complied with the statutory requirements concerning the giving of notice of dishonor, and thereupon, in response to defendant's motion for nonsuit, the plaintiff sought and was granted permission to amend his complaint to conform to the proof by alleging that his failure to give the required notice was attributable to the fact that after due and diligent search he was unable to ascertain the residence, place of business, or whereabouts of the defendant Meyer. With the complaint thus amended the trial of the action proceeded, and when the plaintiff again rested, the motion for nonsuit upon behalf of the defendant Meyer was renewed upon the ground that the plaintiff's evidence failed to show that he had exercised reasonable diligence to ascertain the place of residence and whereabouts of said defendant, and that therefore his failure to give the notice of dishonor was not excused by the provisions of section 3155 of the Civil Code.

[1] Upon this phase of the case the evidence was to the effect that on the afternoon of the day when the note in suit fell due the agent of the plaintiff called at the office of the defendant corporation, the maker of the note, for the purpose of demanding payment, and was informed by a stenographer in charge of the office that both the president and secretary of the corporation were not in. Later on the same day the plaintiff's agent again called, and meeting either the president or secretary, demanded payment of the note. Payment was refused. At about 5 o'clock on the same day plaintiff's agent called upon the defendant Aronsohn, who was also an indorser on the note, and presented him with a written notice of dishonor and a demand for payment. Plaintiff's agent at the same time asked Aronsohn for the address of the defendant Meyer. Aronsohn thereupon gave to him a written memorandum, showing the resident address of Mrs.

Meyer to be 1654 Divisadero street in the city and county of San Francisco. Plaintiff's agent then proceeded to the office of the defendant corporation, where he met Stoltz, Sr., and Jr., respectively the president and secretary of the corporation, and, after some conversation concerning the note and its nonpayment, rewrote on an envelope in the presence of the Stoltzes the address of defendant Meyer as previously given him by Aronsohn. On the following day close to the noon hour, plaintiff's agent went to the address given him by Aronsohn, but was unable to find the defendant Meyer there or ascertain her whereabouts. Plaintiff's agent then proceeded to his office, arriving there about 1 o'clock, and there prepared a notice of nonpayment and dishonor, which was mailed to Mrs. Meyer later in the afternoon.

This evidence, we think, justified the denial of the motion for nonsuit, and sufficiently supports the finding of the trial court to the effect that the plaintiff by his agent had made due and diligent search to locate the residence and place of business of the defendant Meyer for the purpose of serving her with notice of presentment, dishonor, and nonpayment of the note in suit.

[2] We see no abuse of discretion in the ruling of the trial court permitting the plaintiff to amend his complaint.

The judgment and order appealed from are affirmed.

On Petition for Rehearing.

The petition for a rehearing is denied. It is based upon the sole ground that the court failed to consider and pass upon the sufficiency of the complaint as finally amended at the trial. The only appellant herein is the defendant Meyer. The original complaint was insufficient in its averments as to notice of dishonor as against the special demurrer of Meyer. The amendment, however, made during the trial pleaded an excuse for giving Meyer notice of dishonor substantially in the language of subdivision 1 of section 3155 of the Civil Code. To this amendment, which obviated the effect of appellant's original special demurrer, no demurrer, either general or special, was presented. We think it sufficiently rectified the defect in the original complaint in the absence of a special demurrer.

(32 Cal. App. 607)

BETTENCOURT v. SUPERIOR COURT OF KINGS COUNTY et al. (Civ. 2191.)

(District Court of Appeal, Second District, California. Jan. 26, 1917.)

1. Divorce 🔑161 — Judgment — Default — Time for Opening.

Service and filing of a notice that a motion will be made on a day after expiration of six months to vacate and set aside an interlocutory decree of divorce is not an application within six months within Code Civ. Proc. § 473, authorizing the vacation of certain judgments where application is made within six months after the taking of judgment.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 522–526.]

2. Judgment 🔑153(2) — Default — Setting Aside—Motion—Sufficiency.

In August defendant served and filed a notice that on September 11th she would move the court to set aside an interlocutory judgment. The minutes of the court for September 11th show the following: "The motion to vacate and set aside the interlocutory decree of divorce coming on regularly to be heard at this time, and H. Scott Jacobs, Esq., attorney for plaintiff, and J. L. C. Irwin, Esq., attorney for defendant, being present, it is ordered by consent of attorneys for both parties that the same be continued to Saturday, September 16th." September 16th was more than six months after judgment. Code Civ. Proc. § 473, authorizes the vacation of certain judgments where application is made within six months after entry. *Held*, that the proceedings had before the court on September 11th, being treated by judge and attorneys as such, was an application, and that, although the order was not made until September 16th, court did not lose jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 300.]

Petition by Joe A. Bettencourt for a writ of review against the Superior Court of the County of Kings and another. Writ granted, and order of the Superior Court affirmed.

H. Scott Jacobs, of Hanford, for petitioner.

J. L. C. Irwin, of Hanford, for respondent.

CONREY, P. J. On March 13, 1916, in an action for divorce wherein petitioner, Joe A. Bettencourt, was plaintiff and Antonia de Gelloria Bettencourt was defendant, and wherein the default of the defendant had been duly entered, an interlocutory judgment of divorce was duly filed and entered. In August, 1916, the defendant served and filed a notice of motion, together with affidavits and a copy of her proposed answer, stating in the notice that on September 11, 1916, she would move the court to vacate and set aside her default and the said interlocutory judgment, upon the ground that said default and interlocutory judgment of divorce were taken, made, and entered through the mistake, inadvertence, surprise, and excusable neglect of the defendant. The minutes of the superior court for September 11, 1916, show the following proceeding in said action:

> "The motion to vacate and set aside the interlocutory decree of divorce, coming on regularly to be heard at this time, and H. Scott Jacobs, Esq., attorney for the plaintiff, and J. L. C. Irwin, Esq., attorney for the defendant, being present, it is ordered, by consent of attorneys for both parties, that the same be continued to Saturday, September 16, 1916, at 10 o'clock a. m."

The minutes of September 16th in the same action show the presence in court of the same attorneys—

> "and the motion to vacate and set aside the interlocutory decree of divorce, coming on regularly to be heard at this time, the same was argued by the respective counsel, and the court,

being fully advised, orders that said motion be granted."

The foregoing facts appear from the return of respondent to the writ of review heretofore issued out of this court on petition of the plaintiff, Joe A. Bettencourt.

[1, 2] The order setting aside the interlocutory decree was concerning a matter arising under section 473, Code of Civil Procedure, which authorizes the court to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect—

> "provided, that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken."

Petitioner claims that from the foregoing record it appears that the application for relief was not made within six months after the 13th day of March, 1916, at which time the six months' period mentioned in section 473, began to run, and therefore that the superior court was without jurisdiction to make the order of September 16th. If the record of proceedings had on September 11th is sufficient to support the inference that the application for relief was made on the 11th day of September, then the fact that the continuance was had and the order was not made until September 16th would not impair the jurisdiction of the court. Notice that an application or motion will be made to the court at a specified time, even though such notice be filed, as well as served, is not itself an application or motion. And it has been held that, where notice of motion for relief under section 473, was served and filed prior to the expiration of the six months' period, and the notice gave warning that the motion would be made on the stated day, which was after the six months expired, the application was not made in time, and the court was not authorized to act thereon. Thomas v. Superior Court, 6 Cal. App. 629, 632, 92 Pac. 739.

The principal difficulty with this case arises from the absence of a specific statement in the record that on September 11th the motion or application was made. In Herrlich v. McDonald, 80 Cal. 472, 29 Pac. 299, the court was considering an appeal from an order refusing to recall an execution. Notice had been given that the motion would be made on a certain day. The only thing tending to show that a motion was made was a recital in the order appealed from that "the cause came on to be heard this day on defendant's motion to vacate and set aside writ of execution." The Supreme Court held that the record was insufficient to show that a motion was actually made. But in Townsend v. Parker, 21 Cal. App. 317, 131 Pac. 766, the First District Court of Appeal reached a different conclusion upon somewhat similar facts. The case was one referring to an order of the justice's court setting aside a judgment, and the question was whether the application was made within due time under section 859, Code of Civil Procedure, requiring that the application for such relief be made within ten days after notice of entry of judgment. On January 6, 1912, notice of motion was given that the stated motion would be made on Monday, January 8th, which was the last day of the time within which the application might be made. The justice's docket, as shown by the return to the writ of review, showed that on January 8th, at the hour mentioned in the notice, attorneys for the plaintiff and attorneys for the defendant appeared "for the hearing upon the motion to vacate and set aside the judgment of default made and entered herein." But at that time, upon request of the plaintiff's attorney and consent of defendant's attorney, the hearing of said motion was continued until January 10th, which was beyond the time limited for making such an application under section 859. It was held by the District Court of Appeal that the foregoing facts stated in the docket of the justice were sufficient to make it appear that the defendant did move on the 8th day of January, and that the application was made within time. The court thereupon affirmed the judgment of the superior court affirming and approving the order of the justice's court. A petition for rehearing by the Supreme Court after judgment in the District Court of Appeal was denied.

It appears to us that there is no material difference between the facts shown by the record in the present proceeding and the facts set forth in Townsend v. Parker. Upon the authority of that case we hold that the application for relief by defendant in the case of Bettencourt v. Bettencourt was made within time. This is the more satisfactory conclusion also, because it is in harmony with the requirement of good faith between parties litigant. In substance, if not in form, the application was before the court on the 11th day of September. It was treated as such, both by the judge and by the attorneys in the case. Under such circumstances this court should incline, as far as it reasonably may, toward construing the facts favorably to the jurisdiction of the lower court to proceed further, rather than to sustain an objection which was not urged at the proper time.

The order is affirmed.

We concur: JAMES, J.; SHAW, J.

(32 Cal. App. 563)

PEOPLE v. PERRY. (Cr. 367.)

(District Court of Appeal, Third District, California. Jan. 22, 1917.)

HOMICIDE ⚷250—EVIDENCE—SUFFICIENCY.

Evidence *held* sufficient to justify conviction of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515–517.]

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Joseph M. Perry was convicted of murder, and appeals. Affirmed.

L. N. Peter, of Quincy, and S. C. Young, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was informed against for the crime of murder, and was found guilty by the jury, and was sentenced by the court to imprisonment in the state penitentiary for the period of his natural life. He appeals from the judgment of conviction. The transcript was filed July 26, 1916. Defendant's attorneys have filed no brief or points and authorities. The case was placed upon the January calendar, and, there being no appearance for defendant, on motion of the Attorney General the case was submitted on the record. We have examined the evidence, and are satisfied that it was sufficient to justify the verdict.

The homicide occurred at the Feather River Inn, Plumas county, on the night of May 8, 1916. Deceased, James Harrigan, was occupying a tent about 50 feet from another tent occupied by witness Rorabaugh. During the night of May 8th, at about 1:20 a. m., witness Rorabaugh testified that he was awakened by loud talking and quarreling going on at Harrigan's tent; that he recognized the voice of the man other than Harrigan as that of defendant, Perry. He was asked what was said and what they were quarreling about.

"A. Well, they started in—I heard Harrigan say, 'Get away from here you old ———,' and the other party says, 'Well, I will stay here as long as I want to,' and Harrigan says, 'Get away, get away from here—get the hell out of here.' In that manner, and the quarreling went along just so, and this man left, says, 'I will go get my gun and I will fix you.' Q. Who was that man? A. Joseph Perry. * * * Q. And how were you able to observe the man leaving there? A. Looking out from under my tent—the side of it next to Harrigan's tent. Q. After Perry left there did he return? A. Yes, sir; in the neighborhood of five minutes. Q. Upon his return please state to the jury what took place. A. Well, he came up and says, 'Well, I am back again.' And Harrigan again told him, he says, 'Get away from here.' He says 'Get away, G—— d—— you, get away.' And the quarreling went on as I have used the language at first, and they quarreled there for about perhaps a minute or a minute and a half; then I heard the gun fired; I heard the gunshot; I also seen it; I also seen the fire."

He testified that Perry had a lighted lantern on his left arm and "the gun in two hands" (showing). The tent was closed, Harrigan on the inside and Perry on the outside "about two feet—about two foot in front of the tent—from the tent." It appeared that a bullet hole was found "right close to the flap, the opening of the tent," and Harrigan was found "lying there dead." Witness Margon occupied a tent about 200 feet from Harrigan's and between Harrigan's and Perry's. Margon testified that defendant came to his tent during the night of June 8th and awoke him. He testified:

"Well he came there and call me four or five times, 'Margon, Margon.' I said, 'What you want?' 'Open the tent,' he said, 'I want to come in.' 'No,' I said, 'Joe, better go home; I want to sleep; it is too late now.' Well he said, 'I want to tell you,' he said, 'I have trouble with one man up there,' he said, 'I want to fix him.' I said, 'Go on home,' I said, 'go home.' 'Well, I go home,' he says, 'and get my gun and come up and fix him.' Q. He said, 'I go home and get my gun and fix him'? A. Yes, sir; four or five minutes I see the light go by there and hear the shot. Q. How long was it you say between the time you saw the light go by and you heard the shot? A. One and one-half minutes."

Witness Martini was sleeping in Margon's tent at the time, and was awakened by Perry's call to Margon. He testified to facts about the same as given by Margon.

There were other facts and circumstances shown tending to corroborate the testimony of Rorabaugh and make it reasonably certain that defendant killed the deceased.

When the sentence was imposed the court made the following statement:

"The Court: On the 10th day of May, 1916, an information was filed in this court against you by the district attorney charging you with the crime of murder, alleged to have been committed on the 8th day of May, 1916, in the county of Plumas, state of California, by then and there willfully, unlawfully, feloniously, and with malice aforethought killing and murdering one James Harrigan, a human being. On this information you were arraigned and pleaded not guilty, and, having no means to employ counsel, the court appointed two attorneys of this court to defend you. These attorneys did everything that is possible for an attorney to do for a client, and took care of your interests, the court believes, as well and as conscientiously as they would had you been paying them a handsome compensation. The court will now ask you if you have any legal reason to urge why the judgment of the court should not be pronounced upon you. (No answer.) The Court: It appearing none, the judgment of this court is that you be imprisoned in the state's prison at San Quentin for the term of your natural life. The evidence presented shows this crime to have been one which may well be classed as that of murder of the first degree. The jury after hearing the evidence determined that you were the person who committed the crime, and, viewing the matter in that light, the court, in its judgment, has imposed upon you the life sentence."

The jury appears to have been fully and correctly instructed as to the law, and we discover no prejudicial rulings made in the course of the trial.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(32 Cal. App. 600)

PEOPLE v. HENSON. (Cr. 518.)

(District Court of Appeal, Second District, California. Jan. 26, 1917.)

1. Criminal Law 🔑517(4)—Confessions—Foundation—Corpus Delicti.

In trial for robbery, testimony of the victim as to being held up as stated in the information was sufficient proof, without corroboration, of the corpus delicti, to render admissible testimony of accused's confessions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1147.]

2. Criminal Law 🔑511(7) — Accomplice — Corroborating Evidence.

Facts admitted by accused in his conversations with police officers, for which proper foundation was laid by testimony showing these confessions were free and voluntary, constituted evidence sufficient to corroborate testimony of an accomplice under Pen. Code, § 1111, as to corroboration, since in itself and without the aid of the testimony of the accomplice it tended to connect defendant with the commission of the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1134.]

Appeal from Superior Court, Los Angeles County; G. W. Nicol, Judge.

Frank Henson was convicted of robbery, and appeals from the judgment and from an order denying his motion for a new trial. Affirmed.

C. B. Conlin, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant was convicted of the crime of robbery, and has been sentenced to a term in the state prison. He appeals from the judgment and from an order denying his motion for a new trial.

[1] Appellant claims that the court erred in admitting testimony of confessions made by him, because the people had failed to establish the corpus delicti. This claim is manifestly wrong. The first witness at the trial was E. Lubansky, the victim of the robbery, who testified fully to the facts showing that he was held up and robbed at the time and place referred to in the information. There is no merit in the proposition of counsel for appellant that corroboration of the testimony of Lubansky was legally necessary.

[2] It is next complained that the testimony of the witness Brown showed that he was an accomplice, and that his testimony was not corroborated. But the record shows that in so far as the testimony of the witness Brown had any tendency to connect the defendant with the commission of the crime, such testimony was amply corroborated by other evidence "which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense." Pen. Code, § 1111. The facts admitted by the defendant in his conversations with certain police officers were sufficient to establish his guilt. A proper foundation was laid for the evidence by testimony showing that these confessions were free and voluntary. One of these statements was made by defendant in the presence of his father. The criticisms directed by counsel toward this evidence relate to the weight of the evidence, rather than to its admissibility. But it was for the jury and is not for this court to determine whether such evidence was worthy of belief.

Complaint is further made that the district attorney was guilty of misconduct in asking certain questions and in making certain statements to the jury. These matters are of such slight importance that we are not justified in entering into a discussion of them. It appears that the defendant had a fair trial, and that upon entirely sufficient evidence he was found guilty of the crime charged.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

(32 Cal. App. 548)

MODOC COUNTY v. INDUSTRIAL ACC. COMMISSION OF STATE OF CALIFORNIA.

In re LYTLE.

(Civ. 1603.)

(District Court of Appeal, Third District, California. Jan. 20, 1917.)

1. Master and Servant 🔑375(1) — Workmen's Compensation Act — Injury in Course of Employment.

One employed to shovel sand, and who, to accommodate the driver of a team, exchanged work with him for a trip, during which he was injured, was not at the time of the accident performing service growing out of and incidental to his employment, and acting within the course of his employment as such, required by Workmen's Compensation Act (St. 1913, p. 283) § 12, for liability for compensation.

2. Master and Servant 🔑135—"Custom" of Employès.

Before a course of conduct among employés can amount to a custom, it must be of such general and continuous practice among those engaged in the work as to constitute a regular course of conduct; and an occasional and sporadic departure from the usual and prescribed course of procedure among a part only of them does not meet such requirement.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 271, 281, 293.

For other definitions, see Words and Phrases, First and Second Series, Custom.]

3. Master and Servant 🔑135—Custom of Employès—Knowledge of Employer.

An employer to be bound by a custom among employés must have knowledge or notice thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 271, 281, 293.]

Application by the County of Modoc for writ of review to annul award of the Industrial Accident Commission of the State of California to Otto Lytle. Award annulled.

Daly B. Robnett, of Alturas, for petitioner. Christopher M. Bradley, of San Francisco, for respondent.

PER CURIAM. The application is for a writ of review to annul an order of said commission awarding compensation to said applicant for injuries received in an accident claimed to have been "in the course, incidental to, and growing out of his employment" by said county.

There is no real controversy as to the law. It is conceded that the inquiry here can extend only to the question of jurisdiction, and that, if there is no substantial evidence to support a material finding of the commission, the award must be set aside and annulled. Great Western Power Co. v. Pillsbury et al., 170 Cal. 180, 149 Pac. 35; Employers' Assurance Corporation Limited v. Industrial Accident Commission et al., 170 Cal. 800, 151 Pac. 423.

[1] It is also not disputed that the question of whether the accident occurred in the course of the employment involves a vital jurisdictional consideration, and it may be stated in the language of the county that "the principal question upon which petitioner relies for an annulment of the award in this case is that there is no evidence to support the finding that the accident arose out of and in the course of employment or while the injured employé was performing a service growing out of or incidental to the employment," as contemplated and required by section 12 of the Workmen's Compensation Insurance and Safety Act (Stats. 1913, p. 283), providing as an essential condition of the liability that, "at the time of the accident, the employé is performing service growing out of and incidental to his employment and is acting within the course of his employment as such."

A careful reading of the record compels, in our opinion, a conclusion in harmony with petitioner's said contention. It can hardly be gainsaid that the applicant was employed as a laborer to shovel gravel, and it is admitted that he was injured while driving a team. As to this the finding of the commission is that:

> "While driving a team hauling a gravel wagon, the team became frightened, and applicant was thrown from the wagon, sustaining a fracture of the neck of the femur of the left leg; that there was no specific duty assigned to applicant in his said employment; that he had started his work as a shoveler, but later changed places with a teamster, his injury occurring while driving a team; that it was customary for teamsters and shovelers to exchange as applicant had done; and therefore that applicant was acting in the course of his employment when injured."

It is true that the applicant testified that he was not assigned specifically to any particular kind of work, but there can be no doubt from his testimony that he understood he was to shovel gravel. He said he was up at the pit, and he asked the supervisor if he needed any help, and the latter said:

> "'Yes; come up in the morning.' He said for me to come up there and go to work. I was right there. Nothing was said about what work I was to do. I started loading wagons, shoveling gravel."

He worked at that till about 3 o'clock in the afternoon, when one of the teamsters, who had been out in the rain, wanted to get warm, and requested applicant to exchange with him, and in coming back on the first trip the team ran away, and the driver was thrown out, resulting in the injury as before stated. At the time of the investigation before the commission the following statement was made by the applicant's attorney:

> "We admit that that statement is a mistake, and that at the time of the accident he was not employed as a teamster."

It appears also that the applicant, as is required by law, filed with the board of supervisors a verified claim for the wages due him, specifying the kind of work as "shoveling gravel." The father of applicant testified that he had a conversation with the supervisor at said pit as follows:

> "He says, 'Where is your other boy?' I said, 'Down home.' He said, 'What is he doing?' I said, 'He is not doing anything at the present time.' He said, 'Well, we could use another man up here at the present time, at the pit.' * * * He said, 'Tell him to come up in the morning.' I went home and told Otto to come down. * * * He said for me to tell the boy to come up and he could go to work. I would not swear definitely; he may have said 'come and go to work in the pit' or 'go to work,' but he said he would put him to work, that was all there was to it."

It also appears in the record that the custom as to work on the road was to employ the number of men and teams required, each man to furnish and drive his own team, and in addition the number of laborers that might be required, and all were sent to a certain place to engage in work.

We think there can be no doubt that, while the expression of the nature and character of the work might have been more precise and complete, it was understood that the applicant was to do the work of a laborer in shoveling gravel. If so, it needs no argument to reach the conclusion that in driving a team he was acting outside of the scope of his employment, and that the accident did not arise "out of and in the course of employment." Indeed, to hold that the beneficent provisions of the Compensation Act apply to this case we must place upon the acts and declarations of the parties an unnatural and unreasonable construction. The commissioners saw the difficulty, and, in their commendable zeal to favor as far as possible the claim of the applicant, sought to bring the case within the operation of the law by finding that a custom existed as to exchange of labor. As to this it may be said that the evidence hardly amounts to proof of such custom. There was some showing that occasionally the employés did exchange work. The applicant himself, in response to the question, "Do you know whether it is common for men to change work in that way?" answered, "Well, they had done it before."

Mr. Goodwin, with whom the exchange was made, testified that he did not know that it was common "for men to exchange work in that way."

[2, 3] It is undoubtedly true that before an alleged course of conduct can be legally held to have developed into a "custom" it must be of such general and continuous practice among those engaged in the work as to constitute a regular course of conduct, and an occasional and sporadic departure from the usual and prescribed course of procedure among a part only of those to whom the custom is attributed does not meet the requirement of the rule. Besides, it does not appear that the employer had any knowledge or notice of any such custom, and he cannot be bound in absence of knowledge of the custom. Mr. Fritz, the supervisor, who, it is claimed, employed the applicant, testified that he did not recognize any such custom, and that it was understood in that kind of work what each man should do, and that he was not expected to exchange with any one doing a different kind of work.

Authorities are cited to the effect that a custom or usage, in order to have any binding effect, must be certain, well known, long established and acquiesced in. The proposition is virtually conceded, and we need not dwell upon it. We may call attention, however, to the quite recent case of Pacific Coast Casualty Company v. Pillsbury et al., reported in 162 Pac. 1040, wherein it was contended that, by reason of a certain custom of the employés in using a freight elevator for going to and returning from the office in which they were employed, the applicant was justified in thus departing from the instructions given him not to use such elevator. The court emphasized the importance of the circumstance that there was a failure to show that "these instances of the disregard of the instructions and warnings on the part of its employés were ever brought" to the notice of the employer. It would, indeed, be quite unreasonable to hold that such custom among the employés, unknown to and unrecognized by the employer, would or could operate to change one kind of employment into another so as to render the accident compensable, notwithstanding it was not incidental to or in the course of the work for which the injured person was employed.

The law itself is a piece of humane and beneficent legislation that should be upheld and accorded a liberal interpretation. The present case, it may be said also, makes a strong appeal to sympathetic consideration, but, applying the terms of the law to the facts disclosed by the record, it clearly appears that there is no legal ground for the relief sought.

We need not review the many cases cited as analogous to this. They constitute interesting illustrations of the application of the principle, but it is manifest that each case must stand or fall according to its own peculiar facts. If investigation of the manner in which the subject has been treated by various courts should be desired a guide to the examination may be found in the notes on page 464 of volume 1 of Honnold on Workmen's Compensation.

We think the award should be annulled; and it is so ordered.

(32 Cal. App. 590)

LAUER v. WILLIAMS et al. (Civ. 1408.)

(District Court of Appeal, Third District, California. Jan. 23, 1917. Rehearing Denied by Supreme Court March 22, 1917.)

1. Principal and Agent ⚿183(1) — Foreclosure of Mortgage — Who may Foreclose.

Under Code Civ. Proc. § 369, providing express trustees may sue without joining the beneficiary and making a person in whose name a contract is made for another's benefit an express trustee, an agent of a bank may foreclose a mortgage taken in his name for the bank's benefit.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 691, 697-699.]

2. Mortgages ⚿319(3) — Payment — Sufficiency of Evidence.

Evidence in a mortgage foreclosure action *held* to sustain a verdict that the debt had not been paid.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 863, 875, 913, 1366.]

Appeal from Superior Court, Modoc County; C. A. Raker, Judge.

Action by B. Lauer against C. O. Williams and J. P. Harter. Judgment for plaintiff, and defendants appeal. Affirmed.

A. F. Shartel and J. T. Sharp, both of Alturas, for appellants. Jamison & Wylie, of Alturas, for respondent.

HART, J. This is an action for the foreclosure of a mortgage executed by the defendant, C. O. Williams, to the plaintiff, to secure the payment of a promissory note made and delivered to the plaintiff by said Williams. The defendant Harter, although duly served with process, did not answer the complaint or otherwise make an appearance. The findings were in favor of the plaintiff. As to the defendant Harter, the court found that he had, subsequently to the execution of the mortgage, purchased the premises described therein and in the complaint, and that the "claim and interest of the said J. P. Harter in and to the said real estate, and each and every part thereof, are subsequent and subject to the lien of plaintiff's said mortgage." By the decree entered upon the findings, the mortgage was foreclosed and a sale of the mortgaged premises by the sheriff for the purposes of satisfying the amount due on the note to secure which it was given was ordered and directed. This appeal is by the defendant Williams, from said decree or judgment, and is supported by a bill of exceptions.

The appellant contends: (1) That the plaintiff cannot maintain this action for the alleged reason that he is not the real party in interest in the subject-matter thereof; (2) that the findings are not sustained by the proofs—that is to say, that, while the execution of the note and the mortgage as alleged in the complaint is admitted, it is the contention that the evidence discloses that, prior to the commencement of this action, the appellant paid the principal of and interest accruing on the note in full.

The note was executed in the sum of $12,500, and the balance remaining due thereon, according to the complaint, and to satisfy which foreclosure of the mortgage was sought, is the sum of $3,085.77. The note and the mortgage were executed and delivered to the plaintiff on the 23d day of January, 1909. Contemporaneously with said transaction and as a part thereof, the plaintiff and Williams signed and executed a writing in which it was set forth that the note and the mortgage were given "as collateral security to secure to said mortgagee the payment by said mortgagor of certain promissory notes of the said mortgagor, of dates and amounts as follows," following which are the dates and amounts, and in which it is further stated and stipulated "that said foregoing note [referring to the note in suit] and this mortgage shall be considered original security for any further advances of cash or merchandise made by said mortgagee to said mortgagor to the amount of the difference between the aggregate amount due upon the above enumerated notes and the amount of the foregoing note (note in suit), secured by this mortgage."

The note to secure which the mortgage involved here was given provided for interest at the rate of 10 per cent. per annum, and was made payable on or before the 15th day of October, 1909, or approximately nine months from its date. The note was, by indorsement on the back thereof, transferred and made payable by the plaintiff to the Bank of Modoc County. At the time of the transaction above referred to, Lauer, the plaintiff, was the cashier of the Bank of Modoc County. He was at the same time also a member of the firm of E. Lauer & Sons, doing business as general merchants at Alturas, Modoc county. The Bank of Modoc County carried on its banking business in a room of the building in which the store of E. Lauer & Sons was located. The defendant Williams was engaged in the business of raising sheep in Modoc county. He bought his supplies or merchandise from the firm of E. Lauer & Sons. It will be observed that, according to the written agreement between Lauer and Williams, above adverted to, the note was to cover advances by the mortgagee to the mortgagor made either in cash or merchandise.

Lauer testified that, notwithstanding that he was the named and ostensible payee of the note, as a matter of fact, in the transaction in which the note and the mortgage were made, he was acting only as an agent for the bank and not for himself, individually.

Williams, from time to time, made payments to Lauer until the early part of 1912, when the plaintiff received information that Williams had conveyed by deed the mortgaged lands to the defendant Harter. The plaintiff thereupon called upon Williams for a settlement, and on the 1st day of April, 1912, the two men came together and agreed upon a settlement. This agreement was reduced to writing, was signed by Lauer and Williams, and was dated the 1st day of April, 1912. By said agreement, it was stipulated and agreed that a settlement had been effected with respect to the indebtedness evidenced by the note here in question, and that there was then due and unpaid upon said note and payable to the Bank of Modoc County the sum of $3,085.77. It appears that after the above settlement was made, and about the 23d day of July, 1912, the Bank of Modoc County went into liquidation, and the assets thereof taken possession of by the state superintendent of banks. The note and mortgage involved herein were among the assets so taken over.

> "After the depositors of the Bank of Modoc County were paid off, which was done by E. Lauer & Sons," testified the plaintiff, "these assets and this note and mortgage were turned back and indorsed over to me in lieu of the bond which was given by the United States Fidelity & Guarantee Company for the entire assets of the Bank of Modoc County, which were in the neighborhood of $85,000, this bond being given to protect Mr. W. R. Williams (the superintendent of banks) against any depositors, known or unknown, that were not on the ledger of the bank. * * * We paid some twenty-eight thousand and some odd dollars, besides the bond, as a consideration for the assets of the bank. This was paid to the depositors of the Bank of Modoc County."

Williams testified that the settlement referred to above was effected and agreed to between the plaintiff and himself, but said that it was incorrect and did not accord with the actual figures and facts. He declared that he so told the plaintiff at the time of the settlement, but that finally he was forced into an agreement to the settlement by the threats of the plaintiff that, unless he did so, foreclosure proceedings would at once be instituted against him. He further testified that, prior to the settlement, he at various times paid to the plaintiff certain sums of money, aggregating in amount over $15,000, more than enough, he said, to extinguish that obligation. He enumerated the payments, giving the dates and the amounts. He testified that he supposed the moneys so paid would be credited on the note, but did not say that he gave the plaintiff specific directions, either before or at the times of such payments, that they should be applied to the extinction of the note. He admitted having bought merchandise during the existence of the note at the store of E. Lauer & Sons.

In rebuttal, the plaintiff testified that some of the payments made by Williams were credited on the store account with E. Lauer & Sons for goods and merchandise, and that some were credited on the notes. He said that the books of the bank were then in the possession of the state superintendent of banks, and that he was therefore unable to say what proportion of said payments was credited to the note. Nor did he appear to be able to say what proportion was credited on the store account. There appear to have been no steps taken or effort made by the defendant to get either the bank or store books of account before the court.

We have now briefly stated the testimony submitted by the parties on the issues before the court. The statement is itself sufficient to demonstrate that neither of the legal propositions upon which the defendant relies for a reversal can be sustained.

[1] 1. The plaintiff was the proper party to bring and maintain this action. While it is true that he was, in the transaction culminating in the execution and delivery to him of the note and mortgage, acting solely as a representative or agent of the Bank of Modoc County, and that the latter was the party beneficially interested therein, yet the note and the mortgage were made to him and in his own name and he was the holder of the legal title to the same as a trustee for the bank. Nor was it necessary that the bank should have been joined as party plaintiff to the suit. Code Civ. Proc. § 369. Said section provides:

> "An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another is a trustee of an express trust, within the meaning of this section."

In Walker v. McCusker, 71 Cal. 595, 12 Pac. 723, the action was brought to recover possession of property sold under a decree foreclosing a mortgage thereon, the plaintiff having purchased the property for the mortgagee, a bank. The claim was, as here, that the plaintiff was not the real party in interest, and therefore could not maintain the action. The court said that:

> While it was true that no facts were stated in the complaint showing the plaintiff to be a trustee of an express trust, the complaint was, nevertheless, sufficient and the action properly brought. "A trustee of an express trust," continued the court, "is a person with whom, or in whose name, a contract is made for the benefit of another, and he is authorized to sue without joining with him the persons for whose benefit the action is prosecuted. Code Civ. Proc. § 369. The plaintiff bid in the property, and received the certificate of sale and sheriff's deed in his own name, and thereby became the purchaser. As between him and the bank, he was the trustee of an express trust, but that fact did not concern the defendant. As to her, he was the real party in interest, and might sue without alleging or proving his trusteeship."

See Corcoran v. Doll, 32 Cal. 90; Walsh v. Soule, 66 Cal. 443, 6 Pac. 82; Lewis v. Adams, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423; Giselman v. Starr, 106 Cal. 651, 40 Pac. 8; Hoagland v. Trask, 48 N. Y. 686.

[2] 2. The evidence amply supports the findings. It is wholly unnecessary to recapitulate it here. It may be observed, however, that, even if it be true, as the defendant Williams, testified, that the payments he made to the plaintiff totaled a sum equal to the principal and interest of the note, it is also true that he did not show that he was not indebted to E. Lauer & Sons for merchandise, or that some of the moneys so paid were not applied to the payment of his merchandise account. Nor did he show that he directed or by any means manifested a desire to Lauer that the moneys so paid should be applied exclusively to the payment of the note (Civ. Code, § 1479; Ray v. Borgfeldt, 169 Cal. 253, 146 Pac. 679); and, while he asseverated that the settlement had on the 1st day of April, 1912, whereby it was agreed between him and Lauer that there was then still due and unpaid on the note the sum of $3,085.77, was wholly and entirely incorrect, and that, as a matter of fact, he had at that time paid the principal and interest of the note in full, still he signally failed to show, other than by his mere naked asseverations, that the amount then agreed upon as being due was not the correct amount, or that he was not still indebted upon the note in the sum arrived at and agreed to in said settlement.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(32 Cal. App. 566)

Ex parte MAGIDSON. (Cr. 389.)

(District Court of Appeal, Third District, California. Jan. 22, 1917.)

1. RECEIVING STOLEN GOODS 🔑1—ATTEMPT—EVIDENCE—SUFFICIENCY.

Where accused, when told that stolen copper wire was hidden in a certain place, hired a vehicle and procured cloths to cover the wire, and went to the place where the wire was supposed to be hidden with the intention of taking it, he completed the offense of attempting to receive stolen property; there being the intent and the overt act.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. §§ 1–3.]

2. RECEIVING STOLEN GOODS 🔑5—ATTEMPT—EVIDENCE—SUFFICIENCY—IMPOSSIBILITY OF OFFENSE.

Though the wire had been removed by police officials, and it was impossible for accused to receive it, the impossibility of completing the crime did not render his acts any the less an attempt to receive stolen goods.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 7.]

Barney Magidson was committed to answer to the Superior Court to the charge of an attempt to receive stolen property, and applied for writ of habeas corpus. Writ discharged, and petitioner remanded.

Harry Ellis Dean, of Los Angeles, for petitioner. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for respondent.

BURNETT, J. Petitioner seeks his discharge on the ground of the want of probable cause for the order made by a committing magistrate holding him to answer to the superior court to the charge of an attempt to receive stolen property. There is no contention of any lack of intent to commit the crime. Indeed, as to that the evidence seems clear and convincing. It is claimed, however, that the showing made extends no farther than to reveal the intent and some degree of preparation, but falls short of disclosing an overt act necessary to complete the offense charged.

[1] Quite a quantity of copper wire had been stolen and secreted in a certain park near the city of Stockton. One of the thieves saw petitioner standing in front of an empty building looking at some junk contained therein, and asked him "if he was buying any copper." He responded in the affirmative, inquired how much there was and, after some discussion as to the price, petitioner agreed to purchase it. He was told that it was stolen property and where it was concealed. The informant advised him to get an automobile or a horse and wagon and go out after the wire and also some sacks, blanket, or canvas with which to cover the loot. Petitioner agreed, and he did secure a horse and a light wagon from a livery stable and some canvas from a store and loaded the same into the conveyance, and, thus equipped and in company with said thief, he proceeded on his journey from the livery stable in the direction of and to the place where said property had been secreted. He looked about for the stolen property, but was disappointed, as it had been previously discovered and removed by the police. It thus appears that he had the criminal intent, and not only made preliminary preparations, but he went to the very place where the property had been cached and where he believed it to be at the time, and he was ready and prepared to receive and take it away. The manual tradition of the property was the only thing left to constitute the crime of receiving stolen goods. There certainly existed the two elements of an attempt, namely, the intent to commit the crime and a direct ineffectual act done towards its commission. The case falls within the spirit and reasoning of the appellate decisions in this state. The subject is elaborately considered in People v. Stites, 75 Cal. 570, 17 Pac. 693. Therein it is said:

> "Mere intention to commit a specific crime does not itself amount to an 'attempt' as that word is employed in the criminal law. There must, in addition to the wicked intent—the mens rea—be some act done toward the ultimate accomplishment of the purposed crime. But even such acts do not always of themselves amount to an 'attempt,' or to an offense of which human laws will take cognizance; for, if they be but acts of preparation, however elaborate, our municipal law would not assume to deal with them. For instance, the construction of the dynamite bomb by the prisoner at his home on the night of the 15th of February, with the deliberate intention on his part to employ it the next morning in destroying the lives and property of others, atrocious as it was, and indefensible in foro conscientiæ, was but an act of preparation, and when perfected did not render him amenable to the municipal law as then existing, or punishable by its rules. But when the prisoner left his house on the morning of the 16th day of February, and went to Turk street pursuant to the antecedent arrangement between his confederate and himself, it amounted to an overt act done by him for the purpose of effecting the crime intended, and was in law and fact a criminal attempt."

So here it may be said that, if petitioner had simply agreed to take the goods and had obtained a conveyance and canvas and had done no more, it would not be sufficient, but when he drove to the place where the goods had been concealed he committed the overt act that made the offense complete.

In this connection reference may be had to the interesting cases of People v. Paluma, 18 Cal. App. 131, 122 Pac. 431, and People v. Petros, 25 Cal. App. 236, 143 Pac. 246, wherein it was held that the evidence showed an "attempt" within the contemplation of the law. The facts disclosed therein were no more striking and significant as evidence for such purpose than are the facts in the case here.

[2] Probably a more serious question arises out of the contention that there could be no "attempt" for the reason that when the effort was made it was impossible to commit the crime itself. In other words, before petitioner drove to the place where the goods had been secreted, the police officers had taken possession of them. It is therefore argued that the offense was impossible, not only because the goods had been removed, but because they were taken out of the category of stolen goods by having been virtually restored to the owner through the action of said officers. However, there is no necessary infirmity in the contention that there may be a criminal attempt, although the consummation of the attempt may be impossible, and there is ample authority for holding that such attempt may exist under such circumstances. In People v. Lee Kong, 95 Cal. 668, 30 Pac. 800, 17 L. R. A. 626, 29 Am. St. Rep. 165, it is said:

> "It is a well-settled principle of criminal law in this country that, where the criminal re-

> sult of an attempt is not accomplished simply because of an obstruction in the way of the thing to be operated upon, and these facts are unknown to the aggressor at the time, the criminal attempt is committed. Thus an attempt to pick one's pocket, or to steal from his person, when he has nothing in his pocket or on his person, completes the offense to the same degree as if he had money or other personal property which could be the subject of larceny. State v. Wilson, 30 Conn. 500; Commonwealth v. McDonald, 5 Cush. [Mass.] 365; People v. Jones, 46 Mich. 441 [9 N. W. 486]; People v. Moran, 123 N. Y. 254 [25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732]."

In the Wilson Case, supra, it is said:

> "There must undoubtedly be present ability to perpetrate the offense. * * * But it is not true that the thing intended to be taken must be where the attempting thief supposes it to be, or that there must be in fact property where he supposes there is. It is sufficient if he supposes there is property in the pocket, trunk, or other receptacle, and attempts, by some act adapted to the purpose to obtain it feloniously."

In the McDonald Case, supra, this language appears:

> "But it was said in argument for the defendant that he could not be said to have attempted to steal the property of the unknown person, if there was no property to be stolen; and that therefore the indictment should have set out the property and shown the existence and nature of it by the proof. But it will appear, at once, by a simple reference to the import of the term 'attempt,' that this proposition cannot be maintained. To attempt is to make an effort to effect some object, to make a trial or experiment, to endeavor, to use exertion for some purpose. A man may make an attempt, an effort, a trial, to steal, by breaking open a trunk, and be disappointed in not finding the object of pursuit, and so not steal in fact. Still he remains nevertheless chargeable with the attempt, and with the act done towards the commission of the theft."

In the New York Case it is declared:

> "Whenever the animo furandi exists, followed by acts apparently affording a prospect of success and tending to render the commission of the crime effectual, the accused brings himself within the letter and intent of the statute. * * * The question whether an attempt to commit a crime has been made is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design. * * * So far as the thief is concerned, the felonious design and action are then just as complete as though the crime could have been, or in fact had been, committed, and the punishment of such offender is just as essential to the protection of the public, as of one whose designs have been successful."

The court, after calling attention to some English decisions to the contrary, continues:

> "In this country, however, the courts have uniformly refused to follow the cases of Reg. v. McPherson and Reg. v. Collins, and have adopted the more logical and rational rule, that an attempt to commit a crime may be effectual, although, for some reason undiscoverable by the intending perpetrator, the crime, under existing circumstances, may be incapable of accomplishment."

In the Jones Case the Supreme Court of Michigan approved the McDonald decision, saying:

> "We think this is not only the better, but the only, rule of law that could be adopted or recognized with safety to the rights of the public or of individuals."

There is a class of cases pointed out in State v. Wilson, supra, apparently similar to those herein considered, but clearly distinguishable where a different decision has been made. Thus where, with intent to defraud, a writing was falsely made which could not by legal possibility defraud any one, it was held that no offense had been committed, because a person could not be legally presumed to intend that which was legally impossible, and where an attempt was made to poison with an article believed to be poisonous, but which was in fact innoxious, and where an attempt was made to shoot a person with a pistol which was not in fact loaded, it was held that no offense had been committed, because no act had been done which was intrinsically adapted to the then present successful perpetration of the crime. 1 Bishop, Crim. Law, §§ 517, 518.

> "Here the perpetration of the crime was legally possible, the persons in a situation to do it, the intent clear, and the act adapted to the successful perpetration of it; and whether there was or was not money in the pocket was an extrinsic fact not essential to constitute the attempt."

So in the case at bar it was legally possible for petitioner to receive the stolen property. His intent to do so is entirely clear, he took the steps that were adapted to the successful accomplishment of it, and the circumstance that the said stolen goods had been removed involved an extrinsic fact not material to the crime of an attempt to commit said offense of receiving stolen property.

The writ is discharged, and petitioner remanded.

We concur: CHIPMAN, P. J.; HART, J.

(32 Cal. App. 571)

PEOPLE v. WESTON. (Cr. 371.)

(District Court of Appeal, Third District, California. Jan. 22, 1917.)

1. Criminal Law 🔑747—Trial—Questions for Jury—Credibility of Witnesses.

In face of direct conflict in testimony of prosecuting witness and accused, the question of their credibility was for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1714, 1727.]

2. Homicide 🔑269—Assault with Intent to Murder—Question for Jury—Evidence.

In prosecution for assault with intent to murder, evidence *held* to present a question for the jury as to the intent with which accused fired the rifle.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 563.]

3. Homicide 🔑25—Attempt to Murder—Intent—Elements of Offense.

While to constitute murder accused need not intend to take life he must specifically contemplate the taking of life to constitute an attempt to murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 42.]

4. **Homicide** 🔑230—**Assault with Intent to Murder—Intent—How Determined.**

In prosecution for assault with intent to murder by shooting with a rifle, the intent must be determined from all the circumstances, and from the character of the weapon, and the probable effect of its discharge into the body of another.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 478.]

5. **Criminal Law** 🔑855(8)—**Trial—Conduct of Jury—Communications with Others.**

Pen. Code, § 1121, requiring the jury not to communicate with others on any subject connected with the trial, should be given a reasonable construction, so that where a juror was suddenly taken ill it was not error for the sheriff to admit a physician to care for the juror, where the sheriff remained in the room and no communication as to the trial passed between the juror and the physician.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2053.]

6. **Criminal Law** 🔑719(1)—**Trial—Argument of Counsel.**

In prosecution for assault with intent to murder, where the character of weapon was not conclusively shown, it was not error for the state's attorney to argue that the weapon used was a shotgun instead of a rifle.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1669.]

Appeal from Superior Court, El Dorado County; N. D. Arnot, Judge.

Mary Weston was convicted of assault with intent to commit murder, and from the judgment and order denying a new trial, she appeals. Affirmed.

Wm. F. Bray, of Placeville, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was informed against by the district attorney of El Dorado county for the crime of assault with intent to commit murder. Upon her trial the jury returned a verdict of guilty as charged. Defendant moved for a new trial, which was denied, and she was thereupon sentenced to imprisonment in the state prison for the term of ten years. Defendant appeals from the judgment and from the order denying her motion for a new trial.

It appeared that one Harry J. Stevens had a mining claim in the near vicinity of the defendant's home and had been accustomed to go to and from his cabin by a road leading past the Weston house. It was shown that this road, for some distance beyond the Westons' house, had been used as a public highway for 30 or 40 years. It had not been used beyond the Westons' place for wagons for the past 2 or 3 years, since about the time the Westons came there, but was used for horsemen and footmen. Stevens' mining claim was situated at one side of this part of the road and was reached from the road by a trail. It appeared that, some time in the early part of 1916, some one shot a dog belonging to the Westons, but it appeared that Stevens had nothing to do with this shooting, though the defendant accused him of doing it. Up to this time his relations with the Westons were friendly, and he had used this road without objection, and was told that the notices against trespassing, posted by the Westons, were not intended to prevent his using the road, but were rather aimed at stockmen who left their gates open. However, in April, 1916, after the dog shooting (the dog was not killed), the Westons, husband and wife, went to Stevens' cabin and told him he was forbidden to use the road, and if he did so "must take the consequences." Stevens ceased using the road and found his way to and from his cabin by another but circuitous route considerably longer than by this old road. On the 4th of June, 1916, he had been at a neighboring place and was taking from there to his cabin a bag of soiled clothing, as he testified, to be washed, and as he was on foot and the nearest way to his cabin was by this old road past the Westons, he took that route. When he reached a point on the road in view of the Weston premises the Westons were engaged in planting garden seeds at a point south of their house and about 180 feet from the road where Stevens appeared. Defendant left her husband and hurriedly went to the house and got a gun, and, according to Stevens' testimony, she appeared next near the northwest corner of the hen house with the gun at her shoulder in a position to fire at him, and commanded him to stop and go back. He testified:

> "As I came around the turn I saw Mr. and Mrs. Weston standing below the house working in the garden. Q. You were coming down the road, going easterly to your place? A. Yes, sir. Q. And the Weston house would be off to the south? A. It would be right off to the lower side of the road. * * * They were apparently putting in a garden below the ditch. * * * Q. State what transpired then. A. I saw Mrs. Weston run towards the house. Q. What house is that? A. The Weston house. The next thing I knew I saw her standing out by the chicken house with a rifle apparently pulled to the shoulder. Q. One minute—this chicken house, whereabouts is that? A. It sets in a northerly direction from their house, about 10 or 15 feet from the house I should judge—between the house and the road. Q. What kind of a gun, do you know? A. As near as I can say what I would call it was a Marlin rifle that they own. Q. What was her position with that rifle? A. Apparently to the shoulder when she came to a stop. * * * As near as I can place it, she was very near to the northwest corner of the chicken house; that is as near as I could state. * * * Weston was down in the garden. Q. Now, what transpired? A. She told me, she says, 'You have been warned what you may expect for traveling here'; she said for me to go back. I asked her, as near as I can remember, if she would not put the gun down." (He testified that he thought it was 100 or 150 feet from where he stood to where Mr. Weston was at this time; that he was on the road and she was inside the fence and by the hen house.) "Q. When you said that what transpired? A. It was a very few seconds when she fired. I fell to the ground where the blood spot was seen by the sheriff and others that went there." (This blood spot and other objects in the immediate vicinity

> were located by the county surveyor, who made a diagram or map of the premises and other objects, which was used at the trial.) "Q. What was the effect of that shot? A. I was blinded instantly. I fell to the ground. George Weston came up and I says, 'I want to go to Indian Diggings.' They was talking there for a few minutes, and he says to her to get a bucket of water, and she immediately went and got a bucket of cold water and started to bathe off the blood, and she says, 'You are not badly hurt'; she says, 'you have just got a little of the same thing you caused my dog to get.' She said further, she says, 'I am treating you better than you would treat me, because you would go off and leave me.' Q. Go on. A. So in a few minutes—I don't know how long—I got to my feet and reached for my sack; I says, 'I want to go to Indian Diggings;' and George, he says, 'All right.' I started to walk, and I walked to the top of the hill going back the same way I came, but instead of going up the road I went down towards Indian Diggings; I went a little ways, and then I said I could go no further, and I laid down, and he went on to Indian Diggings, and when he returned he brought Lon Votaw back with him. Q. What was the nature of this shot; what was in the charge? A. It was charged with bird shot. Q. Where did it strike you? A. It struck me full on the forehead and in the face. There were a few scattered ones; one struck my hand, a couple struck against the teeth, but the heavy shot struck my forehead. It also showed at the examination after the swelling was removed from the eyes, it showed that there was two shot in the eye on the right side, and one went around the ball of the eye on the left side and left it permanently blind. Q. Can you see out of your eyes? A. I can see a little light with the right eye. Q. You cannot see with the left eye at all? A. Not at all. Q. How long was it after you saw the Westons there in the garden south of the fence and by the ditch—how long was it after you saw them there before Mrs. Weston fired this shot at you from the hen house? A. The time between? Q. Yes, between those. A. It was a very few minutes, because it was a short distance to the place where I stood still."

Weston assisted in taking Stevens to the Staten Mill, a few miles from Weston's, where he received temporary treatment by Dr. Wrenn soon after the shooting, and was later removed to Plymouth, and still later to Sacramento for treatment. The left eye was destroyed, and the sight of the other so far impaired as that he could only distinguish day from night. Dr. Wrenn testified that shot was found in all parts of his face and in his hand with which he was supporting his bag of clothes on his shoulder; that he extracted or found evidence of 75 separate shot that struck Stevens about the face and head —"the scalp was badly plowed up, as is shown by the scars on his head." He bled profusely at the point where he was shot, and the doctor found his wounds still bleeding.

On cross-examination Dr. Wrenn testified:

> "Q. Would the others, Doctor, as a professional man, be of any danger to life, those you have testified to, one in the arm, one in the hand, one on the lip, two or three through the ears, and 25 or more lodged around the eye; would either one of those under any circumstances be likely to produce death? A. Well, hardly. Q. Well, as a matter of fact, would they produce death? A. Where these shot lodged it is doubtful it they could produce death, or they would have done so. Q. You testify as a professional man that a shot fired that way could not produce death? A. I testify this way, that the shot that struck him at the points where they struck evidently could not produce death or they would have done so; had they hit in other parts it could. Q. What other parts? A. If the 25 shot that struck him around that eye had struck the soft portion of the neck here (showing) it could easily have punctured the jugular vein and the carotid artery. The pneumogastric nerve and the phranic nerve which control the action of the heart and the respiration, if any of those had been struck it could have caused death, but striking where it did it could not cause death."

On re-direct he testified:

> "Q. What you mean to say in this case is this, that in so far as these wounds are concerned that happily they turned out not quite mortal at present, that is the idea? A. They are not mortal. Q. At the present time, but had the same impact—the same shot hit a little lower down, for instance here (pointing to own throat) in the region of the jugular vein and carotid artery, the chances are that the same impact, the same five or seven shot would have been mortal if they had penetrated to the same depth? A. It could have been."

There were no witnesses to the shooting except defendant and her husband and Stevens. Mrs. Weston's testimony was that as soon as she saw Stevens coming along the road she went to the house, got the gun which she said was a 30-30 Marlin rifle loaded with bird shot No. 6, which she took "for her protection"; that she went out of their inclosure to the road and confronted Stevens. She testified:

> "I told him to go back up the trail; that he had been forbid trespassing across the premises, and I didn't want him to go across. Q. What did he say to you in response, if anything? A. He said he would not do it; he said he wished me to understand he was not afraid of me nor my gun; that me nor my gun could not bluff him."

She testified:

> That Stevens pushed her out of the road and faced her again down by the gate. "Q. Did he come towards you or threaten you then? A. Yes, sir; I raised the gun, and then he stopped, and then I lowered the gun; he started again; I didn't know whether he was going to grab me or what he was going to do; anyway I raised the gun and fired at the same time, and that is all I remember. Q. What position did you have the gun in when you fired? A. I had it up like this (showing). Q. By your side? A. Yes, sir. Q. Did you fire that gun intentionally? A. No, sir; I did not. Q. Did you intend to shoot Mr. Stevens? A. No, sir; I did not. Q. Do you know how that gun went off, whether you pulled the trigger or whether you did not? A. I can't say that; I was excited at that time. Q. Were you afraid of Mr. Stevens? A. I was afraid of him—I did not intend he was going by me."

Her testimony was that when the "gun went off" she was within 8 or 10 feet of Stevens. It appears that at the request of her husband she got some water and bathed Stevens' face. On cross-examination she testified:

> "Q. What did you get the gun for? A. For protection. Q. Why didn't you stay with your husband if you wanted protection? A. Well, I didn't intend Mr. Stevens were going through my premises after I had forbid him of crossing, and he still insisted on crossing. Q. Well, you would have had all the protection you wanted

if you had stayed with your husband; Stevens was not coming up to where you were, was he? A. I know, but it was my premises; I am entitled to defend them after my dog had been shot. Q. So you went and got your gun? A. Yes, sir; I did. Q. You went out to where Stevens was? A. Yes, sir; I want up to where Stevens was coming in the road. Q. The gun was shot off there, was it? A. It was fired off there. Q. You left your husband where he was? A. Yes, sir; I didn't cart him along. Q. You didn't need him for protection, did you? A. Need my husband? No. I was capable of taking care of myself. Q. Now, you shot him because he was trespassing, didn't you? A. Yes, sir; after he had been forbid."

She admitted having told the sheriff that she shot Stevens because he was trespassing:

"Q. Did you tell the sheriff that it was an accident at the time? A. No, sir; I did not. Q. Did you say anything about it being an accident? A. No, sir. Q. You did tell him that you shot him because he was trespassing, is not that right? A. I shot him after he was trespassing because he had been forbid. Q. And you so told the sheriff? A. I so told the sheriff them same words. Q. But you didn't tell him that the gun had gone off accidentally or anything of that kind? A. Well no; I did not."

[1] Weston's testimony was that defendant did the shooting with a Marlin 30-30 rifle which he had loaded with black powder and No. 6 shot to kill a hawk which had been troubling their chickens. There was no dispute as to the size of the shot. The Westons were known to have a shotgun, but Weston testified that it was at a neighbor's house at the time of the assault on Stevens. Stevens thought the gun used was a Marlin rifle, although from where he stood he may have been mistaken. He was mistaken as to the distance from where he stood to the hen house, where he testified defendant stood when she shot him. The measured distance was 67 feet. Defendant's testimony was that she was within 8 or 10 feet of Stevens when the gun was fired. The evidence tended to show that if the gun used was a Marlin rifle, and was loaded as Weston said he loaded it, and if it was discharged within 8 feet of Stevens, he would have had a slim chance of escaping with his life. There is a direct conflict between Stevens' account of the shooting and the defendant's account of it, and it was with the jury to decide which one to believe.

[2, 3] So, also, was the question of intent one of fact and for the jury. While, to constitute murder, the guilty person need not intend to take life to constitute an attempt to murder he must so intend. He must specifically contemplate the taking of life; and though his act is such as, were it successful, would be murder, if in truth he does not mean to kill, he does not become guilty of an attempt to commit murder. People v. Mize, 80 Cal. 41, 22 Pac. 80.

[4] The evidence showed that defendant cherished a feeling of ill will toward Stevens which was exhibited in her forbidding him from using the road where it passed her house (she claimed to own the premises); that in giving him warning he was told that if he used it he might expect to take the consequences. When she first saw Stevens coming along the road she ran to the house for a gun, and from a place where she was in no danger from anything Stevens might do she opened fire upon him, according to his account of the shooting, immediately after he had asked her to put down the gun and before she could know whether he intended to go back as she ordered him to do or to continue along the road. That she got the gun for her "protection" seems not to have been necessary or called for, as nothing had happened after her warning to him in April to lead her to suppose he would injure her in any way. He had not used the road during the interval. She testified that she shot him because he was trespassing on her property, and so admitted to the sheriff. She testified, it is true, that she did not intend to kill him and sought by her testimony to convey the impression that the gun was not discharged intentionally—in fact, that it was an accident. If she shot Stevens because he was trespassing the shooting could not have been accidental. The reason she gave implies a purpose in doing the act, and a purpose implies an intent. What that intent was must be determined from all the circumstances—among them the character of the weapon and the consequences likely to follow the use made of the weapon. There was evidence that had the charge of shot hit Stevens a few inches lower the result might have been fatal.

Defendant, conceding that she might properly have been convicted of a lesser crime, urges "that the jury brought in an excessive verdict." This contention is based upon the assumption that the gun was accidentally discharged, and that defendant's testimony showed that she did not intend to kill Stevens. Defendant overlooks the fact that the jury may not have believed her account of the shooting, which manifestly they did not.

Among the grounds in support of the motion for a new trial was alleged misconduct of the jury. Defendant's attorney deposed that at the close of the trial the jury were placed in charge of Coroner Ruoff and his deputy, Ball, and that, "while the said jury were in said jury room engaged in the deliberation of said cause so submitted to them, Dr. Joseph T. Wrenn, one of the principal witnesses for the prosecution on the trial of said cause, was permitted by the officers in charge of said jury to enter the said jury room and to speak to and communicate with said jurors without any order of court made or entered authorizing them to do so." No other fact is alleged in support of the motion.

Ruoff deposed that, about 6 o'clock of the evening of the day when and after the cause was given to the jury, one of the jurors, Morris, "became temporarily ill and asked the officers to call a physician to attend him, * * * and affiant believed that it was necessary for him to have treatment by a physician without delay"; that at the time the judge was absent from the courthouse "and there was no one within reach to whom affiant could apply for an order permitting him to call a physician to visit said Morris or to whom he could apply for advice or instructions in that regard"; that he "telephoned for Dr. Joseph T. Wrenn to come to the courthouse at once, and upon the arrival of said doctor, permitted him to immediately enter the jury room and prescribe for and treat the said juror Morris for his said illness." Ruoff further deposed that he and his fellow elisor were present within sight and hearing of the doctor all the time he was in the jury room, and heard and saw everything that transpired, which consisted only of questions by the doctor to and answers by the said juror relative to his sickness, and that at no time did the said doctor speak to any other juror, and that during all the time he was in the jury room no mention of the said trial or of anything connected therewith was mentioned by any one. Elisor Ball and Juror Morris deposed to like facts, as did Dr. Wrenn. The latter deposed that he found "Morris suffering from acute gastritis, and conversed with him concerning the symptoms of his illness, and prescribed for his said complaint, but did not converse with him upon any subject connected with the above-entitled cause, nor upon any subject whatever except that of his illness," and that he remained within the jury room but a few minutes; that the juror's illness was not serious, and that he was "quickly relieved from his pain."

[5] The admonition given by the court to the elisors to suffer no person to speak to the jurors or communicate with them, nor to do so himself, "on any subject connected with the trial," was in accordance with section 1121 of the Penal Code. The provision is important and should be observed. The statute, however, is to be given a reasonable construction. An emergency might arise making it imperative for the officer in charge of the jury to enter the jury room for the purpose of meeting the emergency and to take with him a person suitable to assist him. This section of the Penal Code also provides that the jury may be permitted to separate, in the discretion of the court. In People v. Cord, 157 Cal. 562, 571, 108 Pac. 511, 515, the court said:

> "Where the jury has been permitted to separate while deliberating upon a verdict, under such circumstances as to make it appear that they might have been tampered with, a new trial should be granted, unless there is affirmative proof upon behalf of the people explaining the separation and showing that the defendant was not prejudiced thereby. (Citing cases.) If this burden is met by the people the new trial should be denied. We think in this case there was reasonably strong proof that the jury was not tampered with, and that defendant suffered no prejudice from the confusion and slight separation growing out of the alarm of fire. * * * There was no attempt to show the slightest bad conduct on the part of any member of the jury, or any effort by any person to approach or influence them in any way."

So here no attempt was made to show any communication with the jury either by the elisors or by the doctor except as he explained, and it was shown that no one spoke to any juror "on any subject connected with the trial." If the strict rule laid down in the Cord Case applies here we think the burden of showing that no prejudice to the defendant resulted from what occurred in the jury room was fully and successfully met by the prosecution.

[6] Misconduct of the district attorney in addressing the jury is also claimed to have been prejudicial to defendant. The alleged misconduct consisted in the district attorney's advancing a theory, based upon his view of the evidence, that defendant had used a shotgun instead of a Marlin rifle. Stevens did not claim to be certain as to the kind of gun used; he thought it was the Marlin rifle the Westons were known to possess. They also owned a shotgun, but Weston testified it was not then at their house. There was much evidence as to the effect of a charge of shot fired from a 30-30 rifle loaded with a shot cartridge and the same from a shotgun. The facts and circumstances placed before the jury left the question of the kind of gun used and the character of the charge for the jury to determine. In arguing from the evidence and circumstances that a shotgun was the weapon used, we do not think the district attorney went outside and beyond the evidence. No motion was made by defendant to have the remarks complained of withdrawn, nor was the court requested to instruct the jury to disregard the remarks.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(32 Cal. App. 598)

CREDIT ASS'N OF CALIFORNIA v. GRIFFIN et al. (Civ. 1891.)

(District Court of Appeal, First District, California. Jan. 26, 1917.)

BANKRUPTCY 🔑198—DISCHARGE — ATTACHMENT BOND — DISCHARGE OF SURETIES—BANKRUPTCY OF PRINCIPAL.

Under Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1913, § 9651), making void all attachments or other liens obtained against an insolvent at any time within four months before filing petition in bankruptcy against him, and discharging the attached property, the adjudication of bankruptcy within four months after attachment of insolvent's property does not release sureties upon attachment bond, where the bankruptcy proceedings are instituted after the bond has discharged the attachment lien; such lien not being then in existence to be affected by the subsequent bankruptcy of the principal.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 289, 296–316.]

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by the Credit Association of California against E. W. Griffin and another. From judgment for plaintiff, defendants appeal. Affirmed.

Chas. B. Rosendale, of Salinas, for appellants. Leopold Oppenheimer, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal by defendants from a judgment against them as sureties upon a bond given by them for the release of an attachment.

In an action against John Olson, Jr., and another the plaintiff recovered judgment against Olson for $386.35. At the time of its commencement an attachment was duly issued, and to prevent the levy thereof the defendants in the present action executed the undertaking above referred to, which obligated the defendants as follows:

> "Now, therefore, we, the undersigned, * * * in consideration of the premises and to prevent the levy of said attachment, do hereby jointly and severally undertake, in the sum of $772.76, and promise to the effect that if the plaintiff shall recover judgment in said action we will pay to the plaintiff upon demand the amount of said judgment."

Within a period of four months after the commencement of the attachment suit said Olson was adjudicated a bankrupt by the District Court of the United States; and the defendants contend that thereby they were exonerated from the obligation of their bond under the provisions of section 67f of the National Bankruptcy Act.

The point thus raised has been squarely decided against the contention of the defendants in two cases in this state. In the case of Rosenthal v. Perkins, 123 Cal. 240, 55 Pac. 804, a provision of the state insolvency act (St. 1880, p. 82), similar to the one here involved was construed. That provision named one month as the time prior to the commencement of an action during which, if an attachment were levied, it became void by the filing of a petition in bankruptcy against the debtor, in the same way as under the federal act four months is the period fixed. Referring to that provision, the Supreme Court said:

> "It is clear, for reasons which need not be enlarged upon, that if at the time the proceeding in bankruptcy is instituted there is no attachment in force on which the proceeding can operate, if the attachment lien has already been discharged by a bond for that purpose, then the liability of sureties on the bond is not affected by the subsequent bankruptcy of their principal. * * * The mistake of defendants lies in supposing that the lien of the attachment in Rosenthal against Brusie, continued on the attached goods after they had been released to Brusie in consequence of the delivery of the bond. Our statute and the inferences which follow from the decisions of this court seem to put that question at rest."

In the case of S. F. Sulphur Co. v. Ætna Co., 11 Cal. App. 695, 106 Pac. 113, the provision of the federal Bankruptcy Act here involved was construed, and the court followed the rule applied in the case of Rosenthal v. Perkins, supra.

One other point is stated in the brief, but it is not at all discussed, and is without merit. We need not therefore refer to it at length.

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

(32 Cal. App. 517)

PEOPLE v. KIRK. (Cr. 647.)

(District Court of Appeal, First District, California. Jan. 12, 1917. Rehearing Denied Feb. 9, 1917; Denied by Supreme Court March 12, 1917.)

1. CRIMINAL LAW 🔑42—ADMISSION BY ACCUSED IN ANOTHER PROSECUTION—STATUTE.

Where defendant, accused of selling whisky contrary to Wylie Local Option Law, had, upon the prosecution of another for selling beer shortly after defendant's sale, testified regarding the other's offense without reference to his own, Pen. Code, § 1324, providing that witness cannot be convicted upon testimony given at another's trial, unless that section be read to him before testifying, did not apply; the two offenses not being connected.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 45–48.]

2. CRIMINAL LAW 🔑737(1)—FORMER CONVICTION—QUESTION FOR JURY.

Where accused refused to plead to charge that he had been previously convicted, for which, under Wylie Option Law (St. 1911, p. 599) § 19, a severe punishment is provided, he will be regarded as having pleaded not guilty, in which case Pen. Code, § 1025, makes the question one for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1703, 1704.]

3. CRIMINAL LAW 🔑1171(3)—APPEAL AND ERROR—REMARKS OF PROSECUTOR ON EXCLUDED EVIDENCE.

Where testimony of defendant's former convictions was excluded on his theory that having refused to plead to such allegations the matter was for the court at sentence, defendant cannot complain of the district attorney's reference to the matter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3127.]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

John Kirk was convicted of selling alcoholic liquors contrary to the Wylie Local Option Law, and appeals from judgment and order denying new trial. Affirmed.

J. O. Traber and A. Ellenburg, both of Fresno, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. The defendant was charged with having committed a misdemeanor by selling alcoholic liquor contrary to the provisions of what is known as the Wylie Local Option Law. He was tried, convicted, and sentenced. This appeal is from the judgment and from an order denying defendant's motion for a new trial.

[1] The principal point made by the defendant for a reversal of the judgment and order is that the trial court erred in refusing to grant his motion to dismiss the prosecution, based upon section 1324 of the Penal Code, which, so far as it is applicable to the facts of this case, provides in effect that where a witness offending against any of the provisions of the Penal Code objects to testifying against any other person so offending, or failing to so object, and the section is not read to him, his testimony shall not be used in any criminal prosecution against him, nor shall he be liable thereafter to prosecution or punishment for the offense with reference to which his testimony was given, or for or on account of any transaction, matter, or thing concerning which he may have testified or produced evidence.

In this case it appears that the defendant and one Al Meador were separately prosecuted for violations of the provisions of said Wylie Local Option Law, and it is contended by the appellant that the acts charged against him and Meador were in effect and in fact one transaction, and that he having testified on behalf of the people in the case of People v. Meador, without section 1324 having been read to him, he is, under the provisions of that section, exempt from prosecution in this case. This might be true if the respective sales in which Meador and the appellant were concerned were one transaction; but from the facts in the case it appears that the sales were separate and distinct, and that the testimony given by the appellant in the case of People v. Meador was confined and limited to the sale of liquor by Meador, and nothing that the appellant then testified to tended to show that he in any manner had committed any offense. In other words, at the Meador trial, the appellant told of the circumstances of the sale of beer by Meador, and said nothing about the sale of whisky with which he personally was charged, and which took place about an hour before the transaction in which Meador was concerned. This case therefore does not come within the purview of section 1324 of the Penal Code.

[2, 3] Section 19 of the Wylie Local Option Law provides a severer punishment upon conviction of a second offense under the act. In the information in this case the defendant was charged with a prior conviction, to which charge upon his arraignment he refused to plead. At the trial the district attorney adverted to the prior conviction of the defendant in connection with his offer to prove such conviction, upon the sound assumption we think that the defendant having upon his arraignment refused to answer to the prior charge, he must be regarded as having pleaded "not guilty" thereto, with the result that such conviction was a matter to be passed upon by the jury. Section 1025, Pen. Code. The defendant, however, objected to the introduction of this testimony, upon the contention that it was a matter exclusively for the consideration of the court at the time of sentence if the defendant should be found guilty by the jury of the main charge. The court adopted this view, excluded the testimony, and upon request of the defendant instructed the jury to disregard all references to the alleged prior conviction. The claim is now made by the appellant that there being no evidence before the jury of the prior conviction the reference to it by the district attorney was prejudicial to him, and that his motion for a new trial should therefore have been granted. But the exclusion of this evidence was upon the objection of the defendant himself, and he is in no position to complain of the district attorney's reference to a matter as to which there was no competent evidence before the jury when its proper admission was the result of his own objection.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

(32 Cal. App. 553)

CITY OF LOS ANGELES v. ALLEN et al.

(Civ. 1833.)

(District Court of Appeal, Second District, California. Jan. 22, 1917. Rehearing Denied by Supreme Court. March 22, 1917.)

1. EMINENT DOMAIN ⟹203(1)—NATURE AND EXTENT OF SERVITUDE—DAMAGES—EVIDENCE.

In a proceeding in eminent domain by a city to subject property of a street railroad to street uses parallel with its track, evidence of the nature and extent of the proposed improvement and the changes in the railroad necessitated thereby are admissible to show extent of damage.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 542.]

2. EMINENT DOMAIN ⟹120—CONDEMNATION PROCEEDINGS—TAKING WITHIN MEANING OF CONSTITUTION.

Taking property of a street railroad for street uses parallel with its track is a taking entitling the railroad to actual compensation within Const. art. 1, § 14, providing that "private property shall not be taken for public use without just compensation," in view of Code Civ. Proc. § 1240, subd. 4, providing that the court may fix the terms and conditions upon which property may be taken, and vesting in city right to regulate.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 315–319.]

3. CONSTITUTIONAL LAW ⟹251—DUE PROCESS OF LAW.

The Fifth Amendment of the Constitution of the United States is restrictive of the powers of the federal government only, and is not applicable to a state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 726, 727, 732.]

4. CONSTITUTIONAL LAW ⚷280—DUE PROCESS OF LAW.

While the Fourteenth Amendment of the federal Constitution does not regulate compensation to be paid, it prohibits a city in condemnation proceedings from depriving a person of property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 877–890.]

5. CONSTITUTIONAL LAW ⚷227—EQUAL PROTECTION OF THE LAWS.

While the Fourteenth Amendment of the federal Constitution does not regulate the compensation to be paid, it prohibits a city in a condemnation proceeding from denying the party the equal protection of the laws.

6. EMINENT DOMAIN ⚷141(1)—SUBJECTING PROPERTY OF STREET RAILROAD TO STREET USES—MEASURE OF DAMAGES.

Under Street Opening Act (St. 1903, p. 379) § 10, as amended (St. 1909, p. 1038), providing that the actual value of property shall be the measure of compensation for all property to be actually taken and the basis of damages to property injuriously affected, the measure of damages for property of a street railroad taken by a city for street use parallel to its track is the decrease in value of the use of the land for the first purpose by reason of its being concurrently used for the second purpose.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 372, 375, 376.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Condemnation proceedings by the City of Los Angeles against Samuel S. Allen and others and the Pacific Electric Railway Company and the United States Mortgage & Trust Company. From a judgment for plaintiff, and from an order denying a motion for a new trial by the two defendants last named, they appeal. Reversed.

Frank Karr, R. C. Gortner, and A. W. Ashburn, all of Los Angeles, for appellants. Albert Lee Stephens, City Atty., and Charles D. Pillsbury, Deputy City Atty., both of Los Angeles, for respondent.

CONREY, P. J. This action was brought by the city of Los Angeles for the condemnation of certain lands for the opening and widening of Sunset boulevard within described limits, pursuant to proceedings theretofore had under the Street Opening Act of 1903. Part of the land sought to be condemned is a parcel which is owned in fee by Pacific Electric Railway Company, subject to a mortgage interest thereon held by the other appellant, United States Mortgage & Trust Company. The premises to which the controversy refers are a continuous strip of land (with the exception of the intersection of a street crossing), 25 feet in width and approximately 1,100 feet in length, upon and over which the defendant Pacific Electric Railway Company maintains and operates an electric interurban railroad for the transportation of passengers and freight. After the issues had been framed, the cause was referred to referees to compute the damages of the respective parties defendant, and those referees, after taking evidence, made their report, to which report exceptions were filed on behalf of the appellants. After receiving evidence concerning the value of the land and the damages to be awarded, the court confirmed the report of the referees so far as the same related to the said parcel, and an interlocutory judgment was entered condemning the demanded interest in this land, together with other lands, and thereby provided for the payment of $1 to the Pacific Electric Railway Company for the taking of said parcel, without other compensation, and determined that the security of the mortgagee was not impaired by the taking, and that it was not entitled to receive compensation herein. The above-named defendants have appealed from the interlocutory judgment and from an order denying their motion for a new trial.

In its complaint the plaintiff alleged that it does not by these proceedings seek to prevent the defendant railway company from operating its electric road over and across the described land, "but seeks only to condemn said land to a public use for the opening and widening of Sunset boulevard in the manner proposed in this action by plaintiff, and does not seek to interrupt the maintenance and operation of said electric railway over, along, and across said parcel or parcels of real property last above described. Plaintiff further alleges that it seeks to condemn said parcel or parcels of land in such manner as to regulate and limit the said use thereof so that said use may not interfere with the proper use of said parcel or parcels of land as a public street under the law." The interlocutory decree limits the condemnation in like terms as above stated.

[1] There were numerous defendants, but in this decision when we refer to the defendants, we mean the present appellants. The defendants insisted that the court should require the plaintiff to prove the nature and extent of the proposed improvement and the extent of the structural changes in the railroad which will be necessitated thereby. This the court declined to do, and the plaintiff offered no such evidence. The defendants then introduecd evidence to show the value of the land on the 6th day of October, 1913, which it is not denied was the correct date to which the evidence in this case should refer. Their witnesses testified to substantial valuations, amounting to many thousands of dollars, and it is not necessary for us to state or compare the figures given. This evidence related to the market value of the land as held in fee, subject to the right to maintain and operate the railroad thereon, but without the street. Other testimony introduced by the defendants was to the effect that the value of such fee, subject to the right to maintain the railroad, and also subject to the easement for public street purposes, was nothing. The court also rejected evidence

offered by the defendants upon the same points above noted and which it had held that the plaintiff need not prove. The court also sustained objections of plaintiff to questions propounded for the purpose of ascertaining the cost of paving the street and of reconstructing the railroad as would become necessary according to plans and specifications for street improvements which, as defendants offered to show, are proposed and expected to be made as soon as the street opening proceedings are completed. It is now insisted that these rulings constituted prejudicial error.

Section 10 of the Street Opening Act of 1903, as amended in 1909 (Stats. 1909, p. 1038), provides that the actual value of the property sought to be taken at the date of the order appointing referees or of the order setting the cause for trial, as the case may be, shall be the measure of compensation for all property to be actually taken and the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed by the provisions of that act. It is further provided that the referees or court or jury, as the case may be, shall find separately:

> "First, the value of each parcel of property sought to be condemned, and all improvements thereon pertaining to the realty, and of each separate estate or interest therein; second, if any parcel of property sought to be condemned is only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, and to each separate estate or interest therein, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff. * * *"

Section 1248 of the Code of Civil Procedure, which is the general statute as to proceedings in condemnation cases, is to like effect. Section 1241 of the Code of Civil Procedure provides that where property has been appropriated to a public use by any individual, firm, or private corporation, the use thereof for a public street of a city or for any public purpose shall be deemed a more necessary use than the public use to which such property has been already appropriated.

Section 1240, Code of Civil Procedure, in subdivision 4 thereof, declares that where property already appropriated to a public use or purpose by any person, firm, or private corporation is sought to be taken by a city for another public use or purpose which is consistent with the continuance of the use of such property or some portion thereof for such existing purpose, to the same extent as such property is then used, or to a less or modified extent, then the right to use such property for such proposed public purpose, in common with such other use or purpose, either as then existing, or to a less or modified extent, may be taken by such city, and the court may fix the terms and conditions upon which such property may be so taken, and the manner and extent of the use thereof for each of such public purposes, and may order the removal or relocation of any structures, or improvements therein or thereon, so far as may be required by such common use. This provision of subdivision 4, although since amended, was originally added to that subdivision in the year 1911 (Stats. 1911, p. 620), which is subsequent to the date of section 10 of the Street Opening Act of 1903, as that section was last amended. Under its power of control over streets, the city, after the easement (commonly so called) for street purposes has been acquired, will have the right to establish and change grades, to require that the railroad conform to the grades established, to order changes in location of poles, and other structural changes, and to enforce ordinances as to speed of trains, and other regulations necessary to conform to the established general uses of the street, but which may be not beneficial to the defendants. These requirements being made under the police power, and not as a further exercise of powers of condemnation, the railway company will not then receive compensation, although it may be put to large expense in obeying the city's orders. And while the taking of the easement for street purposes will vest in the city all these rights affecting the railway company in the exercise of the company's reserved right to operate its railway over that land, it is not necessary to require proof by plaintiff of any particular regulations or improvements which may be determined upon hereafter. But it does not follow that in the condemnation proceeding the defendants, in proving the amount of their rightful compensation, should be denied the right to show what kind of a street probably will have to be constructed, or be denied all compensation for damage caused to the value of the property interests retained by them, if that value is being diminished by the fact that the city is taking over an interest in the property for street purposes

[2] "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner. * * *" Constitution of California, art. 1, § 14. Here the city proposes to take from the owner a certain interest in land, leaving the owner in possession of the land for the exercise of certain valuable rights. But although those rights, as well as the fee, are to remain vested in the owner, it is proposed to create conditions affecting the owner in the use of those rights; conditions which will diminish the value of the company's remaining interest in the land. To say that a condemnation of this kind is not a damaging of property thus affected, within the meaning of the Constitution, is to deny to that instrument a meaning which it must have under any reasonable interpretation of its language. We cannot agree with the implication in the argument of respondent's counsel, that the process of

condemnation is a mere abstraction or intellectual concept. Its results are concrete, its interferences are to be actual, and the compensation therefor should be real.

In ordinary cases where the condemnation is for a right of way for a use which constitutes a perpetual easement and which will require practically the exclusive use of the surface, evidence is permitted to show, and the condemning party must pay, the value of the fee as the measure of damages sustained. Under such circumstances, in the nature of things there can be no difference in value between the easement taken and the fee. "When, however, such a difference does exist, the rule is different, and the value of the easement taken as distinguished from the value of the fee, is alone to be ascertained by the jury, and the owner compensated therefor." Southern Pacific R. R. Co. v. S. F. Savings Union, 146 Cal. 290, 79 Pac. 961, 70 L. R. A. 221, 106 Am. St. Rep. 36, 2 Ann. Cas. 962. In the cited case the proposed right of way consisted of a strip of oil-bearing land along the boundary of a tract of oil-bearing land owned by the defendant. It was held that the plaintiff was entitled to show that the oil beneath the surface was a valuable right in property, reserved to the owner and which might be utilized by wells sunk on the adjoining tract. This being so, the plaintiff was entitled to prove the value of these property rights vested in the owner of the fee, and to have that value considered in reduction of the amount of compensation to be awarded. If such evidence is admissible on behalf of the plaintiff, it would seem that on the same principle similar evidence should be admitted on behalf of the defendant for the purpose of proving the true value of the easement imposed upon his land, and the reduction in value of the rights that will remain vested in the defendant, in any case where the power of eminent domain is being used to acquire less than the entire valuable interest in the property. Let it be admitted, for example, that the value of the property in the hands of the defendants prior to condemnation by the city, and as it stands devoted to perpetual use for railroad purposes, is $20,000. Let it be further admitted that the value of the fee, apart from the railroad use, is nominal. The result follows that the railroad's right to use its land for railroad purposes is worth $20,000. Now comes the city and seeks to take an interest in the same land for use as a street, without requiring the absolute removal of the railroad therefrom. If, now, it can be shown that the actual establishment of the street, with the incidents attached thereto, will probably require structural changes in the railroad, and limitations not now existing upon the operation of the railroad, which changes and limitations will reduce the value of the property for railroad purposes, the conclusion must follow that the city in condemning the property for street purposes is taking from the defendants valuable property rights, or, stating it perhaps more accurately, is causing damage to the remaining interest of the defendants in the property; a damage for which, according to the fundamental law of the state, the owner is entitled to compensation.

[3-5] It has been suggested that the rulings of the court below and its award of only nominal compensation to the defendants were based upon the authority of a decision of the Supreme Court of the United States in Chicago, Burlington & Quincy R. R. Co. v. City of Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979. That decision affirmed a judgment the Supreme Court of Illinois sustaining a judgment wherein the sum of $1 was awarded as the just compensation to be paid to the railroad company for taking by condemnation a part of its right of way for putting a public street across that right of way in the city of Chicago. The United States Supreme Court was called upon to determine whether the rulings of the state court were in disregard of that part of the Fourteenth Amendment which provides that no state shall deprive any person of his property without due process of law, or deny the equal protection of the laws to any person within its jurisdiction. Having determined that the rulings and decision of the Illinois courts were not in conflict with the requirements of the federal Constitution, the United States Supreme Court adopted the law as declared by the Supreme Court of Illinois as the controlling statement of the law in a matter which was only of state concern. "We may say in the present case that the state court having jurisdiction of the subject-matter and of the parties, and being under a duty to guard and protect the constitutional right here asserted, the final judgment ought not to be held to be in violation of the due process of law enjoined by the Fourteenth Amendment, unless by its rulings upon questions of law the company was prevented from obtaining substantially any compensation." It is the Constitution of the state of California, as it was the Constitution of the state of Illinois, and not that of the United States, which pledges the state that private property shall not be taken or damaged for public use without just compensation. The similar provision in the Fifth Amendment of the Constitution of the United States need not be considered, since that amendment is one of those which are restrictive of the powers of the federal government and not restraints upon the states. So far as the federal Constitution is concerned, it is only necessary that the state in depriving persons of their property for public use shall protect those persons in their right to due process of law and their right to the equal protection of the laws. As long as those rights are duly recognized and protected, the remaining duty of a state court is to determine the true meaning of those provi-

sions of the state law which provide for the compensation to be awarded for the taking or damaging of private property. Assuming (without deciding) that the law of California might, without violating the provisions of the Fourteenth Amendment, refuse to make any allowance to a railroad company in a case like the present, for the expense which it will incur in making changes in its railroad which become necessary by reason of the construction of the street, and might refuse to allow for any consequent damages to the value of the railroad easement, surely there is no obligation created by the federal law which will prohibit the state from more adequately protecting the property owner from losses cause by public improvements. We are called upon to determine what the law of the state has actually provided, and are not to be guided by any rule to the effect that the state shall pay as little as it may possibly be made to pay without violating the Fourteenth Amendment. Even in the case referred to, the Supreme Court of the United States declared that the value to the railroad of that which was taken from it is "the difference between the value of the right to the exclusive use of the land in question for the purposes for which it was being used, and for which it was always likely to be used, and that value after the state acquired the privilege of participating in such use by the opening of a street across it, leaving the railroad tracks untouched. Upon that theory the case was considered by the jury, and the court did not err in placing it before them upon that basis as to compensation."

[6] The difficulty with the case at bar is that the court has refused to take into consideration evidence which would have enabled it to determine the difference between the value of the right to the exclusive use of the land in question for the purpose for which it was being used and for which it was always likely to be used, and that value after the city acquires the privilege of participating in such use by the opening of a street over it; and has refused to receive evidence bearing upon the question whether or not the city in taking the property for street purposes will leave the railroad tracks untouched.

There is an important difference between the extension of a street crossing over a railroad track and a taking for the purpose of constructing a street longitudinally covering a right of way. "The right to take longitudinally is very different from the mere right to cross, for in the one case the rights of the railway company are materially impaired, while in the other the taking is such that both uses can stand together." Elliott on Railroads (2d Ed.) § 1098. See, also, Elliott on Roads and Streets (3d Ed.) § 249; Pierce on Railroads, p. 193. It has been held that when a railroad corporation owns only an easement in the land which it occupies, the imposition of another easement on the same land wholly consistent with the complete and undisturbed enjoyment of the original use is not a taking of property, and that if there is an interference with the original use, there is a taking only to the extent of such interference. The corporation having the original right is not, when the land is occupied concurrently by another corporation, entitled to recover the value of the land as measured by the most advantageous use to which it could be put. The true measure of damages in each case is the decrease in the value of the use of the land for the first purpose by reason of its being concurrently used for the second purpose. 10 Ruling Case Law, title Eminent Domain, § 129, and cases there cited. We understand that the industry of counsel has not enabled them to discover any case where a taking of a street right of way, longitudinally covering a railroad right of way, was said to entitle the railroad company to only nominal damages. Those cases which apply such rule to street crossings, proceed upon the theory that the right of way exists ex necessitate, and that the process of condemnation in such cases is merely formal. It is assumed in such cases that in extending a railroad through a city, the railroad company accepts the establishment of street crossings as a common and necessary incident, on account of which it is not to have compensation so long as its railroad is not subjected to any other interference. "The [railroad] company must be deemed to have laid its tracks within the corporate limits of the city subject to the condition—not it is true, expressed, but necessarily implied—that new streets of the city might be opened and extended from time to time across its tracks as the public convenience required, and under such restrictions as might be prescribed by statute." C. B. & Q. R. Co. v. Chicago, 166 U. S. 226, 250, 17 Sup. Ct. 581, 590, 41 L. Ed. 979. Though we might accept this principle as applied to ordinary street crossings of railroads, we do not consider it applicable to a lengthwise taking for street purposes of a railroad right of way.

We concede that a public service corporation is peculiarly subject to regulation under the police power, and that the action of the city authorities or of state authorities in compelling the defendant railroad company at its own expense, to alter its railroad structures at any time when the continued maintenance of such structures endangers the public safety will not be a taking of the property in the constitutional sense. But this furnishes no adequate reason why the city in condemning this right of way and applying it to street uses concurrently with the railroad use should not pay for any diminution in value of the railroad company's reserved rights of use in the property, to the extent that such diminution in value can now be shown to be actually involved as a consequence resulting from the process of subjecting the land to street uses. That it is the purpose and policy of the state of California to allow this just compensation is indicated by the language of section 1240, Code of Civil Procedure, to which we have referred, wherein it is provided that in subjecting property to such concurrent use the court may fix the terms and conditions upon which the property may be so taken. The fixing of those terms and conditions is evidently intended to include the allowance of compensation for the diminution in value to which we have referred.

The judgment and order are reversed.

We concur: JAMES, J.; SHAW, J.

(32 Cal. App. 582)

ASSOCIATED OIL CO. v. COMMARY-PETERSON CO., Inc., et al.

(Civ. 1608.)

(District Court of Appeal, Third District, California. Jan. 23, 1917. Rehearing Denied by Supreme Court March 22, 1917.)

1. Highways 🔑113(5) — Contracts — Improvements—Bonds—Material Furnished —Gasoline.

Under St. 1897, p. 202, requiring contractors of public works to furnish bonds to pay for material or supplies furnished, recovery may be had on the bond for gasoline used in trucks hauling gravel, cement, etc., for road construction.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 350.]

2. Highways 🔑113(5)—Contracts—Bonds — Subcontractors — Persons Furnishing Material to.

Under St. 1897, p. 202, requiring contractors on public works to furnish bonds to pay for materials or supplies, etc., furnished for performance of the work, persons furnishing material to a subcontractor may recover on the bond.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 350.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Associated Oil Company against the Commary-Peterson Company, Incorporated, and the New England Casualty Company, and A. C. Thode, doing business under the name of the A. C. Thode Motor Draying Company. Judgment for plaintiff, and the two first named defendants appeal. Affirmed.

Samuel Knight and F. E. Boland, both of San Francisco, for appellants. Edmund Tauszky, of San Francisco, for respondent.

BURNETT, J. The facts are undisputed, and we may adopt substantially respondent's statement of them. About June 9, 1914, the Commary-Peterson Company, hereinafter referred to as the "contractor," entered into a contract with the state of California for the construction of a portion of the state highway in Solano county. In compliance with law, the contractor, as principal, and the defendant New England Casualty Company, as surety, filed a bond with the department of engineering; the condition being that if the contractor shall pay or satisfactorily secure "the payment of all labor, materials and supplies furnished for constructing under the said contract the said portion of said highway, as in said contract stipulated, and as required by the provisions of the act of the Legislature of the state of California, approved March 27, 1897, entitled 'An act to secure the payment of claims of material men, mechanics or laborers employed by contractors on state, municipal or other public work,' and the acts amendatory thereof, then said bond shall have no effect, but that otherwise it shall remain in full force and virtue."

On June 25, 1914, the contractor entered into an agreement with defendant A. C. Thode, by which Thode agreed to haul all rock, sand, gravel, and cement required by the contractor from the places where the same are dumped to such places along the route of said highway as shall be designated by the contractor. Between June 25, 1914, and May 25, 1915, Thode performed the work specified in said contract.

During the months of October and November, 1914, plaintiff, at the request of Thode, furnished to him 2,668 gallons of gasoline at 12 cents per gallon, to be used and which were actually used in the performance of the work contracted to be performed by the contractor. The specific finding of the court as to this is:

> "That the gasoline furnished by plaintiff to defendant Thode was so furnished to be used and was actually used in operating and creating motive power with which to operate motor trucks used by said defendant Thode in hauling rock, sand, gravel, and cement used in the construction of said portion of said state highway, and that said hauling was done by said Thode pursuant to his said contract with said Commary-Peterson Company, Inc., and that said gasoline was so used in the performance of the work contracted to be performed by said Commary-Peterson Company, Inc., under said contract between said Commary-Peterson Company, Inc., and the state of California."

Judgment by default was taken against defendant Thode, and after trial, the court found for plaintiff against the contractor and the surety, and they have appealed from the judgment on the judgment roll.

The provision of said statute of 1897 involved herein requires:

> The contractor, before entering upon the performance of his contract, to file "a good and sufficient bond * * * in a sum not less than one-half of the total amount payable by the terms of the contract; such bond * * * must provide that if the contractor, person, company, or corporation, fails to pay for any materials or supplies furnished for the performance of the work contracted to be done, or for any work or labor done thereon of any kind, that the sureties will pay the same, in an amount not exceeding the sum specified in the bond." Stats. 1897, p. 202.

There is no dispute that the bond corresponded with said provision and that no legal objection could be made to it in any respect. There are, however, two grounds urged for a reversal: One, that the gasoline does not fall within the category of "supplies"; and, the other, that the law does not apply to material or labor furnished to a subcontractor.

[1] There seems to us to be no substantial merit in either contention. The use of the gasoline was inseparably connected with the performance of the contract to haul gravel, cement, etc. Without the motive power, the trucks, of course, could not have been propelled, and the delivery of the material could not have been effected. We can see nothing in the purpose or language of the law inconsistent with the conclusion of the learned trial judge that the gasoline was a material part of the supplies.

[2] As to the other objection, it is plain that the law is not confined to the engagements of the contractor. It was manifestly intended to cover all labor and all material contributing to the improvement, whether furnished directly to the contractor or indirectly through a subcontractor. The language of the act and bond will not permit the construction put upon it by appellant. Indeed, the contention, if sustained, would go far toward defeating the beneficent purpose of the statute.

While there is no controlling decision in this state, there is abundant authority for the position taken by respondent, and it may be well to call attention to some of the cases cited in the brief.

The Minnesota case, it is true, arose under the mechanics' lien law, but the provision construed therein was quite similar to the language found in the statute before us. In Johnson v. Starrett, 127 Minn. 138, 149 N. W. 6, L. R. A. 1915B, 708, the contract was for the excavation of a lot for the erection of a church. The work was done with a portable steam power machine known as a "whirly." The earth, as excavated and lifted by the machine, was loaded upon motor trucks and carried away. Johnson furnished Starrett coal used in generating the steam power for the whirly, and an oil company sold the gasoline used in the motor trucks; both of these fuels being sold to the contractors for the purpose stated and delivered on the premises. After the excavation was completed, the machine with its appurtenances was removed from the premises. As to the contention that the coal and gasoline did not furnish the basis for a lien, the court declared:

> "Both the coal and gasoline were materials, and both were components of the resultant achievement. Had the excavation and removal of the earth been done by manual labor, the right to a lien therefor would be undoubted, and we cannot differentiate such a case from one where the same result is reached by other and modern methods."

An interesting case is Zipp v. Fidelity & Deposit Co. of Maryland, 73 App. Div. 20, 76 N. Y. Supp. 386. There one Kriess entered into contracts with the city of Buffalo whereby he agreed to construct a restraining wall across a certain slip in said city. On behalf of Kriess, said company executed its bond conditioned that if Kriess "shall well and truly perform all the labor and furnish all the material necessary to fully complete the work or improvement therein contemplated, and shall well and truly pay for all materials used and services rendered in the execution of such contract, then this obligation shall be void." Two boilers and engines were used for excavating the rocks, sand, and earth and for pumping the water from the slip. The plaintiff, at the request of the contractor, furnished coal, which was used as fuel in the boilers to create power, and it was claimed by the surety company that this was not within the terms of its undertaking. The court said:

> "In the interpretation of a bond or contract of this kind, it is to be construed in view of the work to be performed and the circumstances surrounding its execution, and by the same rules which govern in the construction of any other agreement. * * * The generation of power was essential in the performance of the contract, and, when the defendant became responsible for the payment of 'all materials used and services rendered in the execution of such contract,' it might have expected that fuel was to be consumed in the undertaking. The coal used entered into the execution of the agreement and formed a part of the value of the work done as much as the labor of the masons or of the men who aided in hoisting the stones into position to make up the wall. The materials used need not be a permanent constituent of the structure itself, but must be necessarily incident to the execution of the agreement to come within the purview of the defendant's contract; and the coal consumed in carrying on the work is of that character."

There is a federal statute, passed by Congress on August 13, 1894 (28 Stat. 278, c. 280 [U. S. Comp. St. 1913, § 6923]), similar to our law of 1897, and in United States v. American Surety Co., 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. 437, the Supreme Court of the United States entered into quite an extended exposition of the purpose and interpretation of said statute. It was declared:

> "If literally construed, the obligation of the bond might be limited to secure only persons supplying labor or materials directly to the contractor, for which he would be personally liable. But we must not overlook, in construing this obligation, the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for and to provide a security to that end. Statutes are not to be so literally construed as to defeat the purpose of the Legislature. * * * There is no language in the statute nor in the bond which is therein authorized limiting the right of recovery to those who furnish material or labor directly to the contractor, but all persons supplying the contractor with labor or material in the prosecution of the work provided for in the contract are to be protected. The source of the labor or material is not indicated or circumscribed. It is only required to be 'supplied' to the contractor in the prosecution of the work provided for.

How supplied is not stated, and could only be known as the work advanced and the labor and material are furnished.

"If a construction is given to the bond so limiting the obligation incurred as to permit only those to recover who have contracted directly with the principal, it may happen that the material and labor which have contributed to the structure will not be paid for, owing to the default of subcontractors, and the manifest purpose of the statute to require compensation to those who have supplied such labor or material will be defeated."

In City Trust Safe Deposit & Surety Co. v. United States, 147 Fed. 155, 77 C. C. A. 397, one Bryant sold and delivered coal to the contractor which was used in the locomotives, hoisting engines, and pumping engines employed by the contractor in carrying on the work provided for in a contract for constructing a dry-dock. The surety company contended that coal is not a material supplied and used in the performance of the work within the meaning of the act of 1894; and the United States Circuit Court of Appeals, after affirming the doctrine that the act of Congress and the bond given under it are susceptible of a more liberal construction than the lien statutes and should receive it, said:

"But no especially liberal construction is required to bring the materials supplied in this case within the protection of the act. The labor expended by men in wheeling barrows of material from the point of receipt to the place where it is to be used; in working hand pumps to clear an excavation of water; in turning the cranks of a hoisting derrick, so as to raise materials to a proper elevation—all such labor is so manifestly labor in the prosecution of the work that no one could have the hardihood to contend that it is not within the express terms of the statute. If the contractor, whether for purposes of economy or of expedition, elects to do this work by the power of steam, instead of the power of human muscles, it is difficult to understand how it can be logically contended that such power is not supplied in the prosecution of the work, or that the cost of the coal which produces it should not be equally within the protection of the same statute."

Under a statute similar to ours, a contract was entered into for the construction of a public street improvement in the city of Seattle, state of Washington. One of the claimants furnished to the contractor coal for fuel for a steam shovel used by him in excavating, which was a necessary part of the construction of the improvement, and the Supreme Court, in National Surety Co. v. Bratnober Lumber Co., 67 Wash. 601, 122 Pac. 337, held that a commodity like coal consumed in generating power is included in the word "supplies," saying:

"It seems to us that the words 'provisions' and 'supplies' include anything that is furnished for, and used directly in the carrying on of, the work, and is entirely consumed thereby.

In the case of Grants Pass Banking & Trust Co. v. Enterprise Mining Co., 58 Or. 174, 113 Pac. 859, 34 L. R. A. (N. S.) 395, the Supreme Court of Oregon held that electricity furnished for illumination and for the operation of a quartz mill on certain mining property constituted "supplies" for the working or development of the mine.

Another case from the same state is City of Portland v. New England Casualty Co., 78 Or. 195, 152 Pac. 253. The Oregon statute provides that contractors on public work shall give a bond conditioned that they shall promptly make payments to all persons supplying them "labor or materials for any prosecution of the work provided for in such contracts." A paving company obtained a contract for improving a street in the city of Portland, and the appellant here became its surety. The paving company subcontracted the work of laying cement sidewalks. The subcontractor engaged a company called the Auto Truck Company to haul the cement from a certain warehouse to the place of work. This company hired one Swan to do the hauling in auto trucks owned and operated by him. Neither the contractor nor subcontractor had any direct dealing with Swan. The subcontractor paid the Auto Truck Company, but the company failed to pay Swan, and he instituted suit on the bond. The Supreme Court held that the Oregon statute "does not limit the right of recovery to those who furnish labor or materials directly to the contractor, but all who supply him with labor or material for any prosecution of the work provided for in the contract are to be protected." It was further declared that:

"Truckmen transporting material for a short distance in order to prosecute the work under the contract accelerate the construction just as effectively as the man who mixes the concrete on the ground. * * * It is not important whether he conveys the cement in an auto truck or on his back. Such labor comes within the meaning of the words 'supplying labor or materials for any construction of the work.' It is directly connected with the work of construction and is essential thereto, and a person who performs it is entitled to bring an action on the bond for his benefit."

Appellants cite certain decisions from this state under the mechanic's lien law, claiming that:

"While this action is not to foreclose a lien and the special statute is the measure of the rights and liabilities of the parties, yet the end sought is the same and cases prosecuted under one statute are very persuasive in those under the other, particularly where similar language is employed."

These cases are reviewed by respondent, and it is shown that nothing contained therein is necessarily inconsistent with the conclusion of the lower court herein. Attention is also called to the fact that these cases were decided prior to the amendment of the mechanics' lien law in 1911 (St. 1911, p. 1313) enlarging its scope and, in effect, giving a lien to "teamsters and draymen, and all persons and laborers of every class performing labor upon, or bestowing skill or other necessary services, or furnishing materials to be used or consumed in or furnishing appliances, teams and power contributing to the construction"; and it can hardly be disputed that if the work here had been of a private instead of a public character, and the action were to enforce a lien, the said amended statute is broad enough to cover the supplies furnished in this case.

However, it was held, in French v. Powell, 135 Cal. 636, 68 Pac. 92, that the statute under consideration "is entirely distinct from and independent of the general mechanic's lien law." Therein, in answer to the contention that the services of Clapham as a blacksmith were not lienable, it was said:

> "We do not regard the claim of Clapham as similar to a claim of lien under the mechanic's lien law. The bond and the contract with the city are the source of the obligation, and the obligors agreed to pay for 'any work of any kind' done on the tunnel. Clapham furnished the labor, and it was labor such as the contract called for, and he filed the claim in his own name."

We may say in conclusion that as to the contingency of a default in payment on the part of a subcontractor or the possibility of a duplication of payments the contractor can, of course, protect himself by requiring a bond of the subcontractor or exacting the necessary receipts before making his settlement.

We perceive no reason for disturbing the judgment, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

32 Cal. App. 806

TIDEWATER SOUTHERN RY. CO. v. FRAME. (Civ. 1805.)

(District Court of Appeal, First District, California. Jan. 12, 1917.)

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Tidewater Southern Railway Company against W. W. Frame. Judgment for defendant, and plaintiff appeals. Affirmed.

Meredith, Landis & Chester, of Sacramento, for appellant. H. C. Wuerth, of Fresno, for respondent.

PER CURIAM. It is conceded by the appellant that this case is in all essential particulars as to its facts identical with the case of Tidewater Southern Railway Company v. Vance, 160 Pac. 1097. This being so, it follows, upon the authority of that case, the judgment herein will be affirmed; and it is so ordered.

(32 Cal. App. 631)

PEOPLE v. VALENCIA. (Cr. 524.)

(District Court of Appeal, Second District, California. Jan. 30, 1917.)

1. CRIMINAL LAW ⚿1153(3) — APPEAL — REVIEW — DISCRETION OF COURT — ORDER OF PROOF.

Under Pen. Code, § 1094, authorizing the court in the exercise of sound discretion to depart from the order of proof prescribed by section 1093, a ruling of the court permitting the prosecution in rebuttal to introduce evidence which contradicted no testimony offered by defendant does not require a reversal unless a clear abuse of the court's discretion is shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3063.]

2. APPEAL AND ERROR ⚿1036(1)—REVIEW—PRESENTING QUESTIONS BELOW — OPPORTUNITY TO MEET EVIDENCE.

Accused cannot object on appeal that the court's ruling permitting the prosecution to introduce on rebuttal evidence not proper rebuttal deprived him of an opportunity to contradict such evidence where he made no tender of contradicting evidence in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4069.]

3. CRIMINAL LAW ⚿42 — EXEMPTION FROM PROSECUTION—STATUTE—TESTIMONY.

Pen. Code, § 1324, providing that one who has been compelled to give evidence against his objection that it would tend to incriminate himself cannot be prosecuted for the offense with reference to which his testimony was given, does not exempt from prosecution one who while in jail made a voluntary statement to a justice of the peace which was not under oath and in which he denied committing the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 45–48.]

4. CRIMINAL LAW ⚿1172(1)—HARMLESS ERROR—INSTRUCTIONS—DUTY OF JURY.

In a prosecution for robbery, an instruction that emphatic expressions of opinion by jurors made when they entered the jury room should be avoided, and that jurors should hold their minds in such state that they might fully and freely interchange views with each other and receive the suggestions of fellow jurors, by observing which rule they may more likely reach a verdict, and that it is for the interest of the state and defendant both that a verdict should be returned, was not prejudicial to defendant, since it consisted of commonplace matters which would have occurred to the jury without instruction, and contained nothing from which any inference indicative of the court's opinion as to the defendant's guilt or innocence could have been drawn.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154.]

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

William Valencia was convicted of robbery, and he appeals. Affirmed.

Orr & Gardner, of Ventura, for appellant. U. S. Webb, Atty. Gen., Robert M. Clarke, Deputy Atty. Gen., and Roberto B. Camarillo, of Los Angeles, for the People.

SHAW, J. Defendant was convicted of the crime of robbery. He appeals from the judgment and an order denying his motion for a new trial.

[1] 1. Complaint is made that C. J. Elliott, a witness called by the prosecution in rebuttal, was, over defendant's objection, permitted to give testimony, a part of which was in rebuttal of no evidence adduced on behalf of defendant, but which tended to corroborate evidence in chief offered by the people.

> "The fact that it was permitted to be given in rebuttal constituted in itself no ground of complaint. A court is warranted in departing from the order of proof prescribed by section 1093 of the Penal Code under proper circumstances. Whether it shall permit such departure is a matter committed to its sound discretion, and its action in that regard is not ground upon which error may be predicated, unless the discretion appears to have been grossly abused, and this abuse must affirmatively appear." People v. Willard, 150 Cal. 550, 89 Pac. 124.

The rule contained in section 1093, prescribing the order in which evidence shall be received, is not mandatory, but may be departed from in the sound discretion of the court. Section 1094, Pen. Code; People v. Compton, 123 Cal. 403, 56 Pac. 44.

[2] The contention that defendant was deprived of the right to introduce evidence in contradiction of new matter brought out by Elliott's testimony is wholly without merit, since, in the absence of such tender of evidence, no right was denied him. Had he made such tender, no doubt the court, as it was empowered to do (People v. Christensen, 85 Cal. 570, 24 Pac. 888), would have permitted him to reply to such alleged new matter.

[3] 2. It is next claimed that the prosecution was barred under the provisions of section 1324 of the Penal Code. This contention is based upon the fact that Elliott, who, it seems, was a justice of the peace, prior to issuing a warrant for defendant, and while the latter was in jail, called upon him, at which time defendant voluntarily made a statement to Elliott with reference to his movements and whereabouts at the time the offense was committed. Not only did the statement so made by defendant and testified to by Elliott, standing alone, tend to exonerate the defendant, since it contained a positive denial of any complicity in the crime, but it was not made in the course of any trial, hearing, or judicial proceeding, as defined by section 1324; nor was it made under oath, nor to Elliott other than in his individual character. The provisions of the section cannot be invoked by one accused of crime in voluntarily making extrajudicial statements. People v. Dye, 29 Cal. App. 181, 154 Pac. 875.

[4] 3. Objection is made to an instruction given which contained the following:

> "* * * It sometimes happens that when jurors enter the jury room they make emphatic expression of the opinions they have in the case of their firm determination of adhering to them. Such emphatic expressions of opinion are rarely productive of good. By their emphatic expression of opinion a sense of pride is enlisted and a juror subsequently, though advised of the position he announced is not tenable, hesitates from receding from that position for the reason that he has already expressed his determination

to adhere to it. I would advise you gentlemen, to hold your minds in that state of abeyance so you may fully and freely interchange views with each other, and each individual juror hold his mind so open that he may receive the suggestions and remarks of his fellow jurors, and that his remarks may be entertained and received in the same spirit. I think that by observing that rule interchanging fully between yourselves your views upon the evidence that there is more likelihood you will reach a verdict than if you made an emphatic expression of the position you have assumed. You will remember, gentlemen, in the matters of this character it is advisable both for the interest of the state and benefit of the defendant that a verdict should be returned, that there should be a conclusion of the trial, and you are to remember, too, gentlemen, that you are not partisans in this matter, but you are judges, and that it is not with the opinion with which you retire, but with the judgment with which you return, that the correctness of your deliberation is to be estimated, and that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declarations of the truth."

The substance of the part of the instruction to which objection is urged consists of commonplace matters which no doubt would have occurred to the jury without having it said to them by the court. At all events, there was nothing in the instruction, or any part of it, as in the case of People v. Carder, 160 Pac. 686, from which the jury could have drawn any inference indicative of the mind of the court as to the guilt or innocence of the defendant. No intimation whatever was given as to how the court regarded the evidence; the sole purpose of the instruction being to require a reasonable effort on the part of the jury to come to some conclusion one way or another. Hence in no event could defendant have been prejudiced thereby. People v. Wilt (Sup.) 160 Pac. 561; People v. Miles, 143 Cal. 636, 77 Pac. 666; Niles v. Sprague, 13 Iowa, 198.

The stereotyped contention that the district attorney was guilty of misconduct which prejudiced the rights of defendant merits no consideration.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; JAMES, J.

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32 Cal. App. 626

DUMBARTON LAND & IMPROVEMENT CO. v. MURPHY et al. (Civ. 1777.)

(District Court of Appeal, First District, California. Jan. 30, 1917. Rehearing Denied Feb. 28, 1917. Denied by Supreme Court, March 29, 1917.)

1. WATERS AND WATER COURSES ⟾183½—IRRIGATION DISTRICTS—PETITION—NOTICE—SUFFICIENCY.

Under Act June 10, 1913 (St. 1913, p. 1049), providing for the organization of county water districts, notice of the time and place of the hearing of a petition for the creation of such a district, reciting that hearing would be held at the office of the board of supervisors in the county courthouse was sufficient, the objecting landowner participating in the hearing, to give the board jurisdiction, though the hearing actually occurred at the board's regular place of meeting in the hall of records across the street from the county courthouse; the hall of records being in the same group of buildings as the courthouse.

2. WATERS AND WATER COURSES ⟾183½ — WATER DISTRICTS—ORGANIZATION—REVIEW—MATTERS REVIEWABLE.

A determination by the board of supervisors of a county which organized a county water district, that petitioner's lands were benefited, based on conflicting evidence, cannot, where the board was acting within the scope of its jurisdiction, be reviewed on certiorari.

Appeal from Superior Court, Alameda County; H. D. Burroughs, Judge.

Petition by the Dumbarton Land & Improvement Company, a corporation, for a writ of certiorari against D. J. Murphy and others, Board of Supervisors, to review the determination of such board. From a judgment upholding the board's determination, and order denying new trial, petitioner appeals. Affirmed.

Snook & Church, of Oakland, for appellant. W. H. L. Hynes, Dist. Atty., of Oakland (John T. Nourse, of San Francisco, of counsel), for respondents.

RICHARDS, J. This is an appeal from a judgment and order denying a new trial in a proceeding wherein the petitioner and appellant herein applied to the superior court of Alameda county for a writ of certiorari, in which it was sought to have reviewed proceedings of the board of supervisors of said county in relation to the formation of the Alameda water district and the inclusion of the lands of the petitioner within the boundaries of said district.

[1] The facts, in so far as they relate to the initial steps taken by the said board of supervisors looking to the organization of said district, are practically undisputed, and are briefly these: On November 3, 1913, there was presented to said board of supervisors a petition praying for the incorporation and organization of a county water district under the provisions of an act of the Legislature approved on June 10, 1913 (St. 1913, p. 1049), providing for the organization of such districts. Said act provides that prior to the presentation of such petition notice of the time and place of the hearing thereon, signed by a certain number of those who are seeking to form such water district, was first to be given for the time and in the manner required by said act. The record herein shows that such notice purports to have been given, wherein the time and place of hearing upon said petition was fixed for November 3, 1913, at the hour of 10 o'clock a. m. at the office of said board of supervisors "in the county courthouse of the city of Oakland." The record further discloses that on the said 3d day of November, 1913, the said board of supervisors met at the hour appointed in said notice at the meeting rooms

of said board in the hall of records of said county, and that at said meeting the hearing upon said petition was regularly continued to the 10th day of November, 1913, and was then again continued to the 12th day of November, 1913, and then to the 17th day of November, 1913, and thence to the 25th day of November, 1913, on which last-named day a hearing was had thereon, and that after such hearing, and after the board had excepted from the first-named boundaries of the proposed water district certain lands of the petitioner herein and of certain other persons, which were shown to be covered with water, but had included the portion of the lands described in the petition herein, the board ordered an election to be held within the proposed district to determine whether it was the will of the electors therein that it should be organized under the provisions of the said act; that such election was called and held on December 30, 1913, at which it was voted that said district should be organized. On the 29th day of December, 1913, the day before said election, the petitioners herein applied to the superior court of said county for said writ of review, and on said day obtained said writ, directing the board of supervisors and the members thereof to certify their proceedings in said matter to said court. This was done, and upon the hearing thereon the judgment and order were made from which this appeal has been taken.

The first contention of the appellant is that the board of supervisors never acquired jurisdiction over the matter of the formation of the said water district by reason of certain alleged irregularities and defects in the preliminary proceedings, and chiefly in the notice of the hearing upon the petition by those who were seeking to have the water district created. It appears from the record that subsequent to the inception of said proceedings for the formation of the district and to the election held pursuant thereto, and to the application for the present writ of review, but prior to the hearing thereon, the Legislature by an act approved April 7, 1915 (St. 1915, p. 26), undertook to validate the proceedings for the formation of said district, and it is conceded by the appellant that this validating act of the Legislature did in fact operate to cure all irregularities in the said proceedings with the exception of the two jurisdictional defects which are insisted upon on this appeal. The first of these consists in the alleged defect in the notice of the hearing upon the petition for the formation of said district.

It is contended by the appellant that said notice of hearing specified as the place where such hearing would be held "the office of said board in the county courthouse in the city of Oakland," whereas the board of supervisors has no office in the county courthouse in the city of Oakland, and did not in fact meet there at the time of the first or any hearing upon said petition. It appears, however, from the record herein, that the regular place of meeting of the board of supervisors of Alameda county is in the building known as the hall of records, which stands across the street from the structure commonly designated as the courthouse, but which building is occupied by a number of the county offices, such as clerk, recorder, auditor, treasurer, and the board of supervisors. It is a matter of common knowledge —in that county at least—that said building is so located, occupied, and used, and that it is in fact one of the group of buildings in the city of Oakland devoted to such official activities and uses as are commonly conducted in courthouses. Moreover, the record discloses that the petitioner herein appeared at the said meeting place of said board of supervisors at the time designated in said notice for the first hearing upon said petition, and also appeared and participated in the subsequent hearings thereon at said place without making any objection to the form or sufficiency of said notice, and was therefore in no way misled by its terms.

In view of the foregoing facts we find no merit in the present contention of the appellant as to the insufficiency of said notice to give the board of supervisors jurisdiction to hear and determine the matter thus brought before it.

The second contention of the appellant is that the lands of the petitioner which were finally included within the boundaries of the said water district as the same was organized and incorporated under the orders of said board, were of such nature and character that they could not derive any benefit from the construction and operation of the system of waterworks to be provided and operated through the creation of said water district. It is strenuously argued by the appellant that if its lands are of the character above indicated the board of supervisors would have no authority or jurisdiction to include said lands within said district, and hence that its proceedings and orders culminating in the inclusion of appellant's said lands therein were and each of them is void, and that this being so, the aforesaid act of the Legislature attempting to validate said proceedings was ineffectual for the reason that to give such effect to it would be to take away from the appellant property without due process of law. The authorities cited by the appellant in support of this contention fully sustain it, and we have no doubt that if the undisputed fact should be that the said lands of the petitioner herein were not, from their nature, character, or location, susceptible of receiving the benefit from the creation of such district and the exercise of its functions which are contemplated by the terms of the act of the Legislature providing for the creation of water districts of this character, the effort of the person or official seeking to so illegally include said lands within such district could be successfully thwarted through some appropriate judicial proceeding, and this notwithstanding the act of the Legislature purporting to validate the same. The respondents herein, however, contend that conceding this to be so, a writ of certiorari is not the appropriate or proper proceeding by which to determine said matter; that the board of supervisors having once acquired jurisdiction to determine the matter of the organization of said water district, and having proceeded to organize the same in accordance with the terms of the statute, and the said district having thereby acquired a de facto or de jure existence, its due incorporation can only be assailed by quo warranto, and in support of this contention the respondents present much and very respectable authority.

[2] We do not, however, deem it necessary to enter upon the discussion or decision of either of these questions in this case, for the reason that the record herein discloses that the issue as to whether the said lands of the petitioner were by location and nature such as to be susceptible of receiving the benefits resulting from the creation and operation of said water district in accordance with the purposes of said legislative act providing for its formation, was presented to the board of supervisors during the course of the hearing upon the petition for the formation of such water district, and that the board took evidence thereon, and that the evidence thus taken was in substantial conflict upon such issue, and that the board resolved such conflict in the evidence in favor of the exclusion of a certain portion of the lands of said petitioner herein from the boundaries of said water district, and also in favor of the inclusion of that other portion of the petitioner's said lands involved in this proceeding within the boundaries of said district. Whether in so doing the board was exercising legislative or judicial functions need not be put in question here. They were acting within the scope of their jurisdiction in the premises, and hence with the result of their determination we are not in this proceeding at liberty to interfere.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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32 Cal. App. 637

Ex parte WISNER. (Cr. 528.)

(District Court of Appeal, Second District, California. Jan. 31, 1917.)

1. CONSTITUTIONAL LAW 🔑81—POLICE POWER — REGULATION OF OCCUPATIONS AND AMUSEMENTS.

With regard to employments, occupations, or amusements not of such a character as to be in themselves commonly objectionable, the arm of the police power may be extended only to regulate, and not prohibit.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148.]

2. MUNICIPAL CORPORATIONS 🔑625, 626—POLICE REGULATIONS—ORDINANCE—VALIDITY—"UNINCLOSED"—"INCLOSED."

An ordinance of the city of Venice provided that it should be unlawful for any person, firm, or corporation in any public or uninclosed place in the city to play any musical instrument, to sing, to make any loud or unusual noise, or to call out goods, wares or merchandise, or the attractive features of any amusement, device, or place of recreation or refreshment, without first securing from the board of trustees a permit so to do, which should be granted only on written application specifying the place for which the permit was to be granted and the kind of amusement or noise desired to be made. *Held*, that such ordinance was void as both discriminatory and unreasonable, though the board of trustees might limit the right of persons to play musical instruments or utter loud sounds even to the extent of absolute prohibition, the ordinance covering more than public streets, places, and ways, and applying to private premises and every such place as may be "uninclosed," which means a place not entirely inclosed, an "inclosed" place being a place inclosed on all sides by some sort of material.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1378–1380.

For other definitions, see Words and Phrases, First and Second Series, Inclosed.]

In the matter of the application of C. Q. Wisner for a writ of habeas corpus. Petitioner discharged from custody.

Hutton & Williams, of Los Angeles, for petitioner. Charles W. Lyon, Fredericks & Hanna, and Byron C. Hanna, all of Los Angeles, for respondent.

JAMES, J. The petitioner, being imprisoned by the marshal of the city of Venice upon commitment after conviction for an alleged crime, to wit, the violation of a certain ordinance of the city of Venice, sued out this writ to determine the validity of such imprisonment.

The ordinance under which petitioner was prosecuted, in that part descriptive of the offense which might be committed thereunder, is as follows:

> "It shall be unlawful for any person, firm or corporation, in any public or uninclosed place, in the city of Venice, to play any musical instrument, or to sing, or to make any loud or unusual noise, or to call out goods, wares or merchandise, or the attractive features of any amusement, device or place of recreation or refreshment, without first securing from the board of trustees, a permit so to do. Said permit shall be granted only upon a written application, which application must specify the place for which the permit is to be granted, and the kind of amusement or noise desired to be made."

It is contended that the ordinance is void: First, because it invades the right of the citizen in unduly restricting liberty of action; second, that it is discriminatory. The right of a legislative body in the exercise of its police power to prescribe and enforce reasonable police measures cannot be questioned. However, such power is not without bounds or limits.

[1] With regard to employments, occupations, or amusements not of such a character

as to be in themselves commonly objectionable, the arm of the police power may be extended only to regulate, and not prohibit. The regulation must be reasonable and must apply alike to all persons within a class. In County of Los Angeles v. Hollywood Cemetery Association, 124 Cal. 349, 57 Pac. 153, 71 Am. St. Rep. 75, the court said:

> "If the business be lawful, and having no injurious tendency, they (the legislative authority) cannot say who shall and who shall not exercise the right itself. Under the guise of regulating a business the municipality cannot make prohibition possible by committing to the officers of the municipality the arbitrary power to deny permission to engage in that business."

In the concurring opinion of Mr. Justice Shaw, of the Supreme Court, in the Matter of the Application of Dart, 172 Cal. 47, 155 Pac. 63, L. R. A. 1916D, 905, the leading cases pertinent to this subject are cited, and extensive quotations expressive of the rule of interpretation made. The learned justice writing that opinion observes further:

> "But a law or ordinance by or under which a lawful occupation, in itself, when properly conducted, in no wise injurious to persons, property, or the public interest, may be absolutely prohibited at the dictation of any official body without other cause than its own will or desire, is beyond the legislative power, and to that extent void."

[2] In this case the defendant was charged with having, in an "uninclosed" place in the city of Venice, played a musical instrument, to wit, a snare drum, without first having secured a permit so to do. By an "uninclosed place," as the language is in the ordinance, we take that to mean a place not entirely inclosed; or, in other words, an inclosed place would be a place inclosed on all sides by some sort of material. The ordinance, in the first place, is utterly without descriptive terms defining any character of inclosure; hence one person might upon his premises erect an inclosure of canvas, or even cheesecloth, and he might therein sing or play musical instruments at will without rendering himself amenable to the punishment prescribed by the ordinance. His neighbor, on the other hand, might have his ground inclosed on all sides, except the top, by heavy wooden walls, and yet, if he played a violin therein without a permit from the board of trustees, he would be guilty of a misdemeanor. Then, too, regardless of the kind of instrument played, or the noise or "music" which may be produced thereon, the board of trustees has the arbitrary power to grant to one person a permit and deny it to another person similarly situated and with the same nearness to neighbors or the public ways. There would be no question at all but that the board of trustees might limit the right of persons to play musical instruments or utter loud sounds in public places, even to the extent of absolutely prohibiting such acts, but the ordinance in terms covers more than the public streets, places, and ways; it applies to private premises of the individual and every such place as may be "uninclosed." As the matter is presented, there is nothing in the charge made by the complaint to indicate that any of the acts complained of were done upon the street or any public place within the city, and we cannot assume that it was intended so to charge. Our conclusion is that the ordinance in question is both discriminatory and unreasonable.

It is ordered that the petitioner be discharged from custody.

I concur: CONREY, P. J.

I concur in the judgment: SHAW, J.

(32 Cal. App. 808)

Ex parte MESSENHEIMER. (Cr. 529.)

(District Court of Appeal, Second District, California. Jan. 31, 1917.)

In the matter of the application of Hubert Messenheimer for a writ of habeas corpus. Petitioner discharged from custody.

Hutton & Williams, of Los Angeles, for petitioner. Charles W. Lyon and Fredericks & Hanna, all of Los Angeles, for respondent.

JAMES, J. In this matter petitioner was charged under the same ordinance and in like form as was the petitioner Wisner in the habeas corpus matter decided this day (Crim. No. 528, 163 Pac. 868); the only difference being that the petitioner here was charged with having played upon a different musical instrument from that used by said Wisner. What is said in the opinion in the matter of Wisner is applicable here. Upon the authority of that decision, it is ordered that petitioner be discharged from custody.

I concur: CONREY, P. J.

I concur in the judgment: SHAW, J.

(32 Cal. App. 635)

BANK OF HAYWARDS v. KENYON et al. (Civ. 1914.)

(District Court of Appeal, First District, California. Jan. 31, 1917. Rehearing Denied by Supreme Court March 30, 1917.)

1. Pleading ⟹353—Late Filing of Answer—Striking Answer.

An answer filed late is an irregularity, and not an absolute nullity, and where a defendant filed his answer one day late, which had been served in time, plaintiff was not, as matter of strict right, entitled to have the answer stricken from the files; a judicial discretion in the premises being lodged in the trial court to be exercised in view of all the facts in the case and in the promotion of justice.

2. Judgment ⟹114 — Default in Answering.

Entry of defendant's default in answering is no more than a privilege which may or may not be exercised by plaintiff, and, when it has not been taken advantage of before defendant files his answer, the latter cannot be regarded strictly as in default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 164.]

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3. JUDGMENT 🔑114 — JUDGMENT BY DEFAULT—DISCRETION OF COURT.

Where defendant's answer was filed but one day late, and set forth a meritorious defense, and plaintiff did not move to strike it from the files until a month after it was filed, the court, in the exercise of a sound discretion, should have denied plaintiff's motion for judgment by default, and have allowed the cause to proceed to trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 164.]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the Bank of Haywards against Walter H. Kenyon and another. From an order striking out the named defendant's separate answer, and ordering default and judgment for plaintiff against him, from the judgment entered, and from an order denying his motion to vacate the order and set aside the judgment, the named defendant appeals. Reversed, and cause remanded for further proceedings.

J. W. Dignan, of Oakland, and Clarence E. Todd, of San Francisco, for appellant. F. I. Lemos, of Hayward, and Byrne & Lamson, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal by Walter H. Kenyon, one of the defendants, from an order of court striking out his separate answer and ordering default and judgment in favor of plaintiff and against said defendant; from the judgment entered and from an order denying said defendant's motion to vacate the order and set aside the judgment.

The facts of the case may be stated in a few words. Upon motion of the plaintiff the trial court struck from the files the answer of the appellant Walter H. Kenyon, and ordered judgment by default to be entered, for the reason that said answer had not been filed within the time allowed by the court upon overruling the demurrer of said Kenyon to the complaint, although it had been served in time and was but one day late in being filed. Appellant moved the court to set aside its order and judgment, striking his answer from the files and ordering judgment by default to be entered against him, upon various grounds, in which, however, was no claim that the delay in the filing of the answer was the result of inadvertence, mistake, or excusable neglect. This motion was denied by the court.

[1] We cannot agree with the contention of plaintiff that the answer of said defendant having been filed late and without permission of the court, the court was bound, upon motion, to strike the same from the files. An answer filed late is an irregularity, and not an absolute nullity, and the plaintiff was not, as a matter of strict right, entitled to have it stricken from the files. Discretion to do this is lodged in the trial court (Bowers v. Dickerson, 18 Cal. 420; Lunnun v. Morris, 7 Cal. App. 710, 95 Pac. 907); but, of course, it is a judicial discretion, to be exercised in view of all the facts in the case and in the promotion of justice. It has even been held, as in the case of Drake v. Duvenick, 45 Cal. 455, 463, that the purpose of entering a default is to limit the time during which a defendant may file his answer—which necessarily implies that the defendant's time to answer is extended until the plaintiff causes default to be entered. And that the defendant's time to answer is thus extended was expressly held in the case of Reher v. Reed, 166 Cal. 525, 137 Pac. 263, Ann. Cas. 1915C, 737, where Mr. Justice Shaw, speaking for the court, said:

> "When a party, after the time expressly granted for filing a pleading against him has expired, suffers further time to elapse without taking any action thereon, and in the meantime the pleading is served and filed, he, by such conduct, in effect grants the additional time and the party is not strictly in default."

[2] According to the doctrine of these cases, the entry of the defendant's default is no more than a privilege which may or may not be exercised by the plaintiff; and when it has not been taken advantage of before the defendant files his answer he cannot be regarded strictly as in default.

[3] In the present case the appellant's answer was filed but one day late, and it set forth a meritorious defense. The plaintiff did not move to strike it from the files until one month after its filing. Under these circumstances we think that the court, in the exercise of a sound discretion, ought to have denied the plaintiff's motion and have allowed the cause to proceed to trial. In our opinion the trial court abused its discretion in striking the appellant's answer from the files and ordering judgment by default to be entered against him. Lybecker v. Murray, 58 Cal. 186.

It follows that the judgment and orders appealed from should be reversed, and the cause remanded to the lower court for further proceedings; and it is so ordered.

We concur: LENNON, P. J.; RICHARDS, J.

(32 Cal. App. 595)

MERCHANTS' COLLECTION AGENCY v. LEVI. (Civ. 1889.)

(District Court of Appeal, First District, California. Jan. 26, 1917. Rehearing Denied by Supreme Court March 26, 1917.)

LIMITATION OF ACTIONS 🔑29(2)—APPLICATION OF STATUTE—"OPEN ACCOUNT."

An account for goods purchased in 1912, remaining on the books till 1915, without any payments thereon, is not an "open account" within Code Civ. Proc. § 337, subd. 2, providing that an action to recover a balance due upon an open book account may be brought within four years, but is simple account barred in two years under section 339; no payments having been made thereon.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 137.

For other definitions, see Words and Phrases, First and Second Series, Open Account.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Merchants' Collection Agency against Ben Levi. From a judgment for defendant after his motion for nonsuit had been granted, plaintiff appeals. Affirmed.

E. H. Wakeman, of San Francisco, for appellant. Wal J. Tuska, of San Francisco, for respondent.

LENNON, P. J. This is an appeal from a judgment in favor of the defendant after his motion for a nonsuit had been granted. The facts are therefore undisputed, and are these: On March 20, 1912, the defendant purchased from W. & J. Sloane two items of goods amounting to the sum of $325. They were not paid for, and the said sum was charged to the defendant on the books of W. & J. Sloane. Thereafter the account was assigned to the plaintiff, who commenced action thereon on September 24, 1915. The defendant answered, pleading the bar of the statute of limitations under section 339 of the Code of Civil Procedure. Upon the trial and upon proof of the foregoing facts the court granted the defendant's motion for a nonsuit upon the ground pleaded in his answer.

The sole question presented for determination upon this appeal is as to whether the account sued upon is such an open book account as to bring the action upon it within the provisions of subdivision 2 of section 337 of the Code of Civil Procedure. That section reads as follows:

> "Sec. 335. The periods prescribed for the commencement of actions other than for the recovery of real property are as follows: * * *
>
> "Sec. 337. Within four years: * * * 2. An action to recover a balance due upon a mutual, open and current account or upon an open book account."

It seems to us quite clear that the only reasonable, as well as the only proper, grammatical construction to be placed upon the foregoing section of the Code is that the only book account upon which an action may be commenced within four years under subdivision 2 thereof is a book account upon which there is a balance due. This would necessarily imply that the account should be one upon which the debtor had made payments which, being credited to him, would leave a balance due, and also which, being made by him, would indicate his desire and intent that the account should remain open. It would seem that the intent of the Legislature in amending subdivision 2, § 337, Code of Civil Procedure, so as to include open book accounts was to take accounts upon which money payments had been made out of the category of simple accounts to which it had been long held the provisions of section 339, Code of Civil Procedure, had application, and place such accounts in the same category with mutual, open, and current accounts whereon the balance remaining due from time to time was the result of mutual transactions other than mere money credits. Any other construction would render the amendment to this section of the Code applicable to all accounts other than stated accounts, and would wipe out by indirection the long and uniform line of authority holding actions upon simple accounts to be within the two-year limitation of section 339, Code of Civil Procedure. We are entirely satisfied that such was not the intent of the Legislature in thus amending the former section of the Code. This being so, and this action not being an action to recover a balance due upon the account in question, we are of the opinion that the court committed no error in granting the defendant's motion for a nonsuit.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

32 Cal. App. 679

KLING et al. v. BUCHER. (Civ. 161.)

(District Court of Appeal, Second District. California. Feb. 2, 1917.)

1. CONTRACTS 🔑290—PERFORMANCE—WAIVING ARCHITECT'S CERTIFICATE.

A property owner waived presentation of an architect's certificate for the last installment due building contractors by paying all previous installments without such certificates.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1317.]

2. CONTRACTS 🔑289—PERFORMANCE—WITHHOLDING ARCHITECT'S CERTIFICATE AFTER COMPLETION OF WORK.

Where a building is completed pursuant to contract, an architect's certificate may not be rightfully refused, and the contractor may recover a balance due him without presenting it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1310.]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by G. S. Kling and others against Joseph Bucher. Judgment for plaintiffs, and defendant appeals. Affirmed.

Ralph E. Swing, of San Bernardino, for appellant. Frederick Baker, of Los Angeles, and Curtis & McNabb, of San Bernardino, for respondents.

JAMES, J. This is an appeal from the judgment entered against the defendant. The action was to recover the sum of $4,726.51, alleged as an unpaid balance due from the defendant to the plaintiffs upon a contract for the erection of a hotel building in the city of San Bernardino. Various installment payments were made to the contractors while the building was in course of construction, amounting to $52,350. The contract provided that no payment should be made except upon the production of the certificate of the architect, and the contention of the appellant is that, not only was there a failure on the part of the plaintiffs to show that the building had been constructed as required by the specifications, but that there was a failure also to produce an architect's certificate evidencing the fact of final completion and the right of the plaintiffs to receive complete payment. The court upon sufficient evidence, as is disclosed by the bill of exceptions, found that there had been a substantial completion under the contract and specifications, and the appellant, therefore, must rest his claim for reversal of the judgment upon the fact that the plaintiffs failed to present the architect's certificate, which it is contended was a necessary prerequisite to the right to demand the money sued for. While the contract did specifically provide that the architect's certificate should be produced before any payment should be made on the work, it appears that the appellant, the owner, of his own motion, disregarded this requirement as to all of the payments, except the last, and that he did make 17 payments without any objection to the lack of a certificate. The supervision architect testified:

> "I prepared the first certificate and handed it to Mr. Bucher. He said, 'I have already given the money.' I didn't think much about that, and the next time I brought the certificate he told me he had paid that money and something ahead. I said, 'This is peculiar if you are going to pay checks without the certificates,' and I thought if Mr. Bucher was going to keep making these payments, I wouldn't draw the certificates, and from that time on I drew no further certificates. I am not positive I spoke to Mr. Bucher about it. He made this remark: 'They need the money, and I have it in the bank, and they might as well have it; I am not using it.' That is the understanding he gave me. He had the money, and he wanted them to have it so they could be using it."

[1] We think these facts clearly show a waiver on the part of the owner of the requirement for the production of the architect's certificates, especially as the further fact was shown that he did not at the time he refused to make the final payment base his objections upon a failure of the contractors to furnish him with such certificate. The main controversy arose over the heating plant, which was shown by testimony to have been substantially completed according to specifications. However, it did not work satisfactorily, and the owner had changes made, a different burner installed; in fact, the final arrangement in regard to the heating plant was considerably different from that which was constructed according to the plans. In Knarston v. Manhattan Life Ins. Co., 140 Cal. 63, 73 Pac. 740, speaking of the right of a party to waive a condition made for his benefit, the court said:

> "This waiver may be established by evidence of an express waiver, or by circumstances from which such waiver may be inferred."

[2] Laying aside the question of waiver for a moment, there is another reason why appellant is not in a position to complain: The court found that there was a completion of the work, and in that case there was no legal ground left upon which an architect's certificate might be refused. Where a certificate is refused without cause, the contractor may not be forever debarred from collecting his money. This court so declared in Machinery & Electrical Co. v. Y. M. C. A., 22 Cal. App. 416, 134 Pac. 724, when it was said:

> "It may be admitted that where an architect refuses to issue a certificate to a contractor showing that the latter is entitled to be paid, where no substantial reason exists for such refusal, the contractor may recover the amount agreed to be paid, notwithstanding that the contract specifically provides that payment shall be made only upon the production of the certificate of the architect."

Respondents suggest further that in order to avail the appellant of the objection based upon the failure of the architect to furnish the certificate, that objection should have been presented in the answer, and that the answer contains no averment of that kind. Under the view we have taken of the case, it is unnecessary to give any consideration to this point.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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32 Cal. App. 686

MAIDENBERG v. JUSTICE'S COURT OF LOS ANGELES TP. et al.

(Civ. 1864.)

(District Court of Appeal, Second District, California. Feb. 2, 1917.)

1. Justices of the Peace ⚷61—Appeal—Jurisdiction of Justice.
The jurisdiction of a justice of the peace to entertain a counterclaim over a certain amount may be raised by appeal from a judgment on the counterclaim.
[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 222, 223.]

2. Justices of the Peace ⚷205(7)—Appeal—Record.
In certiorari proceedings to a justice of the peace, the court cannot consider counsel's ex parte statement that he received no notice of entry of judgment, where such fact does not appear from the record.
[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 799.]

3. Justices of the Peace ⚷194(2)—Certiorari—Remedy by Appeal.
Under Code Civ. Proc. § 1068, authorizing writs of review where there is no appeal, certiorari will not lie to review a judgment of a justice of the peace, since an appeal would have afforded adequate remedy had not petitioner allowed the time to expire by his laches.
[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 775.]

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Certiorari proceedings by Harry F. Maidenberg against Justice's Court of Los Angeles

Township, State of California, and Edward Judson Brown, Justice of said court. From an order dismissing the proceeding, petitioner appeals. Affirmed.

John C. Stick and Collamer A. Bridge, both of Los Angeles, for appellant. Chas. S. McKelvey, of Los Angeles, for respondents.

SHAW, J. Upon the application of plaintiff as petitioner, the superior court of Los Angeles county issued a writ of certiorari directed to Edward Judson Brown, justice of the peace of Los Angeles township, pursuant to which said justice of the peace certified and transmitted to said court for review a transcript of its proceedings, including papers and docket entries, in a certain case, wherein petitioner was plaintiff and Roscoe E. Knight was defendant. Upon an examination of such record had at the hearing, the court made an order in effect dismissing the proceeding. On appeal therefrom, petitioner presents a transcript, certified by the clerk of the superior court, containing copies of the papers, docket entries, and proceedings of the justice's court in said action. From this document it appears that upon the trial of the case in question being closed on February 5th, 1915, defendant was instructed to file an amended answer; that on March 12th defendant filed an answer, admitting the claim of plaintiff in the sum of $201.66, and by way of counterclaim alleged there was due from plaintiff to him the sum of $600, leaving a balance of some $398 due defendant from plaintiff; that he remitted therefrom the sum of $99, whereupon the court on said date rendered judgment in favor of defendant for $299.

[1-3] The contention of petitioner is that the court exceeded its jurisdiction in entertaining said counterclaim in the sum of $600 so set up by defendant, and likewise exceeded its jurisdiction in entering judgment thereon without allowing plaintiff an opportunity to plead thereto, and also for the further reason that no copy of said amended answer and counterclaim was ever served upon plaintiff. Section 1068, Code of Civil Procedure, provides that:

> "A writ of review may be granted * * * when an inferior tribunal * * * exercising judicial functions, has exceeded the jurisdiction of such tribunal * * * and there is no appeal. * * *"

Without discussing the merits of petitioner's contention as to want of jurisdiction in the justice to render the judgment, it is plain that the alleged erroneous action of the court could have been corrected by the superior court on an appeal from the judgment. Appellant concedes that an appeal would have afforded him an adequate remedy, but in his brief says that he did not have any notice of the entry of said judgment until April 14th, on which date the time for perfecting an appeal had expired, and for this reason invoked the aid of the writ of review. While so stated by counsel, the record brought up is silent upon the question. From aught that appears by the record to the contrary, plaintiff may have been in court when the answer was filed and present when the judgment was rendered, or had notice of the rendition of the judgment before the time for perfecting an appeal therefrom expired. At all events, we cannot accept the ex parte statements of counsel in lieu of facts shown by the transcript so sent up for review. "An appeal might have been taken, and it is no excuse that defendant did not know of the rendering of the judgment in time to avail himself of that remedy." Hall v. Justice's Court, 5 Cal. App. 139, 89 Pac. 870. In the case of Tucker v. Justice's Court, 120 Cal. 512, 52 Pac. 808, it is said:

> "It is well settled that when an appeal may be taken resort cannot be had to a writ of review. The cases so holding are numerous, and need not be cited."

To the same effect are Weldon v. Superior Court, 138 Cal. 429, 71 Pac. 502, and McCue v. Superior Court, 71 Cal. 545, 12 Pac. 615. In Bennett v. Wallace, 43 Cal. 25, referring to the function of the writ of review, it is said:

> "The statute was intended to supply a remedy where none existed in the first instance, and not to supplement one lost through the laches of the party himself."

To like effect is Hood v. Melrose, 24 Cal. App. 355, 141 Pac. 396. No provision seems to be made in the Code requiring service of notice of the entry of judgments in justices' courts to start the time running within which the losing party may perfect an appeal from the judgment. In the present case, the action was tried on February 5th and defendant given permission to file an amended answer. Judgment followed on March 12th. The time within which he might have perfected his appeal did not expire until April 12th. Two days thereafter, according to counsel's statement, he learned that the judgment was entered.

In our opinion, conceding the rendition of the judgment to have been in excess of the jurisdiction of the court, the perfecting of an appeal therefrom would have afforded petitioner an adequate remedy for the erroneous action of the court; there is nothing in the record showing that petitioner was deprived of an opportunity of prosecuting such an appeal, and his alleged failure to learn of the entry of the judgment was due to his own laches; and, since the law provides a remedy by appeal, in no event can resort be had to the writ of review.

The order appealed from is affirmed.

We concur: CONREY, P. J.; JAMES, J.

32 Cal. App. 616

BRITTAN v. FISHER. (Civ. 1623.)

(District Court of Appeal, Third District, California. Jan. 27, 1917.)

1. Appeal and Error ⟹1011(1) — Findings Supported by Substantial Evidence—Review.

If there is any evidence which affords substantial support to the court's findings, although there is evidence in direct opposition thereto, they will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988.]

2. Trusts ⟹372(3) — Action — Evidence — Sufficiency.

In an action to hold defendant, who took possession of property under a mortgage and express authority of plaintiff, liable as a trustee, evidence *held* sufficient to support a finding by court that defendant took possession of the property solely for the purpose of protecting his own interests under his mortgage, and that agreement whereby plaintiff was released from liability constituted a full, fair, and adequate consideration for her interest in property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 602, 603.]

3. Appeal and Error ⟹1051(2) — Conclusions of Witness—Harmless Error.

In a trial by the court, allowing a witness to give his conclusions is without prejudice, where the conclusions are conclusively established by unimpeachable documentary evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4163.]

Appeal from Superior Court, Alameda County; Wm. H. Donahue, Judge.

Action by M. L. Brittan against Charles H. Fisher. From a judgment for defendant and from an order denying a new trial, plaintiff appeals. Affirmed.

J. E. Pemberton and A. G. Kazebeer, both of San Francisco, for appellant. Wm. O. Minor and H. W. Brunk, both of Berkeley, for respondent.

HART, J The controversy here involves the question of the ownership of a restaurant, a delicatessen, and a bakery business and the equipments and a certain leasehold interest in the building and the basement thereof, situated at 2026–2030 Shattuck avenue, in the city of Berkeley, in which said business was carried on and conducted.

The complaint is in two counts, and the relief sought is: That the defendant, who is in possession of the property above mentioned, be declared to be the holder of said property as the plaintiff's trustee; that defendant be compelled to render an account of his acts and transactions as such trustee; that said trust be terminated, and that the defendant be required to turn over to the plaintiff the possession of said property; that a receiver pendente lite to take and hold possession of said property be appointed; that a certain chattel mortgage executed by the plaintiff and one J. D. Hendrix on the restaurant property to the defendant be canceled.

The defendant, by denials and an affirmative statement of the facts of the several transactions from which this litigation arose, answered the complaint.

Findings, conclusions of law, and a judgment in favor of the defendant were filed and entered.

The cause is brought to this court by the plaintiff by appeals from the judgment and the order denying her application for a new trial.

The general contentions urged by the appellant are that the findings are not supported and that the court erred to the prejudice of her substantial rights in allowing certain testimony to be received. As to the findings, the specific point made by the appellant is that the evidence shows beyond controversy that with respect to the property and the transactions appertaining thereto the defendant occupied toward the plaintiff a fiduciary or confidential relation, to wit, trustee of an express trust, and that the evidence discloses beyond peradventure, so it is claimed, that the defendant, in consummating the alleged purchase by him of the property, particularly that portion thereof which was not subject to a certain mortgage to which particular reference will hereafter be made, practiced and used "adverse pressure" and undue influence and "strong coercion," contrary to the mandates of sections 2228 and 2230 of the Civil Code. In other words, the contention is that the defendant took undue advantage of the confidential business relation existing between him and the plaintiff—that of trustee and beneficiary—and thus brought about the consummation of an unconscientious and fraudulent transfer of the title of the property to himself. It is further claimed that, as a matter of fact, no sale of the property and the business to the defendant ever took place.

[1] The facts found by the court directly negative the above contentions. It will be conceded, of course, that, if there is any evidence which affords substantial support to the findings, it is beyond the power of this court to disturb them, although there may be other evidence in direct opposition thereto. This observation merely involves the statement of a rule which has by the courts so often been declared and exemplified in the cases that its repetition is rather supererogatory than necessary.

The facts, as they are gathered principally from the testimony of the defendant and partly admitted and as they are substantially found by the court, are these: That on the 4th day of September, 1913, and for some time prior thereto, the defendant owned and conducted the restaurant business in the building above described on Shattuck avenue, in the city of Berkeley; that he owned and held a leasehold interest in said building and all the equipments used in carrying on said business; that on the day mentioned he sold the said property and business and the lease to the building to one J. D. Hendrix and the plaintiff, for the sum of $3,250; that, on the consummation of said sale Hendrix and the plaintiff paid the defendant $1,000 in cash and executed and delivered to the defendant a number of promissory notes, payable at different dates, for the balance, securing said notes by the execution in favor of the defendant of a chattel mortgage on the property and business of the restaurant. Said mortgage contained, among others, a provision that, in case there was default by the mortgagors in the payment of any of the said notes or the interest thereon accruing, then all said notes should thereupon become due and payable at the option of the mortgagee, and that the latter might in such event take possession of the mortgaged property and proceed at once to sell the same "in the manner provided by law," and apply the proceeds of such sale to the payment of said notes, the interest thereon, costs of sale, and counsel fees, and pay the surplus of any to the mortgagors.

Hendrix and the plaintiff immediately took possession of the property and charge of the restaurant business, and the defendant went to Lankershim, Cal., and launched upon the business of raising poultry.

Hendrix and the plaintiff jointly carried on the business of the restaurant from the time that they took possession thereof until the 27th day of January, 1914. In the meantime they had paid the defendant various sums on said notes and mortgage, thus reducing the mortgage debt to the sum of $1,500.

On the said 27th day of January, 1914, Hendrix and the plaintiff found themselves well-nigh, if not quite hopelessly in debt. In the conduct of the restaurant business they became indebted to various persons and firms in the sum approximately of $6,000. They were also in default in the payment of some of the notes executed by them to the defendant. Their creditors, other than the defendant, were pressing them for a settlement of their claims, and one or more attachments had been levied upon the restaurant and the property with which it was operated.

It appears that on or about said 27th day of January, 1914, Hendrix sold and transferred all his interest in the property and business of the restaurant to the plaintiff and so severed his connection therewith. It further appears that, after taking over the restaurant business and the property connected therewith, Hendrix and the plaintiff opened in the same building a delicatessen and bakery, and conducted the same in connection with the restaurant. This branch of their enterprise and the property or equipments essential to the carrying on thereof were not included in or subject to the mortgage given by them to the defendant.

The defendant testified that prior to the 27th day of January, 1914, he received a telegram at his home at Lankershim from a Mr. Coulter, one of the creditors of the plaintiff, stating that an attachment had been levied on the restaurant, and that the financial affairs of the concern were in a bad condition, and requesting him (defendant) to go to Berkeley at once; that, on the 26th day of January, 1914, he went to Berkeley, thence to the restaurant and found it under attachment; that, within a few days after he arrived at Berkeley, a meeting of the creditors of the plaintiff was held in the offices of the defendant's attorneys in Berkeley, said meeting having been called by the plaintiff's attorney; that it was at said meeting announced by an expert who had previously examined the plaintiff's books on behalf of the creditors that the debts of the concern amounted in the aggregate to a sum in excess of $6,000. The plaintiff, on the 27th day of January, 1914, executed and delivered to the defendant the following document:

> "Berkeley, Calif., Jan. 27th, 1914.
>
> "To C. H. Fisher:
>
> "The undersigned, M. L. Brittan, does hereby consent that you take possession of the Golden Sheaf Café and everything therein contained and used in connection with the said café. And you are hereby authorized to take such possession under that certain chattel mortgage made by J. D. Hendrix and myself to you dated the 4th day of September, 1913, and recorded on the same day in the recorder's office of Alameda county. This license is intended to and does cover the delicatessen, bakery, and grocery department connected with said café.
>
> "In consideration of the foregoing, and the further consideration of your taking possession under this license, it is understood that you will abide by any agreement or plan of operation that the creditors may arrive at for the future conduct of said business looking towards the running of the concern provided your interests are not prejudiced thereby nor your security impaired. M. L. Brittan.
>
> "I accept the terms and conditions set forth herein. C. H. Fisher."

At the time of the execution of the foregoing writing, one of the notes given by Hendrix and the plaintiff to the defendant was overdue by about 24 days.

The defendant, immediately upon the execution and delivery to him of said writing, took possession of the restaurant and the property thereof and the equipments of the delicatessen and bakery, and, so he testified, remained in possession thereof under said agreement and the chattel mortgage until about the 3d day of February, 1914.

When the monthly rent fell due, continued the defendant, he was unable to pay it, and so called on the plaintiff and asked her to raise the money necessary for that purpose, saying that the business could not be further prosecuted unless the rent was paid. She replied that she was wholly without means to pay it. "I then told her," proceeded the defendant, "that under my chattel mortgage, if she did not pay the rent or the creditors did not pay it, I would force them to foreclose, as my mortgage was prior, and that I wouldn't put up any more money to run the place. I told her that the place was not near paying expenses, wasn't near taking in enough money to pay expenses, and they would have to settle. * * * She told me then that if she could be relieved from all the debts—the $6,000 of debt—and I could sell the restaurant and what stuff they had in the other storeroom and settle with the creditors, it would relieve her from any other obligation of paying any further bills and debts; and so I called a meeting then of the creditors, and told them how things were, that if they wanted to run it any longer that they put up the money to do it; and they wouldn't do it. So they sold, tried to sell, the restaurant; but they could not get any more for it than the $1,500 coming to me, on my mortgage. * * * Miss Brittan did try to raise the money to conduct the business between the 27th of January and the 3d of February. * * * I went with her and with her uncle and another party to Oakland to try and get the money. Stayed there with them the best part of a forenoon. They did not show up then and could not raise the money. During the negotiations I told the creditors if they would put up the money, could settle with me, and pay up the money, they could run the restaurant; but no, they wouldn't do that, they would not put any more into it would not even put up money to pay the rent, and said they would close it out as it was. * * * So they turned the mortgage back to me. * * * Well, on the 3d day of February—before that, after we tried to raise the money and she could not raise any more money—then I told her what had to be done; that she would either have to put up the money or the creditors would sell the place. So, before me and Mr. Mikkelsen, the man that collects the rent, she said that, if we could sell the stuff in the delicatessen store and could relieve her from further responsibility of any one trying to collect these debts after, settle with a committee or get a written statement that would relieve her from any of her debts, why she would be willing to turn the restaurant back to me." The defendant at this time again asked the plaintiff to raise the rent, and called her attention to the fact that another of her notes which he owned and held was due and payable. She then said to him that "the best thing to do is to sell the property, leave the creditors to sell it, and if they would relieve her from any other liability from any one of the creditors coming back on her to collect the bills afterwards that had been created the last three months and a half." Adopting the suggestion so made by the plaintiff, the creditors, acting through a committee appointed from their number, proceeded to attempt to sell the property. "They couldn't get a bid for it," testified the defendant, "and they wanted to know if I would give more than $1,500, and I said I wouldn't." The creditors then sold the property of the delicatessen to the defendant upon his bid for the sum of $600, and, so the defendant testified, "agreed to release Hendrix and Miss Brittan, on the 3d day of February. * * * The restaurant was turned over to me and the $600 was to be given to the creditors, to be divided among them."

The notes given to the defendant by Hendrix and the plaintiff had not, down to the time of the trial, been surrendered to the plaintiff, nor had there been a release or satisfaction of the mortgage, but the defendant in effect testified that he treated the notes as canceled after he had taken back the restaurant. In this connection it is proper to say that the judgment herein has directed that the said notes be delivered to the clerk of the court for cancellation.

The defendant testified that, when he took charge of the restaurant under his mortgage and the agreement of the plaintiff, the business had fallen off to such an extent that it was hardly paying its running expenses, and that it did no better during the period intervening between the date he so took possession and control of it and the time the creditors settled their claims as above indicated.

The witness Mikkelsen a creditor of the plaintiff, testified that at a meeting of the creditors' committee held in the delicatessen part of the building in which the restaurant was conducted after the defendant re-entered into the possession of the restaurant it was generally agreed among the members thereof that the better plan would be to turn the restaurant and delicatessen over to the committee, to be by it disposed of to the greatest advantage of the creditors. The witness said that while the committee was then in session the plaintiff was in the adjoining room, and that he went into the said room and told her of the proposition, to which she replied that she was willing to assent to any plan or arrangement as to the disposition of the business and the property that would give her a complete acquittance of responsibility or liability for the debts of the concern.

Other witnesses gave like testimony, and said, as did the defendant, that the plaintiff repeatedly declared that she could not get the money necessary to pay off the debts of the concern.

[2] The above synoptical statement of the testimony as submitted by the defendant is sufficient for the purposes of this decision. While it is controverted in its vital particulars by the plaintiff, the court, having accepted it as a truthful statement of the facts of the controversy, was thereby warranted in concluding as it did conclude, that the defendant took possession of the property under the mortgage and the express written authority and direction of the plaintiff, not with an understanding and agreement that he would hold the said property and conduct the restaurant business as a trustee or receiver for and

on behalf of the plaintiff and to redeliver to her said property or any part thereof, but solely for the purpose of protecting his own interests under his mortgage, and, if necessary for that purpose, to sell all said property; that the composition effected with her creditors whereby she was released from all further liability upon their claims and the satisfaction of the defendant's debt against her were the culmination of her own agreement with the defendant, and constituted a full, fair, and adequate consideration for any interest she might have had in the property; that the defendant did not during the period he was in possession of the property receive sufficient profits from the conduct of said business with which to repay himself for all advances made by him to the plaintiff's creditors and for all expenses incurred by him in carrying on said business; that the plaintiff was not ready or able to pay the defendant the amounts paid by him to her creditors and the expenses incurred by him in the conduct of said business during the period mentioned.

The court did not directly find, and indeed it was not essential that it should do so in view of the findings above adverted to, that there was no adverse pressure or coercion used by the defendant to secure the assent of the plaintiff to the arrangement finally crystallized. As above stated, the history of the transaction as detailed by the findings directly negatives the idea of coercion and undue advantage on the part of the defendant in said transaction. Indeed, no such element could enter into the case under the findings. Nor was there the slightest proof of coercion. Counsel, it is true, refer to the fact that the defendant called upon the plaintiff to furnish the money with which to pay the rent which fell due within a few days after he resumed possession of the property, and declare that "clearly this demand regarding the rent was used to force her [plaintiff] into assenting to whatever she did assent." But the trial court attached no such significance to that circumstance, and certainly we can conceive of no reason why this court should.

Our conclusion upon this branch of the case is that the findings are sufficiently fortified by the proofs, and cannot, therefore, justly be disturbed, and that the conclusions of law and the judgment are supported by said findings.

The appellant complains of the rulings of the court in allowing the defendant to say, in reply to a question by his attorney, that he "held possession under that agreement and the chattel mortgage until about the 3d of February," and in refusing to strike out the statement of the witness Bracken that "the creditors sold to Mr. Fisher finally." The ground of the objection to said testimony was that it involved conclusions of the witness, the first as to the legal capacity in which the defendant held possession, and the second as to the legal effect of the transaction between the creditors and the defendant.

[3] Strictly speaking, the objections upon the ground stated were well taken. But the testimony so brought into the record was wholly without prejudice. The fact that the defendant was entitled to take possession under his mortgage was shown by unimpeached and unimpeachable documentary evidence. The fact that he was authorized in writing by the plaintiff to take possession under said chattel mortgage was likewise shown. This testimony conclusively established the fact to which the testimony complained of related, and therefore the latter testimony, involving as it did the conclusion of the witness, cannot be held to have added anything to the intrinsic probative force of the competent testimony by which the fact was proved.

The statement that "the creditors sold to Mr. Fisher finally" is in a sense true; they did sell their interests as creditors to Fisher; but, even if the witness thus intended to say that the restaurant was sold by the creditors to Fisher, the statement so made was of little material importance in view of the full explanation made by Fisher of the circumstances of the whole transaction. The fact is, as we have shown, the defendant was himself authorized by the mortgage to sell the property and by the written direction of the plaintiff to "abide by any agreement or plan of operation that the creditors may arrive at for the future conduct of said business looking towards the running of the concern, provided your interests are not prejudiced thereby nor your security impaired." The testimony of the defendant sufficiently shows to warrant the finding, which in effect was made, that the conditions developed in the affairs of the restaurant were such as to make it necessary to sell the restaurant and the property connected therewith to protect the rights of the defendant under his mortgage. The defendant, indeed, was directed and expressly authorized by the plaintiff to dispose of the property and the business in any manner he might choose, provided that in so doing he secured to the plaintiff release from any further liability for the debts of the concern. This arrangement he succeeded in accomplishing. Thus, even if not under his mortgage, he had the right to sell it, and no one will question his right to buy it so long as he acted in good faith toward the plaintiff. As stated, whether he bought from the creditors or from himself as the mortgagee in possession under his mortgage is, under the circumstances and in the last analysis, wholly unimportant.

The judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

32 Cal. App. 681

SHERRIFF v. SHERRIFF. (Civ. 2200.)

(District Court of Appeal, Second District, California. Feb. 2, 1917.)

1. JUDGMENT 🔑252(5)—CONFORMITY TO ISSUES.

The complaint asking for general relief as to plaintiff's deed to defendant, and asserting facts sufficient to show that under defendant's contention plaintiff's title in his real estate might be clouded, it was proper to adjudge what interest, if any, defendant acquired by the deed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 441.]

2. APPEAL AND ERROR 🔑1011(1)—REVIEW—FINDINGS OF FACT.

In so far as findings rest on conflicting oral testimony as to facts, they are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988.]

3. DEEDS 🔑93—CONSTRUCTION—INTENT.

Deeds are to be construed like any other contract, and intent of the parties arrived at, if possible, from its terms; all of it being examined.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232.]

4. HUSBAND AND WIFE 🔑47(4)—DEED—INTEREST CONVEYED—COMMUNITY INTEREST.

A deed from husband to wife, in form one of bargain and sale, except that the recited consideration was love and affection, of "an undivided or community interest" in described lands, does not purport to convey a fee interest to the extent of half of the property described, but conveys a community interest such as the wife would have had the land been acquired after the parties were married.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 236.]

5. HUSBAND AND WIFE 🔑47(4)—DEED—RECONVEYANCE.

That husband and wife join in a grant, bargain, and sale deed of land, to carry out negotiations for a loan, and the grantee executes to them a deed in like form, does not enlarge the wife's community interest in the land which she had under deed from the husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 236.]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by William J. Sherriff against Laura E. Sherriff. From adverse judgment and order, defendant appeals. Affirmed.

Davis & Rush and William Freeman, all of Los Angeles, for appellant. N. Blackstock and H. Perk, Jr., both of Los Angeles, for respondent.

JAMES, J. This case comes here on an appeal taken from a judgment in part adverse to the defendant, and from an order made denying her motion for a new trial. The record contains a history of marital difficulties and differences. The cause of action set forth in the complaint was one in equity, the prayer being for judgment setting aside a deed given by the plaintiff to the defendant, and for general relief. In its recitation of alleged facts the complaint set forth that in May, 1911, plaintiff being a widower about 69 years of age, and being possessed of an apartment house and other real property, engaged the defendant, a woman of about 40 years, as a housekeeper; that a few months thereafter plaintiff and defendant were married; that prior to the marriage the defendant expressed great love and affection for the plaintiff, and that the plaintiff upon entering into an engagement of marriage with her, agreed to make a will in which he would devise to the wife an undivided one-half "or community" interest in all of his property and estate; that this arrangement was satisfactory to the defendant, but that immediately after the marriage defendant ceased to show any affection for the plaintiff, and demanded of him that he execute a deed to her, in lieu of making provision for her in a will, and that she then agreed, "promised and bound herself to aid, assist and help the plaintiff carry on and conduct his business, and to look after and care for his household and superintend the same, and to prepare his meals," etc.; that believing in her promises and assurances, plaintiff executed a deed, which he caused to be placed of record in the recorder's office, transferring to her an interest in certain described property. The form of the deed used was that commonly termed "bargain and sale," except that the consideration recited was that of love and affection. It also contained the following recitation:

> "That the said party of the first part, * * * does by these presents grant, bargain and sell, convey and confirm unto the said party of the second part, and to her heirs and assigns forever, all the real property situated in the city and county of Los Angeles, state of California, and described as follows, to wit: An undivided or community interest in all of the following described parcels and tracts of land."

Then follows a description of the particular property and the usual closing clauses of a deed. In the complaint it was further alleged that it was understood between the parties that the deed conveyed only the interest which a wife would have in the community estate after marriage, but that after the deed was executed the defendant claimed a fee-simple title, and on various occasions asserted that she owned such an estate and demanded that the rents and profits of the estate in part be turned over to her for her own personal uses. It was then alleged:

> "That this claim on the part of the defendant has seriously interfered with plaintiff's control of his said property, and in meeting his expenses, and has heretofore and will hereafter, unless the said deed is canceled, prevent the plaintiff from conveying and alienating his said property without the consent of the defendant; that the said deed is a cloud upon plaintiff's title, and is calculated to and does interfere seriously with plaintiff's control of his said property and prevents his free management thereof and its alienation without interference on the part of the defendant."

The trial judge determined by his findings that the plaintiff was not entitled to a judgment canceling the deed. In his oral opinion, the judge summed up his conclusions epigrammatically as follows:

> "He knew that a man of his age could not marry a woman of her age, unless he had property, and he knew well enough that he had to convince her that he had some property before she would marry him, and it is very plain to the court that she would not have married him—she says she married him for a home—I am satisfied she married him because she thought he was wealthy; I don't think there was any other reason for it; I don't think it is natural for people so different in age to be married; and, as I stated this morning, it has been my observation that, whenever a woman marries a man 30 or 40 years older than she is—it may be an accident—but he always has money; it never occurs in any other way. * * * Of course, she got tired of him; she probably knew before she married him that she would get tired of him—a man as old as he was; and after a while he got tired of her. They both made a bad bargain; there is no question about it. She probably thought she could marry him and see this thing through, but she got tired of it. I think it was nothing more on her part than a speculation, and people, where they made speculations of that sort, they ought to see them through, and take what is coming. If a man lives 2 or 3 years, why they get the best of it; and if he lives a good while longer, why then they don't, but they take these chances, and as far as I can, whenever I can do so, I try, as one of the witnesses stated here to-day, to see that as long as they have made their bed they have to lie in it. As far as he is concerned—73 years old—he wasn't in his dotage; he is a shrewd man, in the habit of taking care of his property, but when he got a chance to marry a woman 30 years younger than himself, he went in and made promises about his property, and when it didn't pan out to his satisfaction, then he comes into court and wants the protection of the court. I don't believe the court is bound to protect men, especially business men, who understand themselves, when they won't protect themselves."

[1, 2] The court made very full findings of fact in which his conclusions were stated at greater length, but to the same intent as set forth in that portion of the oral opinion quoted. The judgment in consequence decreed the deed to be valid, but, particularly construing it, determined that it conveyed a community interest "such as the defendant would have if the property had been acquired during their marriage." We think that the findings and judgment are entirely within the issues made by the pleadings. The complaint asked for general relief and asserted facts sufficient to show that under the contention of the defendant the title of the plaintiff in his real estate might be clouded, and, that being true, it was proper to adjudge what interest, if any, the defendant acquired in the property of the plaintiff by reason of the conveyance. The complaint, it is true, is unusually long; it contains a recitation of much evidentiary matter, but there can be gleaned from it enough to make out a cause of action which is sufficient to support the judgment. In so far as the findings rest upon oral testimony of facts about which there was a conflict of evidence, necessarily we are concluded by the findings of the trial court.

[3, 4] The deed itself, we think further, does not purport to convey a fee interest to the extent of one-half of the property described. While it contains general terms, it also contains terms of limitation when it is recited that the estate conveyed is "an undivided or community interest." Under the modern rule of interpretation at least, deeds are to be construed like any other contract, and the intent of the grantor arrived at, if possible, from the terms set forth in the instrument. As this court said in the case of Firth v. Los Angeles Pacific Land Co., 28 Cal. App. 399, 152 Pac. 935, referring to authorities on this subject:

> "It has often been declared that a deed of conveyance is but a contract, subject to the usual and ordinary rules of construction applicable to such instruments. One of these rules, generally adopted and constantly applied, is that the whole of the instrument shall be examined in order to ascertain the intent of the parties."

In the case cited the instrument of conveyance first purported to make an unreserved transfer in fee simple, and there followed words of condition which were held to limit its operation and effect. We think the construction applied by the court to the deed here under consideration was reasonable and altogether in harmony with the terms of the instrument itself.

[5] It appeared by an amendment to the complaint that plaintiff and defendant at one time after their marriage had joined in making a grant, bargain, and sale deed to an abstract company in order to carry out negotiations for a loan, and that a deed was executed back to the plaintiff and defendant in the same form. It is not apparent how this transaction would have the effect in any wise of enlarging the interest of the defendant in the property as acquired under the first deed made by the plaintiff to her.

We have examined very carefully the extensive record which is submitted with this appeal, and are of the opinion that there is no merit in the questions which are presented in the argument of the appellant.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

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32 Cal. App. 610

PEOPLE v. HERRERA. (Cr. 523.)

(District Court of Appeal, Second District, California. Jan. 27, 1917.)

1. Criminal Law ⚷1172(2) — Trial — Instructions—Error.

Though Code Civ. Proc. § 2061, subd. 3, declares that a witness false in one part of his testimony is to be distrusted in others, the modification of an instruction requested by accused, declaring that a witness false in a material part of his testimony is to be distrusted in others, and that, where the jury were satisfied that a witness had so sworn falsely, they must treat all his testimony with distrust and suspicion, whereby it was made optional with the jury to distrust other portions of the testimony of the witness or reject them, is not, as it relates to a commonplace matter, ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3155.]

2. Criminal Law 🔑777 — Trial — Instructions.

In a homicide case, where accused did not flee from the place of the killing, it will be presumed that the jury considered that fact as one of the commonplace things of which an ordinary man will take cognizance, without special instruction, and so the refusal of a special charge that the failure of accused to flee is a circumstance in his favor is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1878–1882.]

3. Criminal Law 🔑1174(6) — Trial — Exhibits.

In a homicide case, where the door through which bullets were fired was introduced in evidence, as well as blackboard illustrations, the fact that the jury were allowed to carry such exhibits with them in their deliberations, though they were not included among the things which the jury might, by Pen. Code, § 1137, carry into the jury room, does not warrant reversal; there being no showing that the jury used such articles in their deliberations, or received any improper impressions therefrom.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3174.]

4. Criminal Law 🔑531(3)—Evidence—Confessions.

Evidence of accused's confession given by a police officer, was admissible, where such officer stated that no inducements were held out or improper influence exerted by himself or any other person to his knowledge, the mere fact that accused may have been in charge of other officers prior to making his statement to the witness not requiring the prosecution to produce all such officers.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1215.]

Appeal from Superior Court, Los Angeles County; G. W. Nicol, Judge.

Hilario Herrera was convicted of murder in the second degree, and from the judgment and an order denying new trial, he appeals. Affirmed.

S. S. Hahn, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was charged with the crime of murder, it being alleged in the information of the district attorney that he did, on the 10th day of June, 1916, in the county of Los Angeles, feloniously and with malice, kill one Soledad Juarez. By the verdict of the jury defendant was found guilty of the crime charged, in the second degree thereof, and judgment followed accordingly. The appeal is taken from the judgment of imprisonment and from an order denying a motion for a new trial.

The deceased was the wife of Filomeno Juarez, and at the time she received the fatal wound she resided with her husband in a two-room house in the city of Los Angeles. Juarez, the husband, was a laborer, and was acquainted with the defendant, the two men having theretofore worked as section hands on a railroad near Los Angeles. On the 10th day of June, 1916, Juarez met defendant at about 3 o'clock in the afternoon on the street. Defendant informed Jaurez that he was going to San Pedro to work, and urged Juarez to accompany him. Juarez's reply to the invitation was that he could not decide the matter without consulting with his wife. Juarez returned to his home later in the evening, where he resided with his wife and some small children. According to testimony given by the husband, he and his wife retired to bed in the front room of the house at about 9 o'clock; the screen door at the front being closed and latched and the inner wooden door being closed. Shortly after they had retired there was a knock at the front door, and upon Juarez opening it he found the defendant Herrera there. Juarez testified that Herrera invited him to accompany him to a neighboring wine cellar for a drink, which invitation was declined, and Herrera was also informed that Juarez would not go to San Pedro to work. Thereupon the door was closed by Juarez, who, it may be gathered from his testimony, then returned to his bed. Almost immediately, so Juarez testifies, some shots were fired by Herrera, and the wife, who had gone to the door to hold it shut, received one of the bullets through her body. This wound caused her death, which occurred the following day. The testimony was that three shots were fired through the door. Upon the woman being shot, she cried out and called to a neighbor to send for the police, and a telephone message conveyed to a branch police station the alarm. Two policemen in an automobile hurried to the scene, and one of these officers testified that he found Herrera at the door; that when the officers approached, the defendant dropped a gun and placed his foot upon it; that they arrested the defendant, and upon examining the gun found it to be fully loaded. The wounded woman was taken to a hospital and defendant transported to the jail. Other witnesses who were aroused by the alarm testified that they observed the defendant at the door of the Juarez house immediately after the shots were fired, and that he was trying to get into the room where Juarez and his wife were. It was given in evidence that after his arrest the defendant made a statement to the police officers, admitting the firing of the shots, and giving as a reason that he shot because Juarez would not go with him to San Pedro. The substance of the defendant's testimony was that, while he was at the house of Juarez on the night in question, Juarez quarreled with his wife, and the gun, which had been handed to the defendant, was discharged when Juarez grappled with the defendant, and that the gun went off by accident. Contrary to the assertion made on behalf of appellant that the evidence upon which the conviction was had was meager, and that upon the facts a "close case" was presented, we think there was abundant evidence to warrant the jury in determining the guilt of the defendant. Several alleged errors are relied upon as constituting grounds for reversal.

[1] An instruction was offered on the part of the defendant, declaring that a witness false in a material part of his testimony "is to be" distrusted in others, and that where the jury was satisfied that a witness had so sworn falsely they "must" treat all of his or her testimony with distrust and suspicion. The court modified the instruction to make it read that a witness willfully false in a material part of his or her testimony "may be" distrusted in others, and that the jury "might" treat all of his or her testimony with distrust and suspicion under such circumstances. The particular complaint is that the instruction as offered contained a correct statement of the provisions of section 2061 of the Code of Civil Procedure, which declares:

> "3. That a witness false in one part of his testimony is to be distrusted in others."

It was, indeed, held in the case of White v. Disher, 67 Cal. 402, 7 Pac. 826, that it was prejudicial error for a court to instruct the jury that a witness false in one part of his testimony "may be" distrusted in others; it being argued that the Code provision in effect declared that such a witness "must be" distrusted. The law on this question has been subjected to some modification since the writing of that decision. In People v. Hower, 151 Cal. 638, 91 Pac. 507, it is declared that instructions of this class contain "only mere commonplace matters that the jurors would be apt to know about and act upon in the absence of instructions," and that "it is well settled that the giving of instructions of that class will not be held to be a proper ground for reversal." The same was held in People v. Russell, 19 Cal. App. 750, 127 Pac. 829, and in Poor v. W. P. Fuller & Co., 30 Cal. App. 650, 159 Pac. 233, decided June 3, 1916. So it has also been held as to instructions which advise the jury that oral admissions are to be viewed with caution, which point is also raised in another paragraph of appellant's brief. See People v. Tibbs, 143 Cal. 100, 76 Pac. 904. We conclude, therefore, that as to neither of the matters adverted to was the error such as to prejudice the right of the defendant to a fair and impartial trial.

[2] It is next complained that the court erred in refusing to instruct the jury that the fact that defendant did not flee from the scene of the shooting was, of itself, a circumstance in his favor. In the case of People v. Montgomery, 53 Cal. 577, the court observes that while the flight of a person suspected of having committed a crime might be a circumstance which, if unexplained, would tend to establish his guilt:

> "It by no means follows that his failure to flee, having the opportunity to do so, tends to prove his innocence."

And even though it be conceded that the acts of the defendant after firing the shots were all pertinent to be considered by the jury, including his act in remaining at the door of the house, yet nevertheless those matters, in so far as they are entitled to weight, may be assumed to have been fully considered by the jury, as they belong again to the category of "commonplace things" which the mind of an ordinary man will take cognizance of without being cautioned or instructed so to do. We do not agree with appellant that there was error committed by the giving of the instruction as to the intent which would be presumed as to the result following a voluntary act. The instruction was, in substance, that which has heretofore been given in many cases, and in our view it was pertinent to the facts disclosed by the evidence in this case.

[3] The charge also is made that the jury received evidence out of court which improperly influenced their consideration of the case. It appears that at the trial the door which was identified as being the same door through which the three bullets were fired by the defendant was introduced in evidence and exhibited to the jury. It showed the three bullet holes, and the testimony was that they were the ones produced by the shots fired from the defendant's revolver. A blackboard had been used to illustrate the testimony of witnesses, and upon which was drawn a diagram of the scene of the crime. After the jury had been instructed and was about to retire, a juror requested that the jury be permitted to have the blackboard and door. These two articles were carried into the jury room without any direction on the part of the court, and were left there before the jury entered the room. The exhibits which the jury took with them into the jury room were not included among those things which by section 1137 of the Penal Code the jury is permitted to have during its deliberations. However, we do not think that prejudice can be implied from the fact that these particular exhibits were so left in the possession of the jury in the jury room. No showing was made that there was anything about the particular exhibits which would furnish to the jury any other information than that which they had already obtained from the same articles as exhibited to them during the trial. There is no showing of any examination made by the jurors of the articles during their deliberations or, in brief, any showing that either improper impressions might have been or were received by the jury. Prejudice will not be presumed from the fact that the exhibits were within reach, and that opportunity was afforded for their inspection and examination during the deliberations of the jury. The case, to our minds, in its facts falls within

the ruling made in People v. Hower, supra, where complaint was made because a bloody shirt, alleged to contain rents and cuts made by the defendant's knife, with dried and matted blood thereon, was left on the floor of the room where the jury was deliberating. The court there said:

> "There is nothing but the bare 'information and belief' statement of the defendant's attorney to show that any examination of the coat or shirt was made by any juror after the submission of the case, and this, of course, was ineffectual for any purpose. People v. Feld, 149 Cal. 464, 86 Pac. 1100. The mere fact that they were on the floor of the courtroom, and in sight of the jury, does not compel the conclusion that they were so examined. Moreover, the affidavits on motion for a new trial were such as to support a conclusion that these articles had been fully inspected and examined by the jury at the time they were received in evidence, and we are unable to see how, under the circumstances of this case, the defendant could be held to have been prejudiced, even had it appeared that the jurors, or some of them, had again inspected the garments."

[4] The contention that the alleged incriminating statements made by the defendant to the police officer were improperly received because of a lack of sufficient foundation authorizing the evidence to be introduced seems to be without merit. The officer giving the testimony stated that no inducements were held out or improper influence exerted by himself or any other person to his knowledge, and that the statements were free and voluntary. The mere fact that the defendant may have been in charge of other officers and in jail prior to the making of the statement which is viewed as a confession did not make it incumbent upon the prosecution to produce all of those officers and to prove that they in their respective turn had not, by improper influence, persuaded defendant to declare himself in the manner he did to the officer who gave evidence as to the statements.

An examination of the entire record in this case impresses us with the conviction that defendant was given a fair trial. No sufficient reason has been furnished why the judgment or order should be disturbed.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

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32 Cal. App. 453

PEOPLE v. SCARPA. (Cr. 652.)

(District Court of Appeal, First District, California. Dec. 30, 1916. Rehearing Denied Jan. 29, 1917. Denied by Supreme Court Feb. 27, 1916.)

1. LEWDNESS 🔑1—LIVING IN ADULTERY—STATUTES—CONSTRUCTION.

Pen. Code, § 269b, as amended in 1911, by striking out "open and notorious" so as to read, "If two persons each being married to another live together in a state of cohabitation and adultery, each is guilty of a felony, and punishable by imprisonment in the state prison not exceeding five years," applies to those persons who, while each was simulating continence in their marital relations, were at the same time maintaining such a course of illicit and adulterous conduct with another of the opposite sex as would constitute a counterfeit of the marriage relation.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. §§ 1-4.]

2. LEWDNESS 🔑10—EVIDENCE—SUFFICIENCY.

Evidence *held* sufficient to sustain verdict that accused was guilty of living in cohabitation and adultery, he and his paramour each being married to another, so as to violate Pen. Code, § 269b.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. § 15.]

Appeal from Superior Court, Santa Clara County; W. A. Beasley, Judge.

Joseph Scarpa was convicted of crime, and he appeals. Affirmed.

See, also, 163 Pac. 883.

Nathan C. Coghlan, of San Francisco, Charles Davison and H. L. Partridge, both of San José, and William F. Herron, of San Francisco (Edwin V. McKenzie, of San Francisco, of counsel), for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. This is an appeal from a judgment of conviction of the defendant upon a charge of having violated the provisions of section 269b of the Penal Code, and from an order denying his motion for a new trial.

The foregoing section of the Penal Code, as amended in 1911, reads as follows:

> "If two persons, each being married to another live together in a state of cohabitation and adultery, each is guilty of a felony, and punishable by imprisonment in the state prison not exceeding five years."

The amendment of this section made in 1911 consisted in striking from the former section the words "open and notorious" before the phrase "cohabitation and adultery." The contention of the defendant herein is that the evidence adduced at the trial was wholly insufficient to establish the charge that the defendant and the woman in question "lived together in a state of cohabitation and adultery." This contention is based upon the fact proven at the trial that during the several months that the defendant and a woman, Mrs. Mae Beach, were asserted by the prosecution to have maintained illicit relations with each other, the defendant was living and cohabiting with his wife, and the woman, Mrs. Beach, was living and cohabiting with her husband; and it is argued on behalf of the appellant that under such circumstances it was impossible that the defendant and Mrs. Beach could also have been living in a state of cohabitation and adultery. The effect of the argument urged in support of this contention would be that if a husband and wife were living and cohabiting together in their legitimate relation as such, it would be practically impossible for either of them to commit a violation of section 269b of the

Penal Code by engaging in or maintaining a course of illicit relationship and intercourse with another person of opposite sex who was also living and cohabiting with his or her legitimate spouse. We are not prepared to commit ourselves to such a narrow construction of the section of the Penal Code in question, nor to give our indorsement to the cases cited by counsel for the appellant which would give color to such a contention.

[1, 2] We are of the opinion that section 269b of the Penal Code, as amended in 1911, was intended by the Legislature working its amendment through the elimination from the former section of the words "open and notorious," to have application to those persons who, while each was simulating continence in their marital relations, were at the same time maintaining such a course of illicit and adulterous conduct with another of the opposite sex as would constitute a counterfeit of the marriage relation. We think that such a state of cohabitation and adultery would not only be possible, but that the evidence in the case before us was amply sufficient to have justified the jury in finding that such a condition existed between the defendant and the woman in the case. A brief review of the evidence will make this sufficiently plain.

The defendant, Joseph Scarpa, had been married to his wife, Mrs. Scarpa, for a period of about 25 years. They had three children—two daughters and a son, all grown and living away from home, the girls being married, and living, one at Pleasanton, and the other in San Francisco. Early in the month of September, 1915, Mrs. Scarpa, who prior to that time had been residing with her husband part of the time at their home in Mountain View, and part of the time on their ranch in San Mateo county, went on a visit to her daughters, spending nearly all of the next three months with one or the other of them, and returning to her home in Mountain View on but two occasions, and then only for a day or two. The defendant, Joseph Scarpa, who was engaged in the business of buying and selling cattle, spent much of his time at his ranch in San Mateo county. In the month of August, 1915, he met his codefendant, Mrs. Mae Beach, upon a neighboring ranch where the husband was at that time employed, and presently took the latter into his employ at his ranch, whither Beach's wife went to live with him. The intimacy between the defendant and Mrs. Beach dates from about this time. They were often seen riding or driving together, and on several occasions were observed in attitudes and actions which were strongly suggestive of an undue and illicit intimacy. On a number of occasions during several months which intervened between the defendant's first acquaintance with the woman and the final exposure of their adulterous relation, the defendant brought the woman to his home in Mountain View during his wife's absence, and there remained with her overnight. On one of these occasions the woman in the morning came down into the butcher shop and bought the meat for breakfast, having it charged to Scarpa. During the course of these apparently continuous and increasingly intimate relations the defendant boasted to a friend that he "had a chicken up at his ranch," which he sufficiently described to identify the Beach woman, and whom he warned his friend not to interfere with. Finally on December 21, 1915, the defendant and Mrs. Beach came to San José, and after visiting several stores and eating places and walking arm in arm down the street, went to the Imperial Hotel in that city, where defendant registered himself and his companion as "J. Jones and wife, Mountain View," and secured a single room which the pair occupied together until the early morning hours of December 23, 1915, when their apartment was entered by detectives, who found them there in a state of undress and apparently occupying the same bed. The arrest of the pair upon the charge of adultery followed.

Upon the trial of the cause no evidence was presented on behalf of the defendant to offset in any way the inferences to be drawn from the foregoing line of testimony; and we think that from its occasional glimpses of the defendant in his relation and conduct towards his codefendant during the months intervening between August and December, taken in connection with the culminating act of his taking her into a hotel, registering there as man and wife, and occupying the same apartment for a portion of three days in an indisputably adulterous state and relation, the jury were amply justified in drawing the conclusion that the relation of the parties during these several months was not that of mere casual and disconnected acts of adultery, but that during the larger part of that time at least such a continuous course of illicit conduct had existed as would amount to their living together in a state of cohabitation and adultery, and as thus sufficing to satisfy the terms of the Penal Code rendering such conduct criminal.

This being so, it follows that the verdict of the jury finds sufficient support in the evidence; and this being the only point made upon appeal, the judgment and order must be affirmed, and it is so ordered.

(32 Cal. App. 453)

PEOPLE v. SCARPA. (Cr. 2068.)

(Supreme Court of California. Feb. 27, 1917.)

In Bank. Appeal from Superior Court, Santa Clara County; W. A. Beasley, Judge.

Joseph Scarpa was convicted of an offense, and appealed. The judgment was affirmed by the District Court of Appeal, and he sought hearing in the Supreme Court. Hearing denied.

See, also, 163 Pac. 882.

Nathan C. Coghlan, of San Francisco, Charles Davison and H. L. Partridge, both of San José, and William F. Herron, of San Francisco (Edwin V. McKenzie, of San Francisco, of counsel), for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. Hearing in Supreme Court denied.

ANGELLOTTI, C. J. I dissent from the order denying a hearing in this court after decision of the District Court of Appeal, for the reason that however discreditably the evidence, as stated in the opinion, reflects upon the defendant, from the standpoint of morals, I do not think it makes a case within the purview of section 269b of the Penal Code, under any fair construction of the provisions of that section. To constitute the felony there defined there must be, according to the express terms, a living together in a state of cohabitation, which means, as was well said in People v. Breeding, 19 Cal. App. 362, 126 Pac. 181, "the living or dwelling together as husband and wife; * * * in other words, a counterfeit of the marriage relation." I think we all agree that there is nothing in the evidence to show any such situation unless it is to be found in the evidence as to the conduct of the parties in the city of San José between the evening of December 21, 1915, and the "early morning hours" of December 23, 1915. To hold that this transitory visit of these parties to the San José hotel, obviously made solely for the consummation of their immoral purposes, constitutes the living together intended by the statute appears to me to be unwarranted by any fair reading of the law.

I concur: LORIGAN, J.

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174 Cal. 552

HEDGES v. FRINK. (S. F. 7106.)

(Supreme Court of California. March 9, 1917. Rehearing Denied April 4, 1917.)

1. CORPORATIONS 🔑542(3)—INSOLVENCY—VALIDITY OF DISTRIBUTION AMONG STOCKHOLDERS.

An agreement to distribute capital assets of an insolvent corporation among certain stockholders is void under the direct provisions of Civ. Code, § 309, and under Pen. Code, § 560, penalizing directors participating in such distributions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2156.]

2. CONTRACTS 🔑137(2)—INSOLVENCY OF CORPORATION — COLLECTION AND DISTRIBUTION OF ASSETS—PARTIAL ILLEGALITY.

An insolvent corporation's assignment of a note for collection and distribution of the proceeds among certain stockholders gives the assignee a valid right of action thereon, since the invalid portion regarding distribution among the stockholders is separable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 702–704.]

3. CONTRACTS 🔑137(2)—PARTIAL ILLEGALITY —EFFECT.

Both at common law and under the direct provisions of Civ. Code, § 1599, a contract having both legal and illegal objects is void only as to the latter.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 702–704.]

4. CONTRACTS 🔑138(4)—CONTRACT PROHIBITED BY STATUTE—ESTOPPEL.

A stockholder joining in a contract to secure distribution of a corporation's assets among certain stockholders is not estopped to attack contract's validity.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 689, 690.]

Department 2. Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by E. D. Hedges against George K. Frink. Judgment for plaintiff, and defendant appeals. Affirmed.

Goodfellow, Eells & Orrick and Goodfellow, Eells, Moore & Orrick, all of San Francisco, for appellant. McClanahan & Derby and H. W. Glensor, all of San Francisco, for respondent.

HENSHAW, J. Appellant was indebted to the American-Hawaiian Mahogany Lumber Company, a corporation, in which he was a stockholder. His indebtedness was evidenced by his promissory note. The corporation became financially involved to such an extent that it was insolvent. It owed one C. Bolte about $8,000, for money advanced by him. It owed other smaller indebtednesses. It had entered into contracts which it could not fulfill, and under one of these it apprehended a serious liability for damages. A special meeting of the stockholders was held under these circumstances, and the principal creditor, Mr. Bolte, offered to take over the assets of the company in satisfaction of its indebtedness to him, and to assume all the liabilities of the company and to guarantee protection to the individual stockholders against their stockholder's liability. A modification of this offer was tendered by the stockholders and accepted by Mr. Bolte. Under this modified agreement, all of the assets of the corporation were to be made over to Mr. Bolte and retained by him under his guaranty, saving two notes and their proceeds; one of these being the note of the defendant here in suit. Touching these notes and their proceeds, it was agreed that Bolte should transfer them to respondent, as trustee for all the shareholders of the company, excepting himself. The proceeds of the notes when collected were to be distributed ratably amongst all the stockholders saving himself. The appellant as a stockholder executed this agreement, and two-thirds of the stockholders joined therein. The note was indorsed by Bolte to the respondent after maturity, and respondent's title to the note and his right to proceed in this action, which is for the collection of it, is based wholly upon the agreement above set forth between Bolte and the stockholders of the corporation.

The defense to the action was that this agreement between Bolte and the stockholders was void, in consequence of which this respondent acquired no title to the note. The court found and concluded that the trust agreement was violative of section 309 of the Civil Code, but that appellant, maker of the note, who as a stockholder had entered into the agreement, was estopped to deny its validity. It therefore gave judgment accordingly, from which judgment this appeal is taken.

[1] The language of our law and of our decisions permits of no doubt but that this attempted method of distributing a portion of the capital stock of the corporation was illegal and void. Section 309 of the Civil Code forbids it. Section 560 of the Penal Code condemns it as criminal. Such an act of distribution is not permitted, whether attempted by the directors, the stockholders, or both. Kohl v. Lilienthal, 81 Cal. 385, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520; Kreamer v. Earl, 91 Cal. 112, 27 Pac. 735; Tapscott v. Mexican, Colorado, etc., Co., 153 Cal. 667, 96 Pac. 271; Burne v. Lee, 156 Cal. 228, 104 Pac. 438.

[2, 3] The conclusion is therefore not to be avoided that, in so far as this trust agreement contemplated the division by the respondent of the proceeds of these notes, the agreement itself was illegal and void, as the court found. But does this conclusion vitiate the whole contract and thus destroy plaintiff's right of action? We think not, and our conclusion is based upon the fact that the agreement between Bolte and the stockholders contains two severable and distinct objects. It is both familiar and declared law (Civ. Code, § 1599) that where a contract has several distinct objects, of which one at least is lawful and one at least is unlawful, the contract is void as to the latter and valid as to the rest. Here the essence of the agreement between the parties was that Bolte would take not all, but only a part, of the assets of the corporation for the considerations which in turn he would give. The assets which were to remain in the corporation were these promissory notes. But instead of permitting the legal title to remain in the corporation, the devious method of collection through a trustee was agreed upon, and only after collection was the duty imposed upon this trustee of a ratable distribution of the assets. It would seem to be quite plain herefrom that this respondent was vested with title authorizing him to reduce this chose in action to judgment and to collect that judgment. Up to that point the agreement violated no law. The forbidden step was the next separable one which he was called upon to take—the ratable distribution of the fruits of his judgment. An effort upon the part of this trustee to execute this void and illegal trust could, at the instance of any party in interest, be stopped. But there is nothing, as we construe this contract, which prevents the trustee from collecting the amount due upon the promissory note, which amount becomes an asset of the corporation for disposition under the law. Wherefore it would become the trustee's duty upon collection to pay the moneys over to the corporation, or, if this were impracticable, to seek the aid of a court of equity for its final disposition.

[4] Appellant's position is sound that he is not estopped, by virtue of his written assent to this illegal contract, from urging its invalidity here. No ratification or attempted ratification can validate such a contract as this, denounced by both our civil and our criminal law, nor silence an objector to its enforcement, even though he may originally have assented thereto. Visalia, etc., Co. v. Sims, 104 Cal. 326, 37 Pac. 1042, 43 Am. St. Rep. 105; Colby v. Title Ins. & Trust Co., 160 Cal. 632, 117 Pac. 913, 35 L. R. A. (N. S.) 813, Ann. Cas. 1913A, 515; Pomeroy Eq. Jur., sec. 805.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

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174 Cal. 556

HUGHES v. WARMAN STEEL CASTING CO. (L. A. 3853.)

(Supreme Court of California. March 9, 1917.)

1. NEGLIGENCE ⟹108(1)—PLEADING—MATTERS OF FACT.

It is well settled that negligence may be charged in general terms, and an allegation that what was done by defendant was done negligently, and that such negligence caused or contributed to plaintiff's injury, is sufficient.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 174, 180.]

2. MASTER AND SERVANT ⟹258(18)—SERVANT'S INJURY — COMPLAINT — DANGEROUS METHOD OF WORK.

A complaint charging that method of trimming nails from castings with a chisel and sledge "was dangerous," and that employer was negligent in adopting such method, as a result of which plaintiff was injured, describing the manner of the injury was sufficient, and was not bad for alleging conclusions of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 833.]

3. APPEAL AND ERROR ⟹1061(3)—QUESTION PRESENTED—MOTION FOR NONSUIT.

Where there is evidence to sustain a verdict, it is immaterial as to the court's ruling on a motion for nonsuit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4210.]

4. MASTER AND SERVANT ⟹278(4)—SERVANT'S INJURY—SUFFICIENCY OF EVIDENCE—DANGEROUS METHOD OF WORK.

Evidence that employer directed employé to trim nails from castings with a chisel and sledge, which caused nails to fly in every direction, causing employé's injury, *held* to justify jury's finding of employer's negligence, although this method of work was used in other foundries, but another simple and safe method existed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 960.]

5. Master and Servant ⇨105(1)—Duty to Furnish Safe Appliances.

While employer need not furnish employé with latest, safest, and best appliances, he must furnish such as are reasonably safe, and it is not sufficient to merely use the same method used elsewhere, when to a reasonable man it is evident that such method is dangerous, and that by exercise of ordinary care a safer method may be adopted.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 185, 191.]

6. Master and Servant ⇨270(11)—Duty to Furnish Safe Appliances—Question for Jury.

In determining whether an employer has exercised reasonable and ordinary care in adopting a method of work, the jury may consider methods adopted elsewhere, although this is not controlling, and the particular circumstances of the case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 921.]

7. Master and Servant ⇨262(4) — Servant's Injury—Necessity of Pleading Contributory Negligence.

Contributory negligence of an employé alleged to have caused his injury is an affirmative defense, and must be specially pleaded.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 859.]

8. Master and Servant ⇨262(4)—Servant's Injury—Contributory Negligence.

Where employer denied all negligence, and pleaded that employé's injury was caused by latter's negligence, although called a special defense, was an affirmative charge available under the general issue without special plea, and was not a plea of contributory negligence, and evidence regarding it could be considered with all other evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 859.]

9. Master and Servant ⇨289(28)—Servant's Injury—Question for Jury—Cause of Injury.

Where evidence was conflicting as to whether employé stood directly in front of his work while trimming nails from castings, and as to direction in which nails flew when cut, question of employer's liability for employé's injury was for the jury, and did not sustain employer's contention that injury was caused solely by employé's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1120.]

10. Evidence ⇨194—Servant's Injury—Demonstrative Evidence—Safe Appliances.

Where an employé claimed employer's negligence in not furnishing safe appliances for trimming nails from castings, clippers, and shears which might have been safely used for the work were properly admitted in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 679.]

11. Evidence ⇨508—Expert Testimony—"Science, Art or Trade."

The question of whether it was "possible" for an employé to be struck by a cut nail while standing at side of casting which he was trimming, was not a question of "science, art or trade" within meaning of Code Civ. Proc. § 1870, subd. 9, allowing expert opinion in such cases, and exclusion of such evidence was proper where witnesses were allowed to state the effect of trimming nails and the direction they would fly.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2311.

For other definitions, see Words and Phrases, First and Second Series, Science.]

12. Master and Servant ⇨293(7)—Servant's Injury—Instructions—Duty to Furnish Safe Appliances.

Instruction regarding employer's duty to furnish reasonably safe appliances for employé's work, *held* proper in view of the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1150.]

13. Master and Servant ⇨356—Employers' Liability Act—Assumption of Risk.

Employers' Liability Act (St. 1911, p. 796) § 1, eliminating defense of assumption of risk, provides a rule of substantive law governing all employers and employés, whether both have elected to come under the act or not, and instruction to this effect was proper.

Department 2. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by J. Walter Hughes against the Warman Steel Casting Company. Defendant appeals from judgment for plaintiff, and from order denying new trial. Affirmed.

William H. Fuller, of Los Angeles, for appellant. Joseph Scott, of Los Angeles, for respondent.

LORIGAN, J. This action was brought to recover damages for personal injuries to plaintiff, who had a verdict and judgment for $3,000. Defendant appeals from the judgment and an order denying its motion for a new trial.

Several grounds are urged by defendant for a reversal:

1. It is insisted first that the court erred in overruling its demurrer to the complaint which was made both general and special.

The complaint alleged that defendant conducted a foundry at Redondo Beach, Cal., and manufactured, among other things, steel castings, and the plaintiff was employed therein as a laborer; that a part of his duties consisted for a couple of hours a day in swinging a sledge or hammer to trim nails from steel castings in which, when moulded, the heads of nails were embedded, leaving the points and remaining parts of the nails projecting outward from the castings; that to trim such nails it was customary at the plant of defendant for one man to hold the point of a cold-chisel against the nails to be cut while another struck the chisel with a sledge or hammer, cutting the nail and causing it to fly from the casting; that said method of trimming nails from castings was a dangerous method, well known to be such by defendant, but which method defendant ordered plaintiff to use without taking any means or steps to protect said plaintiff from harm and injury; that the use of a heavy sledge, instead of a lighter hammer, in such trimming, is dangerous and causes the nails to fly from said casting with greater velocity than when a lighter hammer is used; that defendant, with full knowledge of these facts, directed and caused plaintiff to use a sledge in performing such labor; that defendant knew that the occupation of defendant was unsafe and dangerous to him, but with full knowledge of this fact permitted and caused plaintiff to continue said work without using any means or protection to lessen said danger; that plaintiff was an ordinary, and not a skilled, laborer, and did not appreciate the real danger connected with his employment; that on April 9, 1913, when plaintiff was regularly engaged in the performance of his duties in trimming nails from said castings and in swinging a sledge hammer for that purpose in accordance with the order of defendant, and was using due care, one of the nails cut from said casting flew with great velocity therefrom, embedding itself in the left eye of plaintiff, whereby the sight thereof was destroyed, necessitating the removal of said eye; that said injury was caused solely by the failure of defendant to provide a safe, sufficient, and suitable place for plaintiff to work in, and a failure of defendant to furnish plaintiff with safe and suitable tools with which to labor.

Error of the court in overruling the demurrer of defendant is based on its contention that while the complaint charges that defendant was negligent in providing a safe, sufficient, and suitable place for plaintiff to work, and was further negligent in providing plaintiff with safe and suitable tools with which to labor, there are no averments of facts showing in what particular the defendant was negligent in either respect; that the allegation that the method adopted by defendant for trimming nails from castings which plaintiff was ordered to follow was dangerous, is a conclusion of law and not an averment of any fact from which the court can determine whether the method of defendant was dangerous or not.

[1] It is well settled in this state that negligence may be charged in general terms. It is sufficient to allege that what plaintiff claims was done by defendant was done negligently by him, and that it appears from the allegations of the complaint that the negligence caused or contributed to the injury of plaintiff. Smith v. Buttner, 90 Cal. 96, 27 Pac. 29; House v. Meyer, 100 Cal. 592, 35 Pac. 308; Champagne v. A. Hamberger & Sons, 169 Cal. 683, 147 Pac. 954.

[2] While the complaint in this case charged negligence on the part of defendant in furnishing plaintiff with a safe and suitable place to work, it is likewise charged that the injury he received was due to the negligence of the defendant in failing to furnish him with safe and suitable tools and appliances with which to perform the labor assigned him, and it is apparent that the particular negligence to which the allegations of the complaint were directed was of the latter character; that the negligence of the defendant consisted in requiring and directing plaintiff to use a dangerous and unsuitable method in trimming nails from castings. As to this, it will be observed from an examination of the matters in the complaint as we have epitomized them above that the method of trimming nails is described; it is alleged that this method is dangerous and describes in what respect it is dangerous; alleges that defendant in adopting the method was negligent, and that as a result of such negligence plaintiff was injured and describes the manner in which the injury occurred. None of these were conclusions of law, but were allegations of facts upon which negligence on the part of defendant is charged. The demurrer was properly overruled.

Its demurrer having been overruled, defendant answered, denying the material allegations of the complaint, and as special defenses set up: First, that any injury sustained by plaintiff was the proximate result of his own negligence and carelessness, particularly, in standing in front of the casting which he was trimming instead of standing at the side, where, defendant alleged, he was ordered to stand; and, second, that the plaintiff entered upon the work of cutting said nails with knowledge of the dangers, and hence assumed the risk incident to such work.

[3] 2. As to the alleged errors committed during the trial of the cause: The court denied a motion of defendant for a nonsuit made at the close of the evidence of plaintiff. We do not think it necessary to give this point any particular consideration. If there was evidence presented on the trial of the whole case to sustain the verdict rendered, it is immaterial as to the ruling of the court on the motion for nonsuit, and whether there was such evidence is one of the points made on this appeal next to be considered.

[4] 3. Now, as to the claim that the evidence was insufficient to justify the verdict: As has been stated, the negligence complained of was in putting plaintiff to work cutting these nails from the castings without taking any measures or steps to protect him from harm and injury while doing so, and further in not providing plaintiff with safe and suitable tools with which to work. The evidence shows that plaintiff and his companion were placed at such work by the manager of defendant, and directed to use a sledge eight or ten pounds in weight to strike the cold-chisel against the nails, principally 6 and 8 penny nails, in some instances 20-penny spikes, with instructions to hit hard, but to avoid shooting the nails in the direction of a window (broken), as they might hit the moulders working there. When placed at work plaintiff was told to stand at the side of the casting, and he would not be injured. In working under this method the severed nails would fly in all directions—sometimes 20 feet—"just go wild," as one

witness described it, striking the windows and doors and walls of the working room. It was in evidence that if instead of being required to use a heavy sledge the plaintiff had been furnished with a lighter hammer, the method would not have been so dangerous as the nails would not fly with such force; that a net or shield or sacking placed against the direction the nail would fly would have removed the danger by retarding its flight, and that aside from this, certain cutting appliances—cutters and shears which were exhibited to the jury and introduced in evidence—could be readily obtained at small expense with which all these nails could be readily pinched or cut off flush with the casting, in effect, producing as clean and finished a job as that accomplished by the use of the sledge and cold-chisel and without any danger from the work. It was at the commencing of his work on a particular casting on April 9, 1912, that plaintiff was hurt. The casting was on the ground, leaning up against an anvil, and it was immediately after the first nail was struck off from the casting by plaintiff in pursuing the method directed with a sledge and cold-chisel that he felt the sting in his eye and pulled the nail out of it. The result was the permanent loss of the left eye and the impairment of the vision of the other to an extent, as testified by plaintiff, that he is just able to get about. It does not appear exactly how the nail came to hit the plaintiff. It may have flown directly from the casting or rebounded from the anvil which was near it, or from some other object in the room. There was testimony introduced by defendant contradictory of the testimony of plaintiff and his witnesses as to essential issues in the case, it being testified to by the witnesses for defendant that the method used by it—the sledge and cold-chisel—in cutting the nails from the castings was that adopted for similar work in foundries on this coast and in some of the Eastern States where the witnesses had worked.

[5] The contention of the defendant that the verdict was not sustained by the evidence is really based on the theory that when it is shown that a method adopted in doing a certain kind of work is that usually employed elsewhere in doing it that the employer is excused from adopting any other or different method. This is not the rule. It is, of course, true that the employer is not bound to supply his employé with the latest, safest, and best tools or appliances that can be secured. What he is required to do is to furnish such tools and appliances as are reasonably safe in pursuing the method of work he assigns his employés to perform. But it is not a sufficient answer in an action for negligence for the employer to say that he uses the same method or ways used by employers elsewhere when as a reasonable man it is evident not only that the method so used is dangerous, but that by the exercise of ordinary care safer tools may be used in doing the work and a safer method adopted.

[6] The question always is, Did the employer exercise ordinary and reasonable care in adopting the method he set his employé to pursue in doing his work? In determining this the jury may take into consideration methods adopted elsewhere, but they are not controlling in the matter of reasonable care; that is to be determined from all the circumstances of the employment—the tools or appliances used, the method pursued, the attendant risks; whether there are other tools and appliances in general use which are adapted to perform the work with a lesser or entire removal of danger. Having all these matters before it, it is for the jury to say whether the employer exercised ordinary care or not in pursuing the method whereby the employé was injured. In this case the jury has held that such reasonable care was not exercised, and, adopting as true, as it undoubtedly did, the testimony presented on behalf of the plaintiff, it cannot be said that their conclusion was not justified.

[7-9] 4. It is contended by defendant under its special defense interposed in that regard that the evidence shows that the injury to plaintiff was entirely caused by his own negligence. This, of course, is not a plea of contributory negligence on the part of plaintiff. Such a defense is an affirmative one and must be pleaded. No attempt to plead it appears in this case. Crabbe v. Mammoth Channel G. M. Co., 168 Cal. 500, 143 Pac. 714. Defendant having in its answer denied all negligence on its part, this plea, though denominated a special defense, is simply an affirmative charge of negligence on the part of plaintiff which was available under the general issue without special plea, and the evidence respecting it would have to be considered with all the other evidence in the case in determining whether it justified a verdict for the plaintiff, which the jury, of course, did. This might dispose of this point made by defendant, but as its position under it will not involve much time to consider, we will take it up. In support of the special defense defendant insists that the evidence clearly showed that plaintiff's injury was proximately caused by his own negligence, and that he must have been standing and working, not on the side of the casting where he had been instructed by defendant to stand, but in front of the casting where it is always dangerous; that the evidence shows that the nails always fly straight out from the position in which the cold-chisel is held, and therefore plaintiff must have been standing directly in front of the casting and in a position of danger from the flying nails. But the evidence shows no such clear or unquestioned condition as defendant claims. There was testimony, it is true, introduced on the part of defendant that plaintiff was working standing in front of the casting at the time of his injury, but there was also testimony

that plaintiff was not doing so, but was standing at the side of the casting and working there as he had been directed to do, and that instead of its being true that the nails flew straight out from the casting they flew in all directions. The jury, doubtless, as they had a right to do, accepted this testimony on the part of plaintiff.

[10] 5. As to certain alleged errors of law committed by the court in the admission or rejection of testimony: It was not error for the court to admit in evidence certain appliances offered by plaintiff. These consisted of a pair of shears and a pair of clippers. The claim of negligence by plaintiff against defendant was that defendant failed to supply him with proper appliances and suitable tools to do the work assigned him. The offer of the shears and clippers was in connection with testimony showing that these tools could be readily obtained which would be suitable and less dangerous in doing the work.

[11] Exception was taken to the ruling of the court sustaining objections to inquiries made of expert witnesses called by defendant as to whether it is "possible" or whether it is a "physical impossibility" for a nail flying from a casting to hit a man standing at the side of it. It is insisted by defendant that such testimony was admissible as on a question of "science, art or trade" and provided for by subdivision 9 of section 1870 of the Code of Civil Procedure. We perceive no error in the ruling. All these witnesses were permitted to testify as to what was the effect of cutting nails as plaintiff was engaged in doing, in what direction they would fly, and whether from the observation of the witnesses or their experience they would fly in any other than a particular direction. It was not matter of expert evidence, however, whether it was "possible" or not for plaintiff to be struck by a cut nail while working at the side of a casting. That was not a question of "science, art or trade." It was one of the essential facts to be determined by the jury and to be determined not from the opinion of experts as to whether it was "possible" or not, but whether, in the judgment of the jury from all the evidence given in connection with the work, including the direction which the testimony showed the nails would or would not fly, the plaintiff could have received the injury, as he claimed he did, while standing on the side of the casting.

[12] 6. It is next insisted that the court erred in certain instructions to the jury. It is claimed that the effect of one of the instructions was to tell the jury that if defendant failed to furnish plaintiff reasonably suitable and safe appliances to do the work he was ordered to do, or with instruments in themselves unsafe either because other appliances to render them safe were not furnished with the tools, plaintiff was entitled to recover. But this does not fully state the instructions. They were more explicit. The court told the jury that it was the duty of the employer to furnish the employé suitable and reasonable tools to do the particular work he is engaged in, and that the servant has a right to rely on this duty being discharged by the employer; that the use of like tools in other establishments is a circumstance to be taken into consideration by them in determining the care which the employer used in that regard, but that it was not, however, the sole test; that the real test was whether they were such as a reasonable prudent and careful man under like circumstances and having a proper regard for the safety of his employé would have furnished. Further, that if the jury found that defendant had exercised such care as men of ordinary prudence and intelligence ordinarily exercised under like circumstances and conditions in view of the character of the work to be done, that defendant had done all that was required of him, and plaintiff could not recover. If, however, they found that defendant failed to furnish suitable reasonably safe tools for the work plaintiff was put at, or ordered plaintiff to do it with instruments unsafe for the work either in themselves or because some other appliances or contrivances to render them safe were not furnished with them, and if, in so doing, defendant failed to use reasonable care for the protection of plaintiff and on account of such failure plaintiff was injured, plaintiff was entitled to recover. We perceive nothing wrong with these instructions. In fact, the complaint of defendant is not so much directed to an attack on the legal principles involved in the instructions as to a claim that there was no evidence in the case of negligence on the part of defendant to which they were applicable. But as we have heretofore discussed the sufficiency of the evidence and found it sufficient, nothing more need be said as to this point on the instructions.

[13] As to a further instruction complained of respecting assumption of risk—a defense interposed by defendant: When the injury to plaintiff occurred on April 9, 1913, the Employers' Liability Act of 1911 (Stats. 1911, p. 796) was in force. Section 1 of that act provided (stating only its terms pertinent here) that in any action for personal injury sustained by an employé in the course of his employment in which recovery is sought on the ground of want of ordinary or reasonable care on the part of the employer, it shall be no defense that the employé either expressly or impliedly assumed the risk of the hazard complained of. The court in harmony with these provisions of the act instructed the jury that under said Employers' Liability Act, the defense of assumption of risk or hazards of the work did not apply; that it was no bar to recovery on account of injury caused by the use of unsafe tools or appliances that plaintiff merely with knowledge

of their lack of safety accepted or continued the employment. The provisions of the Employers' Liability Act warranted this instruction by the court. This section 1 as to all defenses which are mentioned therein, including the defense of assumption of risk, declared rules of substantive law which applied in all actions brought by employés against employers. It is claimed by defendant that the act has no application between employers and employés, unless where both parties had elected to come under its provisions. There is nothing in this point. The act, as far as the defense of assumption of risk (the only one we are now considering) is concerned, applies to all employers and employés and in all actions where the negligence of the employer is the basis of the suit by the employé. As we have said section 1 lays down rules of substantive law governing all actions by employés against employers for injuries resulting from the negligence of the employer. It is only as to other matters that the election of the parties to come within its terms have relation.

While other points are made by the defendant, we think it is unnecessary particularly to refer to them. We have examined them, but do not perceive that any of them have merit sufficient to require discussion.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; MELVIN, J.

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174 Cal. 513

SMITH v. JONES et al. (L. A. 3816.)

(Supreme Court of California. March 7, 1917.)

1. JUDGMENT 🔑135—VACATION OF DEFAULT—RIGHT TO RELIEF.

Although record shows that defendant was personally served with process and defaulted, the judgment may be set aside by motion either under Code Civ. Proc. § 473, for mistake, inadvertence, surprise, or excusable neglect, or independently of statute for lack of due process of law, if timely made; but if not made within reasonable time the party is remitted to his equitable action to declare judgment void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 246, 247.]

2. JUDGMENT 🔑143(3)—VACATION OF DEFAULT—"MISTAKE, INADVERTENCE, SURPRISE OR EXCUSABLE NEGLECT."

Code Civ. Proc. § 473, allowing vacation of default judgment when taken against a party through "mistake, inadvertence, surprise or excusable neglect," does not include defendant's failure to appear when not served with process.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 272.

For other definitions, see Words and Phrases, First and Second Series, Mistake.]

3. JUDGMENT 🔑153(2)—VACATION OF DEFAULT—REASONABLE TIME.

In view of Code Civ. Proc. § 473, allowing one year to vacate default judgment for nonservice of process in certain cases, any motion to vacate judgment, whether under that section or not, must be made within that time; the statutory requirement being used to define the maximum "reasonable time."

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 300.]

4. JUDGMENT 🔑177—ORDER VACATING DEFAULT—OBJECTIONS.

Where judgment roll showed by affidavit that defendant was personally served, which was denied by defendant's affidavit filed with motion to vacate, and where plaintiff appeared at hearing of motion and prepared bill of exceptions to Court's order vacating judgment, it cannot be said that the fact of nonservice was uncontradicted, or that plaintiff did not object to the motion, and hence that order vacating judgment was proper, although motion was not made within a reasonable time, as defined by Code Civ. Proc. § 473.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 258.]

Department 2. Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Suit by J. H. Smith against Frank F. Fisher and others. Default judgment for plaintiff, and upon motion of defendant named, judgment set aside, and plaintiff appeals. Reversed.

Chas. S. McKelvey, of Los Angeles, for appellant. Conner, Heath & Maxwell, of Los Angeles, for respondent.

LORIGAN, J. Plaintiff sued to quiet his alleged title to a tract of land in Los Angeles county, and, among a large number of other defendants, was the respondent Frank F. Fisher. Summons was issued in the action running to said Fisher among the rest, and one George S. King subsequently filed an affidavit that he had personally served said Frank F. Fisher with a copy of the summons and complaint in the action in Los Angeles county on April 9, 1912. The default of said Fisher was thereafter taken, and on May 11, 1912, a judgment was entered against him in favor of the plaintiff quieting the title of the latter to the land described in the complaint. On September 5, 1913, said Fisher, through his attorneys and upon notice given to plaintiff, moved the trial court in which said judgment had been entered to set aside the default and vacate the judgment on the ground that said Fisher had never been served in said action. In support of the motion an affidavit of Fisher made in the state of Illinois was filed. In this he swore, among other things, that he had not been served with summons in said action at any time, or at all, in Los Angeles, or elsewhere; that he was not in the county of Los Angeles, or in the state of California during the year 1912, and that he had no knowledge of the pendency of the action until about a year after the rendition of the judgment against him. The motion was heard on this affidavit and the judgment roll in the case, nothing further being presented, and the court thereafter made an order setting aside the default and the judgment. Plaintiff appeals.

The only question on this appeal is as to the power of the trial court to make the order involved here. Appellant insists that it had no such power on account of the lapse of time intervening between the entry of the judgment and the motion to set it aside. It will be observed that the motion was made more than a year after the entry of the judgment. It is not contended, as of course it could not be, that the judgment entered in this action against defendant was valid upon its face. What is claimed is that though so appearing on its face it was in fact void because the affidavit of service by King was false; that no summons had ever been served upon respondent, and hence the court was without jurisdiction to pronounce judgment against him.

[1] Undoubtedly, though it appear from the record of a judgment entered upon a default that service was made upon a defendant, and hence a judgment against him is valid upon its face, it is well settled that such a judgment may be set aside on motion either under section 473 of the Code of Civil Procedure on any of the grounds therein specified, or independent of that section where, as here, the motion is made upon the ground that its entry was based solely on a false return of personal service upon the defendant. But in order to invoke the power of the court to set a judgment aside on the ground that it was entered against a party defendant without service of process on him at all, the motion must be made within a reasonable time, or the right to make it is lost, and the party is remitted to an action in equity to have the judgment declared void.

[2] While in this discussion we have referred to section 473 of the Code of Civil Procedure, we have, however, only done so as bearing on the further consideration of the question whether the motion of defendant was made within a reasonable time, because this application to set aside the judgment is not made under said section 473. That section provides for relief upon motion when the judgment is taken against a party through "mistake, inadvertence, surprise or excusable neglect." Not having been served with process, and hence having no knowledge that he was required to appear, the failure of respondent to do so cannot be said to arise from any mistake, inadvertence, surprise, or neglect on his part. If respondent, as defendant in the action, had not been served with summons, he had an absolute right on motion, if timely made, to have the judgment set aside independent of section 473, or any other statute, as violative of the fundamental principle that one may not be deprived of his property without due process of law. The only condition to his right to invoke this aid of the court by a motion in the action itself is that his motion be made within a reasonable time.

[3] Was the motion here made within that time? Under the plain rule of the authorities in this state, it was not. As we have stated, the motion was not made until more than a year after the entry of the judgment. Section 473 of the Code of Civil Procedure, heretofore referred to, provides that motions made under its provisions to set aside a judgment shall be made within six months after it is taken, save when the motion is on the ground that from any cause the defendant has not been personally served with summons, when one year is allowed within which to make it. Whether the latter provision would apply in a case like this (Baker v. Riordan, 65 Cal. 368, 4 Pac. 232; Young v. Fink, 119 Cal. 107, 50 Pac. 1060) is not material here because this motion was not made within a year after the rendition of the judgment. Now while, as we have said, this motion is not made under said section 473, it has, nevertheless, been the long-settled rule in this state that in determining whether a motion to set aside a judgment, decree, or order made independent of said section is presented within a reasonable time, the period fixed in said section within which motions under it may be made is the standard or criterion in all cases. And so as to motions such as the one here made, based on the ground that no service of process was made on the defendant, it is expressly held that in no case can the time of making them be extended beyond the time limit specified in section 473 for making similar motions under that section. Estate of Eikerenkotter, 126 Cal. 54, 58 Pac. 370; Norton v. A. T. & S. F. R. R. Co., 97 Cal. 388, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198; People v. Temple, 103 Cal. 447, 37 Pac. 414; People v. Dodge, 104 Cal. 487, 38 Pac. 203; Young v. Fink, supra; Canadian, etc., Co. v. Clarita, etc., Co., 140 Cal. 672, 74 Pac. 301. Hence as this motion was made more than a year after the entry of judgment it was under these authorities made too late

[4] It is contended, however, by respondent that if by analogy the limitation of time specified in said section 473 be applied, yet the order made here may be sustained on another principle of law which he invokes. This is that when on a motion of this character an affidavit is filed showing that no service at all was made on a moving defendant, and no evidence is produced countervailing this showing, and no objection or exception is taken to the introduction of such testimony, the fact is then established without controversy and a simple question of law is thus presented, and such condition of undisputed facts establishes a judgment just as void as if its invalidity appears on the face of the judgment, and like such a judgment may be set aside at any time when the uncontroverted fact of the failure to serve process shows that the court was without jurisdiction to pronounce the judgment, citing Hill v. City Cab, etc., Co., 79 Cal. 188, 21 Pac.

728; People v. Harrison, 107 Cal. 541, 40 Pac. 956. But our examination of those cases shows a different condition from that presented here. Here the claim of respondent that no personal service was made on him does not stand uncontroverted. It appears from the judgment roll by the affidavit of King that defendant was personally served with process in the action, and the judgment so recites. It thus affirmatively appears from the judgment that the defendant was served. This fact he denies by his affidavit filed on the motion. But, certainly, there is thus presented a controverted fact of service and not an uncontradicted proof of nonservice, as claimed by respondent. Nor is there anything to show that the hearing was without objection or exception on the part of plaintiff. It was not necessary for him to file any written objection or exception to the proceeding. It is shown in the record that he appeared to the motion at the hearing, and in due course prepared a bill of exceptions, upon which he presents the ruling of the court here. He does not appear to have admitted anything or to have waived any legal rights to attack the order made.

Under the views expressed, the motion of respondent to set aside the judgment was made too late, and for that reason the court had no power to make the order. Under such circumstances the respondent is required to seek whatever relief he is entitled to through an independent action in equity to set aside the judgment for want of jurisdiction in the court to pronounce it. Brackett v. Banegas, 116 Cal. 278, 48 Pac. 90, 58 Am. St. Rep. 164; Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007.

The order appealed from is reversed.

We concur: MELVIN, J.; HENSHAW, J.

174 Cal. 518

SMITH v. BRATMAN et al. (L. A. 3818.)

(Supreme Court of California. March 7, 1917.)

1. Judgment ⟹153(2)—Vacation of Default—"Reasonable Time."

A default judgment not void upon its face may be set aside on motion for lack of personal service if timely made, and a "reasonable time" is that allowed by Code Civ. Proc. § 473, for such motions in other cases, regardless of whether the motion is made under that statute.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 300.

For other definitions, see Words and Phrases, First and Second Series, Reasonable Time.]

2. Judgment ⟹173—Vacation of Default—Terms.

The fact that in vacating a default judgment no terms were imposed as provided by Code Civ. Proc. § 473, did not invalidate the order, since the motion was not made under statute, but on the ground that defendant was being deprived of property without due process of law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 340.]

Department 2. Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Suit by J. H. Smith against Frank F. Fisher and others. Default judgment for plaintiff, and upon motion of defendant named judgment set aside, and plaintiff appeals. Affirmed.

Chas. S. McKelvey, of Los Angeles, for appellant. Conner, Heath & Maxwell, Dennison & Towner, and Carter, Kirby & Henderson, all of Los Angeles, for respondents.

LORIGAN, J. The actual parties in this appeal are the same as in the case of Smith v. Jones (No. 3816) 163 Pac. 890, this day decided, and a similar question is presented for consideration, though under different circumstances.

Plaintiff brought suit against a large number of defendants to quiet his alleged title to several tracts of land in Los Angeles county, had summons issued therein, and thereafter an affidavit of one V. Mayer was filed in the action in which she swore that she had personally served Frank F. Fisher, one of the defendants in the action, with a summons and copy of the complaint therein in Los Angeles county on March 21, 1913. Subsequently, an affidavit of service by him of said process on another of the defendants in the action—Mrs. Robert Bowen—in the county of Los Angeles on March 25, 1913, was made by one George B. King, and filed. Thereafter, the defaults of these two defendants were entered, and on May 9, 1913, a decree quieting the title of plaintiff to the property against both said defendants was entered. On September 15, 1913, on notice to the plaintiff, said defendants, Fisher and Mrs. Bowen, made a motion in the action in which the decree was entered to have it vacated and set aside on the ground that the affidavits of service upon them of summons and complaint in the action were false; that no service whatever had been made upon them; that hence the court had not acquired jurisdiction to pronounce a decree against them; and that the decree attempted to be pronounced was therefore void. In support of their motion said defendants each filed a separate affidavit. Mrs. Robert Bowen swore in her affidavit, made July 15, 1913, that she was the owner in fee of land described in the complaint, and that she was a resident of Mesa, Maricopa county, Ariz., and that she had not been in Los Angeles county for 4½ years last past; that she had never been served with summons in said action in Los Angeles county, or anywhere else, and had no knowledge of the pendency of any such action until after the entry of the decree therein. Frank F. Fisher, in his affidavit, swore that for a number of years past he had been the owner of other property described in the complaint;

that he had not been served on March 21, 1913, or at any other time, personally, or at all, in Los Angeles county, or elsewhere, with summons in said action; that he was not in the county of Los Angeles during the year 1913, but that during all of said year was without the state of California; that he knew nothing of the pendency of said action until after the rendition of the decree therein. The court granted the motion, and set aside the decree as to both defendants. Plaintiff appeals.

As far as this appeal affected the respondent Mrs. Bowen, we shall have no occasion to consider it, because pursuant to stipulation between her and the plaintiff the appeal as to her was dismissed by order of this court. We shall therefore consider the order appealed from only as it affected the decree entered against the respondent Fisher.

[1] It is not claimed by appellant but that the showing upon which the court made the order setting aside the decree was sufficient to warrant it in doing so. This being true, we perceive no legal ground which can be urged against the validity of that order. While it is well settled that a judgment which is not void upon its face (and the decree here was of that character) may not be set aside on motion unless made within a reasonable time, it is equally well settled that when the application to vacate and set aside a judgment is made within a reasonable time after its rendition, and is based upon a sufficient showing, it is within the power of the court, and it is its duty, to set it aside. What is a reasonable time within which to make such a motion has been clearly laid down in this state as being the same time that is allowed for motions which are permitted to be made under section 473, Code of Civil Procedure. While the motion here was not made under that section, but independent of it, as is pointed out in Waller v. Weston, 125 Cal. 201, 57 Pac. 892, which involved a similar motion, nevertheless, it is held that motions to set aside orders, decrees, or judgments which are not void upon their face, whether made under said section 473, Code of Civil Procedure, or not, must be made within six months, as provided in that section, after the entry of such order, judgment or decree. Estate of Eikerenkotter, 126 Cal. 54, 58 Pac. 370. See, also, Norton v. A. T. & S. F. R. R. Co., 97 Cal. 388, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198; People v. Temple, 103 Cal. 447, 37 Pac. 414; Canadian, etc., Co. v. Clarita, etc., Co., 140 Cal. 672, 74 Pac. 301. It will be observed that the motion in this case was made within six months after the entry of the decree. It was, hence, made within time, and a sufficient showing in the judgment of the trial court having been made to warrant it, the order setting aside the decree must be sustained. Waller v. Weston, supra.

[2] It is insisted by appellant that the order is erroneous because the court should in granting the motion have imposed terms upon the respondent—the payment of the accrued costs in the action—citing Heermanr v. Sawyer, 48 Cal. 562. This authority has no relevancy. It relates to motions made solely under section 473, Code of Civil Procedure. Respondent was not proceeding in this motion under that section. He was not asking to be relieved on terms from some oversight or neglect on his part to appear to the action after service. He was asserting a right independent of statute; that he could not be deprived of his property by judgment or by decree entered against him without due process of law; and that as no service of process had been made upon him the court never acquired any jurisdiction to pronounce a decree against him. His application being made timely, and his showing of nonservice of process on him sufficient, he had an absolute right to have the judgment annulled without the imposition of any terms or conditions whatever. Waller v. Weston, supra.

The order appealed from is affirmed.

We concur: MELVIN, J.; HENSHAW, J.

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174 Cal. 521

PURDY v. JOHNSON et al. (S. F. 7010.)

(Supreme Court of California. March 7, 1917. Rehearing Denied April 4, 1917.)

1. TRUSTS ⚷331—ACCOUNTING—ESTOPPEL—WAIVER OF ADJUDICATIONS.

In a beneficiary's action against testamentary trustees, where defendants joined with plaintiff in asking that every item involved in their management of the trust estate be investigated, that their annual accounts be set aside, and a new account stated, by their answer defendants waived any right to stand upon the settlement of their annual accounts as a conclusive adjudication of the matters embraced in the decrees of settlement.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 494.]

2. TRUSTS ⚷305—TRUSTEE'S DUTY TO ACCOUNT.

Trustees are under obligation to render to their beneficiaries a full account of all their dealings with the trust fund, and where there has been a negligent failure to keep true accounts, or a refusal to account, all presumptions will be against the trustee on settlement.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 421–426.]

3. TRUSTS ⚷305—ACTION AGAINST TRUSTEE—ACCOUNTS—BURDEN OF PROOF.

In a beneficiary's action against testamentary trustees, where, by their answer, defendants asked an entire new accounting, to supersede the previous settlements of their accounts, the burden of proof was not on the plaintiff to point out the particulars in which their account was erroneous, and she was not bound to go forward and establish affirmatively the impropriety of the charges and credits which she assailed; the burden being on defendants to prove that the charges made by them were proper.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 421–426.]

4. Trusts 🔑305—Action Against Trustee—Accounts—Findings.

In a beneficiary's action against testamentary trustees, the findings should be drawn in such manner as to disclose the particular items of the trustees' account allowed and rejected by the trial court.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 421-426.]

5. Trusts 🔑181(1) — Trustee's Duty to Collect Notes.

It was the duty of testamentary trustees to collect promissory notes distributed to them, and they were liable to the beneficiary for the amount of the notes, with interest, unless their failure to collect was not due to their fault.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 234.]

6. Trusts 🔑231(1)—Use of Trust Property by Trustee—Statute.

Under Civ. Code, § 2229, prohibiting a trustee from using trust property for his own profit, or for any purpose unconnected with the trust, testamentary trustees could not use the trust property to secure repayment of advances made by them personally, and in doing so they assumed a position antagonistic to their beneficiaries, and any advantage or profit received by them belonged to the beneficiaries.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 330, 335.]

7. Trusts 🔑183 — Trustee's Failure to Collect Rent—Duty to Account.

Where testamentary trustees rented land of the trust, but their accounts in the beneficiary's action against them showed that only part of the rent was collected, the trustees were bound to account for the balance, unless they could show some good reason for failure to collect.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 237.]

8. Evidence 🔑355(1) — Documentary Evidence—Vouchers.

Memorandum checks or tags found among the papers of a bank, and unsigned by the beneficiary of a trust, did not constitute vouchers showing payments to her by the trustees.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1484, 1487.]

9. Trusts 🔑225 — Trustees' Charge Against Estate—Interest.

If it was necessary for testamentary trustees to overdraw a trust bank account, thus in effect borrowing money from the bank, and being charged interest compounded monthly, trustees' charge for interest was a proper one against the trust estate.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 322.]

10. Trusts 🔑219(1) — Duty of Trustees Borrowing Money—Interest—Statute.

Under Civ. Code, § 2261, requiring the investment of trust money by a trustee, though trustees are not ordinarily liable for interest on moneys coming into their hands unless they have improperly failed to invest them, they are not justified in borrowing more money than they need, and charging the trust with interest on the sums borrowed, and, where they have idle money on hand, it is their duty to apply it so as to stop unnecessary interest charges.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 305, 314.]

Department 1. Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by Anita Christal Purdy against Robert F. Johnson and another, as trustees under the will of Alberto Trescony, deceased. From a judgment for defendants, and from an order denying her motion for new trial, plaintiff appeals. Judgment and order reversed.

Houghton & Houghton, of San Francisco, for appellant. Daugherty & Lacey, of Salinas, for respondents.

SLOSS, J. The plaintiff is a granddaughter of Alberto Trescony, who died testate in the year 1892. The defendants, Robert F. Johnson and Julius A. Trescony, were the executors of the will of said Alberto Trescony, and are trustees thereunder. At the close of the administration of the estate, a decree of distribution was made, whereby one-third of the residue of said estate was distributed to the defendants as trustees, in trust to manage and control the same for the use and benefit of Anita Christal (now Anita Christal Purdy), the plaintiff herein, and Leo Christal, her brother, until they should respectively reach the age of 30 years, at which time or times the trustees were to pay over to said Anita Christal or Leo Christal, or both, their respective shares of the trust property, if in the judgment of the trustees said beneficiaries should "possess such habits of industry, prudence, and economy as to render it suitable and proper and expedient that she or he shall have the control and management of her or of his property." Thereafter, there was a proceeding in partition which resulted in the setting apart to the defendant trustees of certain parcels of land in severalty in lieu of the one-third interest theretofore distributed to them.

The complaint herein, filed in November, 1911, is in two counts. The first alleges that the plaintiff has arrived at the age of 30 years, and that the defendants have informed her that, in their judgment, she possesses the necessary habits and qualifications to entitle her to her share of the trust property, but that the defendants, notwithstanding her demand of a conveyance to her of an undivided one-half interest in said trust estate, refuse to convey the same. The second count is based upon charges of misconduct and impropriety on the part of the defendants in the management of the trust estate. It is alleged that, while the defendants were acting as trustees, they filed in the office of the clerk of the county of Monterey, in which the estate of Alberto Trescony had been administered, six accounts of their transactions as trustees. Five of the said accounts were settled by the court, and no appeal had, in any case, been taken from the order settling the account, and the time to appeal therefrom had expired. The sixth account had been set for hearing at the time of the filing of the complaint. It is alleged that the first, second, third, fourth, and fifth accounts were filed and presented to the court for hearing at times when the plaintiff was out of the jurisdiction, and had no notice or knowledge of the presentation of said accounts; and that the trustees had intentionally concealed from her the fact of the filing of said accounts, and of the hearing and settlement thereof. It is charged that in each of said accounts the trustees failed to account for all of the property and moneys received by them for the use and benefit of the plaintiff. They have, it is averred, wrongfully and fraudulently mingled the trust property with their own, and have carelessly and negligently managed said trust, and so carelessly kept the accounts thereof as to deprive plaintiff of a large amount of rents, income, and assets thereof. The complaint specifies a number of instances of alleged misconduct by said trustees, consisting mainly of the renting by them to J. A. Trescony, one of the trustees, of land belonging to the estate at a rental less than that at which similar lands were rented by them to others. It is charged that the other trustee, R. F. Johnson, and his wife, have occupied and used part of the trust property without accounting to the estate therefor; that the trustees failed to credit the trust property with the full amount received from tenants upon leases of portions of the trust property; that they failed to deposit in bank funds of the trust estate, using said funds for their own benefit, and thereby overdrawing their account in bank, and becoming liable for interest for the amount of said overdraft; that they have negligently permitted fences, buildings, and other improvements on the property to become out of repair. As a result of the failure of the trustees to keep proper accounts, the plaintiff has been wrongly charged in the sixth account with a sum of money as due from her to the trustees, whereas, in fact, the trustees are indebted to her in a sum of money exceeding $7,000.

The prayer of the complaint is that the defendants be required to convey to plaintiff an undivided one-half interest in the trust property; that the orders of the superior court settling the first, second, third, fourth, and fifth accounts of the trustees be set aside; and that the defendants be compelled to account to the plaintiff for all other dealings and transactions with said trust estate.

The answer of the trustees denies all of the alleged misconduct and negligence with the exception of two items inadvertently omitted from the accounts settled by the court; alleges that the plaintiff is indebted to the defendants as trustees in a considerable sum; declares the willingness of the trustees to transfer an undivided one-half interest in the trust estate to the plaintiff upon the settlement of their accounts and payment by plaintiff to them of the sum of, approximately, $14,000, alleged to be due them for advances to her from the trust estate. The answer further denies all of the charges affecting the propriety or conclusiveness of the orders settling the first five accounts filed by the trustees, but declares that, "inasmuch as the plaintiff seems to be dissatisfied with the accounts referred to, in her complaint," the defendants join in plaintiff's prayer, and ask that the orders settling said five accounts be vacated, and that a new account be taken covering the entire period of the duration of the trust, and that, upon payment of the amount found to be due by or to the plaintiff, the plaintiff receive from the defendants a conveyance of her interest in the trust property.

The findings of the court were, in the main, in accord with the denials and averments of the answer. It is found that a true accounting between the plaintiff and said trustees shows that the plaintiff is indebted to the trustees in the sum of $8,996.17 for moneys advanced to her by said trustees, which plaintiff refused to pay, and that the protection of the defendants requires that they retain control of the trust estate until the settlement of their accounts and the payment of said balance. All of the charges of concealment, or misrepresentation, of misconduct, and of negligence, are negatived. It is found that there are some errors in the accounts filed by the trustees, but these are found to have been inadvertent, merely. There is a further finding:

> "That in all matters connected with said trust estate and the management thereof said trustees have acted with the utmost fidelity towards the beneficiaries thereof and have conducted the same with prudence and economy."

The court finds that the sum of $500 per annum is a reasonable amount to be allowed to said trustees as their compensation, this amount having been charged and allowed in the several accounts heretofore presented by the trustees.

The judgment declares that a correct accounting of the trust estate up to January 1, 1909, shows a balance of $8,996.17 due from plaintiff to defendant trustees, and that the defendants recover this sum from plaintiff; that, upon payment of said amount to the defendants, the defendants, as such trustees, execute and deliver to plaintiff a conveyance of an undivided one-half interest in the trust estate, but until such payment "said defendants as such trustees may hold and possess all of said trust estate." The plaintiff appeals from this judgment and from an order denying her motion for a new trial.

The appellant attacks these findings and conclusions in almost every conceivable particular. The record is very voluminous, and the appellant's briefs little less so. As it will not be practicable for us to follow counsel minutely into every branch of their exhaustive discussion of the facts and the law, we shall have to content ourselves with a more general survey and review of the situation.

[1] The course of the trial was somewhat

peculiar. By their answer the defendants waived any right they might have had to stand upon the settlement of their five accounts as a conclusive adjudication of the matters embraced in the decrees of settlement. They joined with the plaintiff in asking that every item involved in their management of the trust estate be investigated. The answer also admitted certain inaccuracies in the accounts as rendered. At the outset of the trial, the plaintiff called the trustees and examined them and other witnesses regarding a number of items in the various accounts which had been presented to the probate court. The trial ran on in this way for a number of days, when counsel for the defendants suggested that the case be continued to enable the trustees to submit the accounts to the examination of an expert accountant, with a view to having any irregularities and inaccuracies reconciled and explained. It was admitted that there were errors other than those specified in the answer, counsel saying that "it seems impossible for the court to any more than guess at what the result should be." After some discussion, the court granted the continuance, with a direction that the trustees employ experts and restate their account. After a lapse of several months, the hearing was again resumed, and there was presented to the court a restatement of the account, prepared by Mr. Lutgen, an expert accountant. At this point the plaintiff insisted that the trustees must file their account and prove its correctness. The course actually followed, however, was to have the trustees take the stand without any direct examination on their own behalf, and to subject them to cross-examination by the plaintiff. The ensuing inquiry, involving an examination of a number of witnesses in addition to the trustees, and the production of much documentary evidence, consumed a great length of time.

[2] We think the course pursued was irregular, and that its adoption was the result of a fundamental misapprehension of the nature and extent of the obligation of trustees to account to their beneficiaries—a misapprehension shared by the trial judge with counsel for defendants. As shown by its findings, the court below believed that the trustees had acted throughout in good faith and without any intent to deceive or overreach the plaintiff in any way. We are not disposed to dissent from this view, which we think finds adequate support in the testimony. But, conceding the good faith of the trustees, the fact remains that they had, by their own admission, failed to comply with the obligation which rests upon all trustees to keep full and accurate accounts of the trust funds coming into their hands, and to render an account thereof to their beneficiaries.

"Trustees are under an obligation to render to their beneficiaries a full account of all their dealings with the trust fund (3 Pomeroy's Equity Jurisprudence, § 1063; 28 Am. & Eng. Ency. of Law [2d Ed.] p. 1076), and where there has been a negligent failure to keep true accounts, or a refusal to account, all presumptions will be against the trustee upon a settlement (Lupton v. White, 15 Ves. [Eng.] 432, 440; Blauvelt v. Ackerman, 23 N. J. Eq. 495; Landis v. Scott, 32 Pa. 495)." Bone v. Hayes, 154 Cal. 759, 766, 99 Pac. 172.

[3] The entire trial was conducted upon the erroneous theory that the burden of proof was upon the beneficiary to point out the particulars in which the account was erroneous, and that she was bound to go forward and establish affirmatively the impropriety of the charges and credits which she assailed. Such is not the law.

That the defendants had failed to comply with their duty to keep accurate and detailed accounts is manifest from the facts already recited. In their answer the trustees, after admitting errors amounting to several thousand dollars, allege that the plaintiff is indebted to them in the sum of $14,000. The report of the expert shows an indebtedness of the plaintiff to the trustees of $9,904.95. The court finds that such indebtedness amounted to $8.996.17. These discrepancies, in and of themselves, demonstrate that many errors must have found their way into the accounts as presented.

[4] If we take the statement prepared by the expert as a final account of the executors, the record furnishes no means of ascertaining how the court arrived at its conclusion that the balance due was $8,996.17. There is a mere general finding that the plaintiff is indebted to the defendants in this amount. Upon the new trial, which we shall have to order, the findings should be drawn in such manner as to disclose the particular items allowed and rejected. Even if we accept the ultimate finding as technically sufficient, it must be held the trustees failed to prove an account that would justify the judgment under review. The appellant's attacks upon the various items of the accounts are well founded in at least enough particulars to bring the balance well below the figure found by the court.

[5] A few of the matters dwelt on by the appellant may be mentioned. A one-third interest in certain promissory notes belonging to the estate of Alberto Trescony was distributed to the trustees, and it is claimed that the trustees should have been charged with one-third of the face value of the notes not collected. It was the duty of the trustees to collect these notes, and they were liable for the amount of them with interest, unless they made it appear that the failure to collect the notes was not due to their fault. In re Sanderson, 74 Cal. 203, 204, 15 Pac. 753. With respect to two of these notes, that of M. Orradre, and that of D. Amestoy, there was no satisfactory showing that the notes

could not, with due diligence, have been collected.

[6] The trustees leased a part of the trust lands to J. Parsons, the lease containing a provision for the payment of $458.86 in addition to a proportion of the crop grown. A lease to Charles Parsons called for a payment of $116 in like manner. By the leases the trustees were given a crop mortgage to secure these payments. The cash rentals were not accounted for. The testimony of one of the trustees was that these payments, although described as cash rental, in reality represented a cash advance that had been made to the tenant by the trustees personally. The explanation conflicted with the written lease which the defendants had executed as trustees. Furthermore, the arrangement testified to was in violation of their duty. They could not use the trust property to secure repayment of advances made by them personally. Civ. Code, § 2229. In so doing they were assuming a position antagonistic to that of their beneficiaries, and any advantage or profit received by them through the transaction is deemed in law to belong to the beneficiaries. Western S. L. I. Co. v. Lockwood, 166 Cal. 185, 135 Pac. 496.

[7] Certain land was leased to Ingram and Sargent at an annual rental of $1,425. The accounts show that only $1,225 was collected for 1894. The appellant claims, and rightly, that the trustees were bound to account for the balance of $200, unless they could show some good reason for the failure to collect it. Johnson knew nothing about the subject, and Trescony gave a vague and uncertain explanation which can hardly be termed satisfactory.

[8] From time to time the trustees advanced money to the beneficiaries for living expenses. In the account prepared by Lutgen the plaintiff was charged with $1,228 claimed to have been advanced to her in the Salinas City Bank, and not charged to her in the original accounts. These charges are attacked as not being supported by vouchers or by the testimony. The objection is supported by the record. The charges were based by the expert solely on memorandum checks or tags found among the papers of the bank. They were not signed by the plaintiff. Such tags do not constitute vouchers showing payment to her. Estate of Rose, 63 Cal. 349. Furthermore, many of the tags do not purport to be for remittances to the plaintiff, but contain merely the words: "For Remittance. Debit Christal Heirs." "For Check to S. F., Debit Christal Heirs Estate." "For Ck. D. K. B. Co. Debit Christal Heirs Estate"—and the like. The appellants claim that the tags of this class aggregate $700.35. The defendants do not dispute this computation, and we do not feel called upon to make a minute examination of the record to verify the figures. Regarding this charge of $1,228, the respondents say in their brief that the plaintiff was present during the trial and did not take the stand to deny receipt of the amounts specified in the tags. The fault in this argument is that which we have already mentioned as permeating the entire proceeding, viz. that it is assumed that the burden is upon the beneficiary to disprove the correctness of items in the account, whereas, in fact, the burden is upon the trustees to prove that charges made by them are proper.

[9, 10] The accounts filed in the probate court, as well as the restated account of Lutgen, contain charges against plaintiff for interest, aggregating thousands of dollars. Early in the history of the trust, the trustees opened an account with the Salinas City Bank. This account was almost continually overdrawn, and the bank charged interest on the overdraft at varying rates, compounded monthly. If it was necessary to borrow this money and the terms of the borrowing were reasonable, the charge was a proper one against the trust estate. But it appears that during all this time one of the trustees was collecting money for the trust estate. This money, or a large part of it, he would hold without depositing it in bank, and would pay it out from time to time on behalf of the trust estate. Obviously, if this money had been deposited promptly when received, it would have reduced the overdraft, and consequently the interest charges of the bank. While trustees are not ordinarily liable for interest on moneys coming into their hands unless they have improperly failed to invest them (Civ. Code, § 2261), they are certainly not justified in borrowing more money than they need, and charging the trust with interest on the sums so borrowed. Where they have idle money on hand, it is their duty to so apply it as to stop unnecessary interest charges. It is totally impossible to determine from the record what the proper computation of interest should be. As is said by respondents themselves:

> "It is undisputed that these books were kept without any reference to the correctness of the dates of the entry of receipts and expenditures."

Upon the new trial, it will be the duty of the trustees to establish these dates, and, where they are unable to do so, the computation must be made upon the basis most unfavorable to them.

Numerous other items in the account are attacked by appellant, but we think we have discussed enough of them to show that the judgment appealed from cannot be sustained. The case must be remanded for the taking of a new account in accordance with the established principles of equity. The court may either take the account itself or make a reference for that purpose. But whichever mode is followed, the account should be stated in accordance with the rules to which we have adverted, i. e., that it is the duty of the trustees to support every item of their account, and that, wherever they fail to support the correctness of a charge or a credit by satisfactory evidence, the item must be disallowed. It is probable that, upon any such settlement of the account, these trustees will be compelled to forego repayment of sums which they have properly and in good faith expended for the trust, and that they will be charged as having received money in cases where they have not, in fact, received it, and could not with reasonable diligence have received it. But, if this be the result, it will follow from the failure and neglect of the trustees to perform their duty of keeping full and accurate accounts of their transactions. Their good faith cannot save them from the consequences of this neglect. Whatever doubts arise from their failure to keep proper records or their inability to establish the items of their accounts must be resolved against them.

We shall not make any disposition at this time of the questions of compensation of trustees and costs, both of which are discussed in the briefs. These matters can be disposed of by the court below upon the new trial, in view of the facts as then developed, and in accordance with equitable principles.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; LAWLOR, J.

(174 Cal. 504)

AINSA v. MERCANTILE TRUST CO. OF SAN FRANCISCO. (S. F. 7019.)

(Supreme Court of California. March 7, 1917. Rehearing Denied April 4, 1917.)

1. CORPORATIONS 🔑479 — INDEBTEDNESS — TRUST DEED—LIABILITY OF TRUSTEE.

In a deed whereby a corporation accepted a trust on behalf of the holders of bonds of another corporation it was provided that the trustee corporation should not be liable or accountable for the acts, defaults, or neglect of any agent to be appointed in good faith for any of the purposes expressed in the mortgage, and the instrument, referring to the trustee, also provided that no liability or responsibility should attach to the corporation other than for the exercise of reasonable diligence in the performance of the trust, when action on its part should become necessary, and that it should not be required to take any affirmative action on behalf of the holders of bonds unless indemnified, nor be compelled to pay any taxes assessed or imposed on any of the property unless the moneys necessary should be furnished by the company issuing the bonds or their holders, and that no liability or accountability should attach to the corporation trustee if it should fail to proceed to foreclose the mortgage, but that a new trustee should be appointed in such case. *Held*, that by becoming trustee under such deed, and by issuing its certificate of genuineness to the bonds, the corporation trustee did not assume any obligation to pay the losses of bondholders arising from abandonment of work on its property by the corporation issuing bonds, did not become liable for representations made by the mortgagor company, and did not become liable to bondholders for defects in the mortgagor's title after issuance of the bonds, having expressly protected itself from liability for the representations of the mortgagor company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874.]

2. TRUSTS 🔑179—LIABILITY OF TRUSTEES—ERRORS IN JUDGMENT.

Ordinarily trustees are bound to a fair exercise of their judgment, and to the unselfish exercise of good faith, and, while supine negligence or willful default will render them liable, mere errors of judgment will not.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 233.]

3. TRUSTS 🔑179—POWER AND OBLIGATION OF TRUSTEE—INSTRUMENT CREATING TRUST.

A trustee of an express trust derives his power from the instrument creating it, and such instrument furnishes the measure of his obligation.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 233.]

4. MORTGAGES 🔑209—TRUST DEED—OBLIGATION OF TRUSTEE.

A trustee under deed of trust does not assume the important obligations in some instances cast upon a trustee by operation of law; an ordinary trust deed being little more than a mortgage with power to convey.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 466–468.]

5. CORPORATIONS 🔑479—TRUST DEED—TRUSTEE AS COMMON AGENT.

A trustee under an ordinary deed of trust is the common agent of both parties, and required to act impartially.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874.]

6. CORPORATIONS 🔑479—TRUST DEED—DUTY OF TRUSTEE TO PROTECT SECURITY.

A trustee in a corporation's deed of trust to secure bonds owes a duty to the bondholders of preservation and protection of the security, if the means of the defense are known to the trustee or may with diligence be discovered.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874.]

7. CORPORATIONS 🔑479—TRUST DEED—CERTIFICATION OF CORPORATE BONDS BY TRUSTEE—"CERTIFY"—"GENUINE."

A corporation trustee's certificate to the bonds of another corporation which merely certified that each bond to which it was attached was one of a series of 1,900 bonds, and that the coupons were "genuine," merely guaranteed the bonds and coupons as the issue of the corporation purporting to execute them, since "certify" means to testify in writing, to give a certificate, or to make a declaration about a writing, and the word "genuine" means "not spurious, counterfeit, or false," and its use did not involve the legal sufficiency of the security; the purpose of the certification not being to insure the sufficiency of the security, but to prevent an overissue.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874.

For other definitions, see Words and Phrases, First and Second Series, Certify; Genuine.]

Department 2. Appeal from Superior Court, City and County of San Francisco; F. J. Murasky, Judge.

Action by James Ainsa, in his own right and as trustee, against the Mercantile Trust Company of San Francisco. From a judgment for defendant, plaintiff appeals. Affirmed.

James Ainsa, J. C. B. Hebbard, Marcel E. Cerf, and C. H. Sooy, all of San Francisco (Monte A. Dernham, of San Francisco, of counsel), for appellant. Morrison, Dunne & Brobeck, of San Francisco (R. L. McWilliams, of Burlingame, of counsel), for respondent.

MELVIN, J. Plaintiff appeals from the judgment on the judgment roll alone.

James Ainsa sued in his own right and as trustee for other persons owning bonds issued by the Mexican Anthracite Coal Mining Company. The basis of plaintiff's claim is an alleged breach of trust on the part of the defendant, a trustee under a deed of trust executed by the Mexican Anthracite Coal Mining Company in support of its bonds. The face value of the bonds held by appellant according to the allegations in the complaint was $700,000, and judgment for that amount, with interest compounded yearly at the rate of 7 per cent. per annum from the 1st day of January, 1901, was demanded. It was the theory of the plaintiff that the conduct of the defendant as trustee and as a corporation which had placed its certificate on the bonds of the said mining company had made the Mercantile Trust Company of San Francisco responsible for and liable for the payment of the losses of the bondholders due to the causes which will be more fully discussed in this opinion.

The superior court found that the Mexican Anthracite Coal Mining Company (which we shall call the "Mexican Company") was at all times after July 25, 1901, a corporation organized under the laws of Arizona and doing business in the state of Sonora, Mexico; that the defendant was at all times mentioned in the complaint a Californian corporation doing business in San Francisco; that the "Compania Explotadora de Carboniferos en Sonora" (which we shall for brevity term the "Sonora Corporation") was at all times indicated in the amended complaint a corporation organized and existing under and by virtue of the laws of the state of Sonora, republic of Mexico; that Ainsa and his associates were the owners and holders of $603,200 of the bonds of the Mexican Company; that on July 2, 1901, the Sonora Corporation owned and possessed certain coal mains, mines, or zones named in the amended complaint; that said title depended upon and was held by virtue of a concession and contract with the state of Sonora (which agreement is set out in the findings); and that on or about July 2, 1901, Gen. C. P. Eagan, with the consent of the state of Sonora, entered into a contract for the purchase of the said coal lands from the Sonora Corporation. With reference to the last-mentioned transaction the court found:

> "That neither the contents of said contract and deed nor the facts set forth therein were known to the defendant except in so far as its terms and conditions were set forth in the deed of trust hereinafter mentioned until long after the execution of said contract."

The finding contains a quotation of the contractual portion of this agreement for the purchase of the said coal lands. In substance it provided for the payment by Gen. Eagan of $25,000 American gold; that the Mexican Company, for which it was specified he was making the purchase, should pay $700,000 in bonds on January 1, 1902; that the bonds should be guaranteed by a first mortgage on the real and personal property of Gen. Eagan and the Mexican Company; that the bonds should be issued "with all the requirements and formalities required for their validity by the laws of the state of Sonora and the federal government of the United States of Mexico"; that the Mexican Company, or on its default Gen. Eagan himself, would perform all the obligations contained in the concession to the Sonora Corporation; and that upon default of any of the stipulated payments Eagan or the Mexican Company would forfeit all sums previously paid. On its part the Sonora Corporation guaranteed the validity of its contract with the government of Sonora.

There were also findings that under the laws of Sonora the contract between Gen. C. P. Eagan and the Sonora Corporation was a good, valid, and absolute conveyance of that corporation's right, title, and interest in and to the coal lands; that the $700,000 of the bonds to be paid and delivered by Gen. Eagan to the Sonora Corporation in consideration for said conveyance was the amount agreed upon by the parties to the contract as being equivalent to the indebtedness of the Sonora Corporation to its creditors and those having claims upon the said coal lands, including plaintiff, James Ainsa, and those represented by him; that on September 13, 1901, Gen. Eagan deeded said coal lands to the Mexican Company, but that his wife did not join in the conveyance; that the deed was not stamped nor recorded as required by Mexican law; but that these defects in the execution and authentication of the deed were not known to defendant when a certain deed of trust was executed and a certificate was attached by defendant to the bonds issued by the Mexican Company. Then follow findings regarding the making, execution and delivery to the defendant by the Mexican Company on November 12, 1901, of a trust deed in and to the coal lands described in the conveyance by the Sonora Corporation to General Eagan and in the deed by him to the Mexican Company; and it is specifically found that the only representations ever made by the defendant with reference to said coal lands were contained in this trust deed, in the bonds issued by the Mexican Company and secured by said trust deed, and in the coupons attached to said bonds. The deed of trust is set out at length in the findings, as are a copy of one of the bonds and a copy of the trustee's certificate. This certificate is in the following words and figures:

> "This is to certify that the within bond is one of a series of nineteen hundred (1,900) bonds issued by the Mexican Anthracite Coal Mining Company, and described in the mortgage therein referred to, and that said bond and the coupons attached thereto are genuine. Mercantile Trust Company of San Francisco, Trustee, by Fred'k W. Zeile, President."

The findings recite the delivery to the Sonora Corporation and to the plaintiff and other creditors of $700,000 in bonds in accordance with the agreement among the various parties to the transaction, and that defendant's representations were made with the purpose of inducing the creditors to accept the bonds.

In the thirteenth paragraph of the amended complaint it had been alleged that after the sale of the bonds, the Mercantile Trust Company of San Francisco, desiring to cheat the purchasers of said bonds, united with the Mexican Company and abandoned all work on the coal mains, mines, and zones and destroyed all mortgaged estate of every kind; that defendant refused to demand of said mortgagor other estate in lieu of that destroyed by the abandonment of all work; that defendant declined to provide money to protect the mortgaged estate; that it also refused as trustee to have cured the defect in title arising from the infirmities in the deed from Eagan; and that defendant assented to the abandonment by the Mexican Company of work on the coal mains and zones. The court found against all of these allegations, and found also that no demand was ever made upon defendant to do any of the things which plaintiff alleged in the said thirteenth paragraph of the amended complaint that defendant refused to do. There was also a finding negativing an allegation that defendant had acted in collusion with its legal advisers in purposely having the bonds so drawn as to be of no value. It was also found by the court that the Mexican Company abandoned entirely all control and possession of the coal lands in February, 1903, and that said lands, according to the contract between the republic of Mexico and the other parties thereto, reverted to said republic. There were specific findings in which certain of the statutes of Mexico were fully set forth.

Appellant's principal contentions are that respondent, as trustee under the ordinary form of trust deed, is liable for the representations made by the mortgagor, and that, having attached its certificate to the bonds, the said trustee became liable to the bondholders for the defects in the mortgagor's title discovered after the issuance of the bonds.

The deed of trust contained a representation by the Mexican Company that it was the owner of the property to be mortgaged; that the payment of the bonds was secured by a mortgage on the coal lands described; that the lands were mortgaged to respondent as trustee; and that said trustee should hold the property to secure the payment of the bonds. These representations were made by the Mexican Company, and not by the respondent. The trustee's certificate heretofore quoted, merely guaranteed that the attached bond was one of a series of 1,900 "described in the mortgage therein referred to," and that the bond and coupons were genuine. In that part of the deed whereby the respondent accepted the trust on behalf of the holders of the bonds it was expressly provided that the Mercantile Trust Company of San Francisco should not be liable or accountable for the acts, defaults, or neglect of any agent to be appointed in good faith for any of the purposes expressed in the mortgage, and the instrument also contained the following language referring to the trustee:

> "That no other liability or responsibility shall under any circumstances be borne by or attach to it than for the exercise of reasonable diligence only in the performance of the trust when action on its part for that purpose shall become necessary, and that it shall not be required to take any affirmative action on behalf of the holders of said bonds unless indemnified, nor be compelled to pay any taxes which may be assessed or imposed upon any of the property herein described, unless the moneys necessary to pay such taxes shall be furnished by the Mexican Anthracite Coal Mining Company or the holders of said bonds, and further that no liability or accountability shall attach to it, if it shall fail to proceed to foreclose this mortgage, but in that case a new trustee shall be appointed as hereinabove provided."

[1] It is very evident that by becoming a trustee under such a deed and by issuing such a certificate the respondent did not assume any of the obligations which appellant seeks to place upon it.

[2] Ordinarily trustees are bound to a fair exercise of their judgments and to the unselfish exercise of good faith. "Very supine negligence or willful default will render them liable," but not mere errors of judgment. Ellig v. Naglee, 9 Cal. 683–695; Estate of Cousins, 111 Cal. 441–449, 44 Pac. 182; Estate of Schandoney, 133 Cal. 387–393, 65 Pac. 877.

[3] The trustee of an express trust derives his power from the instrument creating that trust, and the same document furnishes the measure of his obligations. Pomeroy's Equity Jurisprudence (3d Ed.) § 1062; 39 Cyc. 290–294. Applying the measure of these rules, we find that the trustee was under no extraordinary duty. It was not an insurer of the title of the Mexican Company to the coal lands, nor was it bound to know the law of Mexico and to investigate the title in the light of the statutes of that republic.

[4] A trustee under a deed of trust does not assume the important obligations which are in some instances cast upon a trustee by operation of law. An ordinary trust deed is little more than a mortgage with power to convey. Sacramento Bank v. Alcorn, 121 Cal. 379–383, 53 Pac. 813; Curtin v. Krohn, 4

Cal. App. 131–135, 87 Pac. 243; Hollywood Lumber Co. v. Love, 155 Cal. 270–273, 100 Pac. 698; MacLeod v. Moran, 153 Cal. 97–99, 94 Pac. 604; Tyler v. Currier, 147 Cal. 31–36, 81 Pac. 319; Weber v. McCleverty, 149 Cal. 316–321, 86 Pac. 706.

[5] A trustee under an ordinary deed of trust is the common agent of both parties and is required to act impartially. Cook on Corporations (7th Ed.) p. 3050; Jones on Mortgages (6th Ed.) § 1771. Some authorities hold that he is not a trustee at all in a technical sense. 28 Am. and Eng. Enc. of Law (2d Ed.) p. 765.

[6] Appellant cites authorities to the effect that a trustee owes a duty to the bondholder of preservation and protection of the security. This is undoubtedly true if the means of defense are known to the trustee or may with diligence be discovered. Cuthbert v. Chauvet, 136 N. Y. 326–332, 32 N. E. 1088, 18 L. R. A. 745. But in the present case the court found that the trustee was not cognizant of the infirmities in the conveyance from Gen. Eagan, and there is nothing in the terms of the trust itself which imposes upon the trustee the duty of correcting defects of this sort. Obviously the defendant could not compel the Mexican Company to perform the stipulated work on the coal lands, and it is equally clear that, if the title of the latter corporation to the land was void by reason of the defects in the conveyance from Gen. Eagan, the doing of such work would not have operated as a protection to the security. We may therefore dismiss from consideration the asserted neglect of the trustee in failing to compel performance of mining operations on the property in Mexico and determine whether or not respondent was bound to know the law of Mexico and to protect the bondholders by having the title of the Mexican Company made perfect. Even if we assume that in the ultimate execution of its duties the trustee might have been compelled to have resort to the laws of Mexico, this assumption does not charge it with knowledge of the Mexican law relating to conveyances. In the mortgage or deed of trust the Mexican Company, and not the trustee, stated that the former was owner of the "eleven carboniferous zones"; that the Mexican Company was about to issue bonds; and that said bonds should be secured by a first mortgage on the Mexican Company's property. After these representations were made by the Mexican Company, then the trustee consented to act, but protected itself by certain conditions expressed in the instrument, among which was a provision that no liability should attach to the said Mercantile Trust Company of San Francisco except "for the exercise of reasonable diligence only in performance of the trust when action on its part for that purpose" should become necessary. It is evident that respondent thus expressly protected itself from liability for the representations of the mortgagor.

[7] Examining the certificate to the bonds, we find that it merely certifies that each bond to which it is attached is one of a series of 1,900 bonds, and that the coupons are "genuine." The word "certify" is well understood. It means "to testify in writing; to give a certificate; or to make a declaration about a writing." New Standard Dictionary. The word "genuine" means "not spurious, counterfeit, or false." Webster's Dictionary. As was said in Moore v. Copp, 119 Cal. 432, 51 Pac. 630:

> "By genuineness is meant nothing more than that it is not spurious, counterfeit, or of different import on its face from the one executed, but is the identical instrument executed by the party."

The certificate merely guaranteed the bonds and coupons as the issue of the corporation purporting to execute them. To hold that the word "genuine" involved the legal sufficiency of the security would be to stretch the definition of the word beyond the limits of any interpretation of its meaning heretofore given. The purpose of the certification was not to insure the sufficiency of the security. It was to prevent an overissue. Patterson v. Guardian Trust Company, 67 Misc. Rep. 614, 122 N. Y. Supp. 773. The rule on this subject is well stated by Mr. Jones as follows:

> "The limited and guarded terms of a trustee's certificate cannot be lawfully held to embrace a representation or guaranty of the truthfulness of the description of the obligation as made by the obligor. Trustees act for a comparatively trifling consideration, limiting their liability to their own acts of negligence and misconduct, and it would be unfair to put so serious a burden as a guaranty upon them. So far as appears, there is not a single adjudication extending their liability to even an implied guaranty of the securities whose mere identity they have authenticated." Jones on Corporate Bonds and Mortgages (3d Ed.) § 287a.

This declaration of the law is supported by Tschetinian v. City Trust Co., 186 N. Y. 432, 79 N. E. 401; Bauernschmidt v. Maryland Trust Co., 89 Md. 507, 43 Atl. 790; and Davidge v. Guardian Trust Co., 203 N. Y. 331, 96 N. E. 751.

Appellant contends that the provision in the deed of trust purporting to limit respondent's liability is ineffectual and void. In support of this contention Mullen v. Eastern Trust & Banking Co., 108 Me. 498, 81 Atl. 948, is cited but the citation does not sustain the position which appellant takes. That was a case in which a false certificate was made to support an overissue of bonds. The trustee sought to avoid liability under the language of the trust deed exempting it from responsibility for the acts or omissions of its agents. The Supreme Court of Maine held that this provision was not intended to refer to the act of the trustee in authenticating the bonds, but to its duties, powers, and immunities after it should have taken possession of the trust property. That case is in harmony with the other authorities cited above because in the opinion the purpose of a certificate on a bond is declared to be "to guarantee, not the value or sufficiency of the property behind the bond, but the validity of the bond itself as a legal instrument and the fact that it is secured by a trust mortgage."

No other alleged errors merit analysis.

It follows from the foregoing discussion that no material error was committed by the superior court.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

174 Cal. 547

In re STEWART'S ESTATE. (S. F. 7739.)

(Supreme Court of California. March 9, 1917.)

Taxation 🔑864—Inheritance Tax—Property Liable — Homestead — "Transfer of Title or of Interest."

Civ. Code, § 1265, and Code Civ. Proc. § 1474, provide that where a homestead is declared upon community property, upon the death of the husband his title to the land impressed with this homestead vests absolutely in the widow. Inheritance Tax Act (St. 1913, p. 1067) § 2, imposes an inheritance tax upon the transfer of property by will or by the intestate or homestead laws from any person dying seised or possessed of the property while a resident of the state or by any probate homestead set apart from said property. *Held*, section 2 indicates that a "transfer of title or of interest," as used in the inheritance tax law, means a transfer accomplished by operation of law as well as by the act of the parties, and that homestead property, title to which was transferred to the widow by and on the death of her husband, was liable to an inheritance tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1679.

For other definitions, see Words and Phrases, First and Second Series, Transfer.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of James Stewart, deceased. From a decree of the probate court adjusting the inheritance tax, John S. Chambers, as Controller of the State of California, appeals. Decree reversed in part.

Albert H. Elliott, Asst. Inheritance Tax Atty., of San Francisco (Robert A. Waring, Inheritance Tax Atty., of Sacramento, of counsel), for appellant. James C. Sims, of San Francisco, for respondent.

HENSHAW, J. In 1913 Emma Georgina Stewart, then wife, now the widow, of James Stewart, deceased, declared a homestead upon community property. Upon his death title to the land impressed with this homestead vested absolutely in the widow. Civ. Code, § 1265; Code Civ. Proc. § 1474.

In the adjustment of the inheritance tax due to the state from the estate of James Stewart, deceased, the judge in probate relieved from liability for such inheritance tax the sum of $5,000, as a homestead exemption. The question here presented is whether or not under the law an inheritance tax is imposed upon the value of property, title to which is thus vested by virtue of the homestead laws. The inheritance tax act of 1913, in section 2, declares that:

> "A tax shall be and is hereby imposed upon the transfer of any property * * * in the following cases: 1. When the transfer is by will or by the intestate or homestead laws of this state, from any person dying seised or possessed of the property while a resident of the state or by any probate homestead set apart from said property." Stats. 1913, c. 595.

By the sections of the Civil Code and Code of Civil Procedure above cited title to the property impressed with the homestead vested in the widow upon the death of the husband. Hart v. Taber, 161 Cal. 20, 118 Pac. 252; Humboldt Sav. Bank v. McCleverty, 161 Cal. 285, 119 Pac. 82; Wall v. Brown, 162 Cal. 307, 122 Pac. 478. Subdivision 1 of section 2 of the Inheritance Tax Act above quoted unmistakably indicates that a transfer of title or of interest, as used in the inheritance tax law, means a transfer accomplished by operation of law as well as by the act of the parties. It appears too plain to permit of discussion that under these circumstances the homestead property, title to which was transferred to the widow by and on the death of her husband, was liable to the inheritance tax under the law that has been quoted. Respondent has filed no brief upon this appeal, and we are without light as to the views she may entertain in support of the court's decree. Wherefore that decree, so far as it exempts from the inheritance tax the homestead property, is reversed.

We concur: MELVIN, J.; LORIGAN, J.

174 Cal. 537

ANDERSON v. MATHEWS, County Clerk. (S. F. 8035.)

(Supreme Court of California. March 8, 1917.)

1. Indians 🔑29—Electors—Citizens.

Const. U. S. Amend. 14 declares that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States, and of the state wherein they reside. Petitioner was a descendant of uncivilized Indians who were living in California at the time of its cession from Mexico. The United States at no time entered into any treaty with the ancestors of petitioner who was born after California was admitted to statehood, and it did not appear that the group of Indians of which petitioner was a part had any tribal form of government, although they lived together and as a rule associated only among themselves. Petitioner was married under the state laws, and was living with his family in a house on the land of a farmer for whom he worked, although he had secured an allotment and established a residence on land purchased by the government for the benefit of the Indians of which he was one. *Held*, that as petitioner and his fellows recognized themselves bound by the state laws and conducted themselves similarly to white persons, petitioner was a citizen of the state of California and entitled to registration as a voter.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 24.]

2. CITIZENS 🔑3—PERSONS BORN WITHIN JURISDICTION.

Ordinarily, every person residing in the United States is subject to its jurisdiction, and if born there is by that fact a citizen, the only exception being persons who, though residing in the United States or born therein, are for some adventitious reason, as for example resident ministers of a foreign country, citizens of such foreign country.

[Ed. Note.—For other cases, see Citizens, Cent. Dig. §§ 2, 13.]

3. INDIANS 🔑2 — INDIAN TRIBES — WHAT LAWS GOVERN.

Indian tribes recognized by the federal government are not subject to laws of the state in which they are situated, but they retain their right to local self-government, and to regulate and control their own affairs and rights of persons and property except as Congress has otherwise specially provided.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 2, 3.]

4. INDIANS 🔑31—CITIZENSHIP—ABANDONMENT OF TRIBAL CONDITION.

Under Dawes Act Feb. 8, 1887, c. 119, § 6, 24 Stat. 390 (U. S. Comp. St. 1913, § 3951), declaring that every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is declared to be a citizen of the United States, whether he has been by birth or otherwise a member of any tribe of Indians, an Indian who abandoned all forms of tribal government, marrying under the state laws and laboring as did white men in that vicinity, is a citizen of the United States.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 23.]

5. INDIANS 🔑2—DISTINCT TRIBES—RECOGNITION.

The establishment of a school by the federal government for the use of a group of Indians and the purchase of land for allotment to them does not constitute a recognition of them as a distinct tribe with independent self-government so as to take them from without the scope of the state laws.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 2, 3.]

In Bank. Application by Ethen Anderson for a writ of mandate against Shafter Mathews, County Clerk of Lake County, Cal. Writ issued.

Charles Kasch, of Ukiah, and J. E. Pemberton, of San Francisco, for plaintiff. Robert Duncan, of Ukiah, and H. B. Churchill, of Lakeport, for defendant.

SHAW, J. The plaintiff prays for a writ of mandate against the defendant, as county clerk of Lake county, to compel the said defendant, as such clerk, to register plaintiff as an elector of Scotts Valley precinct in Lake county. A demurrer and answer were filed to the petition, but the case has been submitted upon a stipulation between the parties in which all of the facts are stated bearing upon the case, and it is unnecessary to refer to the pleadings further.

Section 1 of article 2 of the Constitution declares that "every native citizen of the United States, every person who shall have acquired the rights of citizenship under or by virtue of the treaty of Queretaro," and who possesses certain other qualifications, all of which it is admitted are possessed by the plaintiff, shall be entitled to vote at all elections authorized by law. Under this provision the plaintiff is entitled to registration, provided he is a native citizen of the United States, or is a person who has acquired citizenship by virtue of the treaty of Queretaro. The defendant refused registration to the plaintiff on the ground that he is of the Indian race, and that because of that fact, although born in this state, he is neither a native citizen of the United States, nor a person who acquired the rights of citizenship under the treaty of Queretaro.

The treaty of Queretaro, or Guadalupe Hidalgo, as it is often called, by which the territory embracing the present state of California was obtained from Mexico by the United States, was made at Guadalupe Hidalgo on February 28, 1848, was ratified on March 16, 1848, and was formally exchanged between the two governments at Queretaro on May 30, 1848. Article 8 thereof (9 Stat. 929) declares that "Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty," shall become citizens of the United States if they remain in such territory for one year without declaring their intention to retain Mexican citizenship. This provision establishes the status of persons then living within the territory referred to, but it does not relate to persons born in the ceded territory after it became a part of the United States. It applies only to persons then living, "Mexicans now (then) established" in that territory. To ascertain the citizenship of after-born children or descendants of the persons then living in the territory acquired from Mexico we must look to the laws of the United States, not to the treaty of Queretaro. The plaintiff was born long after the making of that treaty, but he is a lineal descendant of Indians who were then living in that territory. The treaty can have no bearing upon the question of his citizenship, unless the fact that his ancestors were made citizens by that treaty, if it is a fact, is material thereto. The first question for consideration, therefore, is whether or not he is a citizen of the United States by reason of his birth therein after California became a part of the United States.

[1] The fourteenth amendment of the Constitution of the United States declares that:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

It was said by Field, J., while sitting in the circuit court, that:

> "Independently of the constitutional provision. it has always been the doctrine of this country, except as applied to Africans brought here and sold as slaves, * * * that birth within the dominions and jurisdiction of the United States of itself creates citizenship." In re Look Tin Sing (C. C.) 21 Fed. 909.

See, also, McKay v. Campbell, 2 Sawy. 122, Fed. Cas. No. 8,840; Inglis v. Sailors Snug Harbor, 3 Pet. 120, 7 L. Ed. 617; United States v. Ark, 169 U. S. 658, 18 Sup. Ct. 456, 42 L. Ed. 890; Lynch v. Clarke, 1 Sandf. Ch. (N. Y.) 639.

In McKay v. Campbell, the court said:

> "To be a citizen of the United States by reason of his birth, a person must not only be born within its territorial limits, but he must also be born subject to its jurisdiction—that is, in its power and obedience."

The plaintiff's place and time of birth, under this doctrine, makes him a citizen of the United States, unless the fact that he is of the Indian race, together with such tribal relations as he may have, place him in the class of persons who are not born within the "jurisdiction of the United States" or who are not "born * * * subject to the jurisdiction thereof," as it is expressed in the Fourteenth Amendment.

Indians inhabiting the territories embraced within the United States, prior to the acquisition of territory from Mexico in 1848, were divided into separate tribes, sometimes called nations. The political relation of these tribes or nations to the United States first came up for consideration in the Supreme Court of the United States in 1831, in the case of Cherokee Nation v. Georgia, 5 Pet. (30 U. S.) 1, 8 L. Ed. 25. It was held that an Indian tribe, though not a foreign nation, and though under the protection of the United States, is yet "a distinct political society, separated from others, capable of managing its own affairs and of governing itself." And in Worcester v. Georgia, 6 Pet. (31 U. S.) 515, 8 L. Ed. 483, it was said:

> "The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial." 6 Pet. 559, 8 L. Ed. 483.

This doctrine has been uniformly followed and enforced ever since with regard to all Indian tribes within the territories mentioned, including those within the country situated in the district formerly known as the territory of Oregon. United States v. Ark, supra, 169 U. S. 681, 18 Sup. Ct. 456, 42 L. Ed. 890; McKay v. Campbell, supra, 2 Sawy. 132, Fed. Cas. No. 8,840; United States v. Osborne, 6 Sawy. 408, Fed. Cas. No. 10,599; Ex parte Reynolds, 5 Dill. 398, Fed. Cas. No. 11,719; Jackson v. Goodall, 20 Johns. (N. Y.) 193; The Kansas Indians, 5 Wall. 737, 18 L. Ed. 667; Scott v. Sandford, 19 How. 403, 15 L. Ed. 691. In Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643, the right of a member of one of these Indian tribes to register as a voter in the state of Nebraska was considered. He had fully and completely surrendered himself to the jurisdiction of the United States, but it did not appear that this was done under any federal law or treaty or that the United States had accepted his surrender, or in any way treated or recognized him as a citizen. Speaking of these Indian tribes the court there said (112 U. S. 102, 5 Sup. Ct. 41, 28 L. Ed. 643):

> "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations."

The Indian tribes which were the subject of these decisions were all well known and recognized as distinct communities having laws and regulations binding upon each member and which were in some manner enforced by the tribal authorities. There were other Indians, in various places in the different states of the Union, of tribes which, to use the words of Justice Johnson in his dissenting opinion in Fletcher v. Peck, 6 Cranch. (10 U. S.) at page 146, 3 L. Ed. 162, had "totally extinguished their national fire, and submitted themselves to the laws of the states," or, as stated in Worcester v. Georgia, supra, 6 Pet. 580, 8 L. Ed. 483, were "small remnants of tribes, * * * surrounded by white population, and who, by their reduced numbers, had lost the power of self-government," and had become subject to state laws. In Danzell v. Webquish, 108 Mass. 133, it is said that these Indians in Massachusetts, though forming well-known tribes, "having never been recognized by any treaties or executive or legislative acts of the government of the United States as independent political communities, were under the control of the Legislature of the state." The decision in Elk v. Wilkins, supra, is avowedly based entirely on the premise that Elk "was born a member of one of the Indian tribes within the limits of the United States, which still exists and is recognized as a tribe by the government of the United States," and that the United States had never provided for or recognized his separation from his tribe, accepted him as a citizen, or assumed jurisdiction over him except in connection with its political relations with his tribe.

Under the facts stipulated, the status of the plaintiff, with respect to these two classes of Indians, is not clear. He was born in California, after its admission into the Union, and has always resided there. At the time of the treaty of Queretaro his ancestors were wild and uncivilized Indians settled in and permanently inhabiting Indian villages in the region now forming Lake county. Then and for several years thereafter they lived in tribes and maintained tribal relations, the nature of which is not stated. The name of the tribe is not given. It does not appear that it was known by any name. The United States has never made any treaty with the tribe, or with any tribe of which it ever formed a part, or with the particular group or village of Indians with whom the plaintiff associates and resides. It does not appear that the original tribe had any form of government, laws or regulations of any kind. He is one of a group of Indians residing in Lake county, and who, although surrounded by white neighbors, practically associate exclusively with each other and with other Indians in that and adjacent counties. The group has no tribal laws or regulations, and no organization or means of enforcing any such laws or regulations. The only sort of communal organization or semblance of political autonomy it has consists of the fact that one of them has the title of "captain," and is treated as their leader or spokesman, and receives some deference and respect on that account. But he has no authority. Disputes are sometimes submitted to him for settlement, but his decisions are considered wholly advisory. Each party accepts or rejects them as he chooses, and there is neither enforcement nor means of enforcement thereof.

Some years ago a white man named Bucknall donated a tract of land to another group of Indians in the vicinity, on which said Indians reside as in a village. In this village the United States has established a school for the benefit of all the Indians of the vicinity, and it provides transportation thereto for the children of the plaintiff's group or village. This land is held in trust for the benefit of all these Indian villages, and they all contribute to pay the taxes thereon. They have never been taxed on other property, and the plaintiff has not otherwise paid taxes.

A few years ago the federal government purchased a tract of land in Lake county for a home for these Indians, including the group of which plaintiff is a member, upon which any family of the group can live and make its home. It has been subdivided into lots for allotment, in severalty, to the beneficiaries. The plaintiff has selected a lot and has established a residence thereon where he lives when not employed elsewhere. He has not received any certificate or patent for the allotment. The Indian agent at Round Valley Reservation furnishes some food and clothing to these Indians in cases of extreme necessity "and attends to their ordinary wants." No explanation is given of the meaning of the phrase just quoted. In no other manner has the United States dealt with these Indians or recognized their distinct or communal existence separate from other inhabitants of the state.

The plaintiff and the other Indians of his group maintain themselves and their families chiefly by doing farm work for wages on the farms of their white neighbors. They also catch fish and gather acorns which they dry and store for winter food. When at work for farmers they live in houses furnished by their employers or in camps in the fields near their work, returning to their village when the employment ends. White employés also camp in the fields at such times in similar manner. They all acknowledge themselves bound by state laws, and do not dispute the jurisdiction of the state over them. The plaintiff was married under state law, and when the petition was filed he was living with his family in a house on the land of a farmer for whom he was working. He expects to return to the village when his employment ceases. It is not the custom of those Indians to marry by state law. They usually take a woman and live with her according to the Indian custom, by her parents' consent, but without a ceremonial marriage after our forms. They wear clothes similar to those worn by their white neighbors.

[2, 3] From these circumstances we think it is clear that the plaintiff is a citizen of the United States, and entitled to registration as a voter. Ordinarily every person residing in the United States is subject to its jurisdiction, and if born here is, by that fact, a citizen. The only exceptions to this rule are persons who, although residing here, or born here, are, for some adventitious reason, subject to the jurisdiction of some other country or political community, as for example, resident ministers of some other country and their children born here, or members of Indian tribes recognized as such by the federal government. The Indian tribes recognized by the federal government are not subject to the laws of the state in which they are situated. They are under the control and protection of the United States, but they retain the right of local self-government, and they regulate and control their own local affairs and rights of persons and property, except as Congress has otherwise specially provided by law. Kansas Indians, 72 U. S. 756, 18 L. Ed. 667; United States v. Kagama, 118 U. S. 381–384, 6 Sup. Ct. 1109, 30 L. Ed. 228; Wall v. Williamson, 8 Ala. 52; Turner v. Fish, 28 Miss. 311; Boyer v. Dively, 58 Mo. 529. For this reason Indians of that description are not deemed to be "subject to the jurisdiction" of the United States, within the meaning of that phrase in the Fourteenth Amendment and in the decisions first above cited, and, though born here, they do not thereby become citizens.

The plaintiff and the group of Indians with whom he associates do not belong to any tribe that was ever known or recognized as such by the United States as a distinct political community. The tribe, so far as we know, never had a tribal government of any sort. Admitting that the original tribe may have had such government, yet the plaintiff's group never had any form of self-government of any kind. Neither the members of the group nor, so far as known, the members of the tribe, were subject to, or owed allegiance to, any government, except that of the United States and the state of California, and, prior to 1848, that of Mexico. The reason for the rule laid down in Elk v. Wilkins, supra, declaring that a tribal Indian is not a citizen of the United States, is wholly wanting here, and therefore this case is governed by the general rule that the place of birth confers citizenship. The plaintiff and his group rather belong to that class of Indians described in Danzell v. Webquish, supra, and Fletcher v. Peck, supra, as Indians who have lost their power of self-government and become subject to state laws, and who accordingly must be citizens by birth, since they have never been subject to any jurisdiction other than that of the United States.

[4] Another consideration leads to the same conclusion, with respect to the plaintiff particularly. Section 6 of the act of Congress of February 8, 1887, known as the Dawes Act (24 U. S. Stats. 390), provides that "every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, * * * whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians" within the United States. The tribes of Indians here referred to must be taken to include only the tribes recognized as such by the United States and constituting independent communities under the decisions above cited. The provision contemplates that Indians not of such tribes may become citizens in the manner specified. This would include the plaintiff, if it be conceded that he would not be a citizen but for this statute. He voluntarily lives separate and apart from any recognized tribe, he works, dresses, eats, and lives with and maintains his lawful wife and his family, after the manner of civilized peoples. He comes within the terms of the statute, and is therefore a citizen.

The plaintiff earnestly contends that all Indians residing in California at the time of the cession of the territory to the United States in 1848 were citizens of Mexico under the "Plan of Iguala," declaring that "all the inhabitants of New Spain, without distinction, whether Europeans, Africans, or Indians, are citizens of this monarchy, with a right to be employed in any post according to their merit and virtues" (U. S. v. Ritchie, 58 U. S. 538, 15 L. Ed. 236); that the ancestors of the plaintiff were "Mexicans now established" in the territory ceded to the United States by the treaty of Queretaro; that accordingly they became citizens of the United States by article 8 thereof; and that plaintiff became a citizen by reason of his ancestry and birthplace. It has been said that the translation of the word "habitantes," in the original statement of the Plan of Iguala, as "inhabitants," in the version above given, is not accurate, that the term "habitantes" in Mexican usage, "is limited to persons having a place of abode, and does not embrace vagrants or nomads." U. S. v. Santistevan, 1 New M. 591. There may be doubt, therefore, whether Indians of the northern part of California, such as plaintiff's ancestors, were intended to be included in the phrase "Mexicans now established" in the treaty of Queretaro. Inasmuch as the proposition is not necessary to the plaintiff's case, we express no opinion concerning it.

[5] It is proper to add that the establishment of a school by the federal government for the use of these Indians and the purchase of land for allotment to them does not constitute a recognition of them as a distinct tribe with independent self-government, so as to bring them within the doctrine of Elk v. Wilkins, supra.

Let a writ of mandate issue as prayed for.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.; LAWLOR, J.

(174 Cal. 532)

JONES v. LUCKEL et al. (L. A. 3855.)

(Supreme Court of California. March 8, 1917.)

1. TAXATION 🔑810(1)—TAX DEEDS—QUIETING TITLE—EVIDENCE—SUFFICIENCY.

In action to quiet title, where defendant claimed under grant from state after tax sale, plaintiff was entitled to decree in the absence of showing by defendant of the proceedings by which the state acquired title, and proof of its deed to him was not alone sufficient.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1606.]

2. STIPULATIONS 🔑14(4) — CONSTRUCTION — STIPULATIONS AS TO EVIDENCE.

A stipulation that plaintiff is the owner of the property unless the title vested in defendant by virtue of a tax deed cannot be construed in an action to quiet title as a waiver of proof of the proceedings by which the state acquired title by tax deed.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 27.]

3. TAXATION 🔑810(3) — TAX TITLES — EVIDENCE.

In action to quiet title, where defendant claimed under deed from state after tax sale, plaintiff claiming that such tax deed related to totally different lands, her proof of the tax deed upon such theory was not sufficient proof to support the defendant's claim.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1608.]

4. TAXATION 🔑800(1)—TAX TITLES—QUIETING TITLE—REIMBURSEMENT OF DEFENDANT.

In action to quiet title, wherein defendant claimed under tax deed, but it was proved that the tax deed covered different land from that described in the complaint, defendant was not as a prerequisite to decree for plaintiff entitled to reimbursement for taxes and improvements.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1586.]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Anna K. Jones against Louis Luckel and others. Decree for plaintiff, and order denying new trial, and Luckel alone appeals. Affirmed.

James McLachlan and Louis Luckel, both of Los Angeles, for appellant. Carter, Kirby & Henderson, Collier & Clark, and John Schlegel, all of Los Angeles, for respondent.

LORIGAN, J. Plaintiff brought this action to quiet her title to a tract of land in Los Angeles county. On the trial, and preliminarily to the introduction of any evidence, it was stipulated between the parties:

> "That said plaintiff is the owner of the property described in the complaint, * * * unless the title to said property has become vested in said defendant (Luckel) by virtue of the tax deed to be introduced in evidence by him and the deed to him by William P. Young which is to be introduced in evidence by him."

Plaintiff rested her case upon this stipulation, and defendant then offered in evidence a tax deed from the state of California to himself and his codefendant Young, made June 30, 1903, which recited a delinquency in the payment of state and county taxes on land in Los Angeles county (describing it) for the year 1895, a sale to the state thereof, and subsequently a deed to the state made July 3, 1901, and a purchase by the defendants from the state of the same for the sum of $40.64, being the amount of accrued taxes, penalties, and costs up to the date of sale. Further proof was made by defendant Luckel of a deed to him from his codefendant Young of his interest in the property described in the deed from the state to them, and in addition proved, as alleged in his answer, the payment by him of $26.14 as an aggregate amount of taxes imposed on the property described in the tax deed for the different years from the date of said tax deed to the commencement of the action. No further evidence at all was offered on the part of defendant. Plaintiff in rebuttal introduced in evidence certain official tax records and proceedings for the purpose of showing that the property described in the tax deed from the state to the defendant was not the same property described in the complaint; nor was it the same property on which a delinquency in the payment of taxes accrued and upon which the deed from the state relied on by defendant Luckel was based. Other evidence was also introduced by plaintiff under which it was claimed that the tax deed to defendant was invalid.

The court made general findings in favor of plaintiff—that she was the owner of the property described in the complaint, and that the defendant Luckel had no title or interest therein. It made no finding on the issue tendered of the purchase price paid by Luckel to the state at the sale, or of the taxes subsequently paid by him. A decree quieting her title was entered in favor of plaintiff, and defendant Luckel appeals therefrom, and also from an order denying his motion for a new trial.

[1] Several grounds are urged by the plaintiff in support of the judgment. Some of these consist of particulars in which it is claimed the tax deed from the state to the defendant is invalid. Independent of these claims, however, it is further insisted by plaintiff that the judgment must be affirmed for the reason that the evidence on the part of defendant failed to show that he ever acquired any title to the land described in the complaint. It will be perceived that the only evidence introduced by defendant in support of his claim of title to the land described in the complaint was the deed from the state to himself and his codefendant Young. He introduced no deed whatever in evidence to show that the state had ever acquired any title to the land from the predecessor in interest of plaintiff, or from herself, or at all. This could only be shown by the production of a deed to the state made on a sale to it after delinquency by the owner in the payment of his taxes assessed against it. As there was no such deed to the state produced in evidence, there was no sufficient showing that the defendant had ever acquired title to the property against plaintiff. This being true, then under the stipulation between the parties as to title the court was warranted in its finding against defendant and in favor of plaintiff, and in awarding judgment to the latter. Further discussion of this point is made unnecessary, as just this precise question was involved in County Bank v. Jack, 148 Cal. 437, 83 Pac. 705, 113 Am. St. Rep. 285, where it was decided that the production in evidence of a deed to the state vesting the title of the delinquent taxpayer in the state, together with the introduction of a deed from the state to the purchaser, was essential in order to establish that the purchaser had acquired the title of the delinquent taxpayer to the land, and that the production of the deed from the state to the purchaser was not alone sufficient.

[2] That case must control here. Counsel for defendant questions the applicability of that decision here because he claims that under the preliminary stipulation above quoted, proof of a deed to the state was waived. Be-

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sides, he asserts that on the trial it was proven by plaintiff that such a deed had been made, which proof was sufficient. But the stipulation is not susceptible of any such construction. It was a stipulation really in the interest of plaintiff obviating the necessity of proof by her of her chain of title to the property, while it was also a limitation on the right of defendant to assert any title to the property except under some tax deed from the state. Nothing was conceded on the part of plaintiff respecting this deed. She was not precluded from attacking it or questioning the validity of all the essential proceedings upon which it was based, a right which in several particulars was availed of on the trial. Nor was it a limitation upon her right to question the sufficiency of the evidence in the case offered by defendant in support of his alleged title to the property described in the complaint. It was in no respect a waiver of any proof which was essential on the part of defendant that he should introduce in order to make out a title on his part to the lands. Counsel does not present any argument or suggest any language used in the stipulation which supports the assertion of a waiver of this essential evidence. He contents himself simply by saying that it was waived. But we cannot agree with him.

[3] Nor is there any merit in his claim that evidence of a deed to the state was sufficiently proven by the plaintiff to supply the failure to do so on his part. It is, of course, not claimed by defendant that any deed to the state was produced on the trial by either side. Plaintiff, for the purpose of showing that the description in the delinquent assessment roll, and in the state controller's authorization for a sale of the property, embraced in the deed from the state to defendants, were of different property, and that none of the descriptions were of the property mentioned in the complaint, introduced the record entries in the delinquent assessment roll and in the authorization of the controller to prove those facts. Aside from the description and other recitals appearing in the delinquent assessment roll, was an entry, "Sold to the state, July 2, 1896," and in the authorization is a recital that the property described, various pieces of which were authorized to be sold, including that subsequently conveyed to defendant by the state deed, had been theretofore sold to the state. It is these recitals which defendant claims obviated the necessity of the production of a deed to the state. But this evidence cannot be given the effect of showing the execution of a deed sufficient to transfer title to the state, and hence a waiver of the necessity of producing the deed to the state as an otherwise essential chain, with the deed from the state, to establish title in the defendant. The effect of a simple recital that a deed was made to the state appearing in some of the proceedings under which the property of the delinquent taxpayer was ultimately sold by the state is no greater than would be given to a recital of such a fact which appears in all deeds from the state, and as it was recited in the one to defendant here, and as it also appeared in the deed from the state under consideration in County Bank v. Jack, supra. It was held in the case cited that such a recital did not obviate the necessity of the production by the purchaser from the state of a deed to the state, and if such a recital would be of no avail there, it cannot be perceived how a similar recital in the delinquent assessment roll or the controller's authorization would obviate the necessity of producing in evidence a deed to the state as an essential element in proof of his title to property described in the complaint as purchased of it from the state.

[4] It is further contended by defendant that the court erred in failing to find on the issue of the amount paid by him as the purchase price of the property to the state and the other amounts subsequently paid as taxes on it, and in failing by its decree to require repayment to him of the money so expended. It is held in Holland v. Hotchkiss, 162 Cal. 366, 123 Pac. 258, L. R. A. 1915C, 492, that a court of equity in an action brought by the owner of property to remove or cancel a tax deed or tax sale as a cloud upon his title, or to obtain a judgment which in effect will declare invalid such a sale or deed, should refuse such owner relief except on condition that he first repay to the tax purchaser the taxes, penalties, interest, and costs of sale chargeable upon the land and which the purchaser has paid at the sale by the state, as also the taxes he had subsequently paid. But this is only required where it appears that such taxes are justly chargeable upon the lands affected by the sale or tax deed. There is nothing in this case to show that the state ever acquired any lien for taxes chargeable against the property described in the complaint, or that the state ever acquired any claim against it, legal or equitable, by lien or sale or deed, or that defendant had acquired any interest or title in the property described in the complaint under any tax proceedings or deed. It is a case where it simply does not appear that the state ever had any lien against or title to the property of plaintiff described in the complaint or that the defendant ever acquired any. Under such circumstances there is no ground or reason for imposing as a condition upon the right of plaintiff to have a judgment quieting her title entered that she reimburse the defendant for anything. As under the evidence a finding by the court in the matter of payment of taxes would be of no benefit to defendant if the court had made it, no prejudice was worked against him by a failure to make such finding.

The judgment and order appealed from are affirmed.

We concur: MELVIN, J.; HENSHAW, J.

(174 Cal. 549)

VARCOE v. ALAMEDA LODGE, NO. 1015, BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF UNITED STATES. (S. F. 7113.)

(Supreme Court of California. March 9, 1917.)

INTOXICATING LIQUORS 🔑50—CLUBS—CITY CHARTER.

The Alameda city charter, declaring it unlawful for any one without a license to maintain a place where liquors are sold or given away, or to sell or give away liquors, providing that no license shall entitle the licensee to carry on the business at more than one place, and that it shall be kept posted in his saloon or place of making sales, is designed to limit and regulate the "business" of selling, and not to apply to dispensing by a fraternal order in its bona fide clubhouse of liquors to its members and their guests.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 51.]

Department 2. Appeal from Superior Court, Alameda County; J. D. Murphy, Judge.

Action by William E. Varcoe against Alameda Lodge, No. 1015, Benevolent and Protective Order of Elks of United States of America. From an adverse judgment, plaintiff appeals. Affirmed.

Geo. W. Hollister, of San Francisco, for appellant. Samuel Poorman, Jr., City Atty., of Alameda, amicus curiæ. L. R. Weinmann, of Alameda (Raymond Benjamin, of San Francisco, of counsel), for respondent.

HENSHAW, J. The purpose of this action was to enjoin the selling or serving of liquors by defendant to its members and their guests, upon the ground that such sales are violative of the provisions of the charter of the city of Alameda (article 10, § 1). A general demurrer to the complaint was sustained, and upon plaintiff's failure to amend, judgment passed for defendant. Upon plaintiff's appeal the city attorney of the city of Alameda has presented a brief on behalf of the city, which brief is both admirable in its learning and commendable in its fairness.

The facts are unquestioned and may be thus stated, in the language of appellant's brief:

> "The defendant maintains a bona fide clubhouse, not as its business, but 'solely as an incident possessing and having a tendency to foster and further the spirit of charity and kindly good fellowship between its members.' The maintenance of such clubhouse is not one of the purposes for which defendant was organized, nor is the operation of said buffet. The clubhouse is not owned by defendant, but by Elks' Hall Association, a corporation, 'the directors of which corporation are members of said Alameda Lodge, and have been selected by said lodge.' The dispensing of liquor at said buffet is not for profit, and can in no commercial sense be termed defendant's business, but is rather an incidental accommodation to its members desiring such refreshment, just as the supplying of newspapers and meals is an incident to the real business purposes of any social or fraternal club. A license is held by defendant under the internal revenue laws of the United States."

The charter of Alameda, in article 10, section 1, above noted, declares as follows:

> "It shall be unlawful for any person, firm or corporation to establish, open, keep, maintain or carry on within the city of Alameda any saloon, bar, store, dramshop, tippling place, stand or any place where spirituous, malt or fermented liquors or wines or any admixture thereof, are sold or given away, or for any person, firm or corporation (except as hereinafter provided) to sell or barter or give away within the limits of the city any spirituous, malt or fermented liquors or wines or any admixture thereof, without having permission pursuant to an ordinance of the council or people, as provided in this article."

By section 2 of the same article the council is empowered to impose all license taxes for the selling and giving away of such liquors and the number of licenses is limited. By section 7 it is provided that:

> "No license shall be issued entitling the licensee to carry on the business licensed at more than one place," and that the licensee shall keep his license posted "in his saloon or place of making sales thereunder."

Section 8 provides that:

> "No license shall be required for the purpose of selling liquors at wholesale to any retail dealer in this city who holds a license under the provisions of this article."

The contention of appellant is that this case is to be distinguished from that of Cuzner v. California Club, 155 Cal. 303, 100 Pac. 868, 20 L. R. A. (N. S.) 1095, in that the language of the charter of the city of Alameda is broader and more comprehensive than the language of the Los Angeles ordinance considered in the Cuzner Case; that the Los Angeles ordinance was directed against sales as a business, while the charter of Alameda, while also directed against the same thing, still further prohibits any and all selling or giving away excepting such selling or giving away under license. It is quite manifest and is recognized that this construction would make criminal the giving away of wine or liquor by a host to his guests in his own house; but to this the complete answer is that it is within the power of the law to do this thing, and if it has done so, unquestioned obedience is the law's due.

It would not here be profitable to attempt an analysis of the cases, nor even to set forth at length the divergent views of the courts, because it very rarely happens that the language of an ordinance or charter which a particular court may be engaged in construing is sufficiently identical with that of other ordinances or charters which have been interpreted, so as to give the decisions so doing any considerable, much less controlling, weight. Suffice it, then, to refer to such cases as State v. Minnesota Club, 106 Minn. 515, 119 N. W. 494, 20 L. R. A. (N. S.) 1101; County of Ada v. Boise Commercial Club, 20 Idaho, 421, 118 Pac. 1086, 38 L. R. A. (N. S.) 101; Manning v. Canon City, 45 Colo. 571, 101 Pac. 978, 23 L. R. A. (N. S.) 192; South Shore Country Club v. People, 228 Ill. 75, 81 N. E.

805, 12 L. R. A. (N. S.) 519, 119 Am. St. Rep. 417, 10 Ann. Cas. 383; United States v. Alexis Club (D. C.) 98 Fed. 725—as dealing elaborately with one view of the matter; while the opposing view will be found in such cases as Graff v. Evans, L. R. 8 Q. B. Div. 373; People v. Adelphi Club, 149 N. Y. 5, 43 N. E. 410, 31 L. R. A. 510, 52 Am. St. Rep. 700; Klein v. Livingston Club, 177 Pa. 224, 35 Atl. 606, 34 L. R. A. 94, 55 Am. St. Rep. 717; State ex rel. Bell v. St. Louis Club, 125 Mo. 308, 28 S. W. 604, 26 L. R. A. 573; State, etc., v. Colonial Club, 154 N. C. 177, 69 S. E. 771, 31 L. R. A. (N. S.) 387, Ann. Cas. 1912A, 1079; State ex rel. Columbia Club v. McMaster, 35 S. C. 1, 14 S. E. 290, 28 Am. St. Rep. 826; Cuzner v. California Club, 155 Cal. 303, 100 Pac. 868, 20 L. R. A. (N. S.) 1095; State v. Austin Club, 89 Tex. 20, 33 S. W. 113, 30 L. R. A. 500; Tennessee Club v. Dwyer, 11 Lea (Tenn.) 452, 47 Am. Rep. 298; Piedmont Club v. Com., 87 Va. 540, 12 S. E. 963; Com. v. Smith, 102 Mass. 144; Barden v. Montana Club, 10 Mont. 330, 25 Pac. 1042, 11 L. R. A. 593, 24 Am. St. Rep. 27.

In every case the fundamental question is the scope of the ordinance, and in this case that question may thus be stated. Fully conceding the power of the city of Alameda, under a proper law designed to that end, absolutely to prohibit in every instance any sort of sale or any sort of giving away of intoxicants, did its charter provisions in this instance design to do that thing, or did they design to limit and restrict the business of selling? We think that it is clear that the charter was directed to the regulation of the business, and in this view the case is not distinguishable from that of Cuzner v. California Club, supra. And, finally, of this and of every like case, it may be said that if the construction of the existing law does not meet the views of the municipal authorities or the people, the remedy is ready to their hand, to enact such a law as will put all such questions beyond peradventure.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

(174 Cal. 500)

NORTH PAC. S. S. CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (S. F. 7489.)

(Supreme Court of California. March 6, 1917.)

1. MASTER AND SERVANT 🔑347—WORKMEN'S COMPENSATION ACT—CONSTITUTIONALITY.
The provisions of the Workmen's Compensation Act (St. 1911, p. 796) allowing awards for death benefits are valid.

2. MASTER AND SERVANT 🔑361—WORKMEN'S COMPENSATION—SCOPE OF ACT—MARINERS.
The act authorizes awards for injuries received by mariners on navigable waters.

3. MASTER AND SERVANT 🔑417(7)—WORKMEN'S COMPENSATION ACT — FINDINGS BY COMMISSION—REVIEW.
Findings of the Industrial Accident Commission under the Workmen's Compensation Act are subject to review if totally unsupported by the evidence.

4. MASTER AND SERVANT 🔑417(7)—WORKMEN'S COMPENSATION ACT — FINDINGS BY COMMISSION—REVIEW.
Findings of the Industrial Accident Commission under Workmen's Compensation Act are not reviewable where they find support under any rational view of the evidence.

5. MASTER AND SERVANT 🔑414—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—"WILLFUL MISCONDUCT."
The second officer of a vessel ordered by his superior to seek a lifeboat when vessel was about to strike the rocks is not, as a matter of law, guilty of "willful misconduct" because after getting into a lifeboat he goes back to the vessel and is unable, because of lifeboat being cast off, to return; "willful misconduct" meaning something more than negligence or gross negligence.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful Misconduct.]

6. MASTER AND SERVANT 🔑403—RECKLESSLY IMPERILING ONE'S OWN LIFE — PRESUMPTION—NEGLIGENCE.
There is no presumption that a man recklessly imperils his own life.

7. MASTER AND SERVANT 🔑417(8)—AWARD OF INDUSTRIAL ACCIDENT COMMISSION — HARMLESS ERROR.
An award by the Industrial Accident Commission making attorney's fees allowable under Workmen's Compensation Act payable to the attorney is without prejudice to the employer.

In Bank. Proceedings under Workmen's Compensation Act by the widow of James Bolger.

On certiorari by the North Pacific Steamship Company against the Industrial Accident Commission of California and others to review an award. Award affirmed.

C. H. Sooy and H. W. Glensor, both of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents. F. R. Wall, of San Francisco, for applicant.

SLOSS, J. This is a writ of certiorari to review an award of the Industrial Accident Commission allowing compensation to the widow of James Bolger for injuries causing his death. The petitioner for the writ was the owner of the steamer Eureka, engaged in coastwise trade between San Francisco and other ports. Bolger was the second officer of the Eureka. On January 8, 1915, while the vessel was off Point Bonita, outside the harbor of San Francisco, her engines stopped. The vessel was drifting toward the rocks, and the captain ordered the crew to take to the boats. All hands, with the exception of Bolger, made their way safely to shore in two boats. Bolger was on the vessel when she began to break up and was lost.

[1, 2] Most of the points made against the award have been removed from the field of

discussion by decisions rendered since the present proceeding was instituted. It must now be taken as settled law in this court that the general scheme of the Workmen's Compensation Act (St. 1911, p. 796) is constitutional, that the provisions allowing awards for death benefits are valid, and that the act authorizes awards for injuries received by mariners on navigable waters. Western Indemnity Company v. Pillsbury, 170 Cal. 686, 151 Pac. 398; Western Metal Supply Company v. Pillsbury, 172 Cal. 407, 156 Pac. 491; North Pacific Steamship Company v. Industrial Accident Commission, 163 Pac. 199, decided February 3, 1917.

[3, 4] The petitioner contends that the commission was without jurisdiction to make the award, for the reason that the uncontradicted evidence shows that Bolger's death was the result of his own willful misconduct. Under section 12, (a), (3), of the Workmen's Compensation Act (St. 1913, p. 283), liability exists only where the injury is not "caused by the intoxication or the willful misconduct of the injured employé." The commission found that Bolger's injury was not so caused. But its finding is subject to review here if totally unsupported by the evidence. Great Western Power Company v. Pillsbury, 170 Cal. 180, 149 Pac. 35. The commission is, however, the body charged with the determination of issues of fact, and its findings of fact are not reviewable where they find support under any rational view of the evidence.

[5] The words "willful misconduct," or phrases of similar import, are found in many workmen's compensation statutes. We need not undertake the difficult, perhaps impossible, task of giving an accurate and comprehensive definition of the term. As is true, generally, of inquiries turning upon standards of human conduct, each case must turn upon its own peculiar facts and circumstances. Great Western Power Company v. Pillsbury, supra. Certain it is, however, that "willful misconduct" means something more than negligence—more, even, than gross negligence. In the Great Western Power Company Case we held that a workman was guilty of willful misconduct where he had deliberately and intentionally violated a reasonable rule established for the very purpose of protecting men in his occupation from the danger of serious injury.

In the present case it is claimed that Bolger deliberately violated a proper command of his superior officer, the captain, and that his death was the direct result of this disobedience. The testimony shows that, when the engines stopped and the vessel had struck or was about to strike, the captain ordered the crew to take to the boats. Two boats were available, and were launched, one, a "working boat," near the bow, and the other, a lifeboat, near the stern. Bolger's station was at the lifeboat. Most of the evidence indicates that the captain and some of the men took their places in the working boat, while Bolger and others went into the lifeboat. There is, however, some testimony that Bolger was with the captain in the working boat. At any rate, Bolger, for some reason which is not disclosed by the evidence, left the boat in which he was, and went back to the steamer. While he was still absent from his comrades, the lifeboat was cast off, and when Bolger was next seen he was on the Eureka, appealing to the men in the boats to save him. A high sea was running, and it was not possible to approach near enough to get Bolger off.

[6] The willful misconduct asserted is the failure of Bolger to obey the captain's order to take to the boats. Of course, he did, in the first instance, heed the command by going into the boat. But the order of the captain may fairly be interpreted as an order to abandon the vessel once for all. This does not, however, answer the whole question. Did the evidence compel an inference that Bolger's act in returning to the ship was a deliberate and intentional defiance of his superior's command, in reckless disregard of his own safety? The situation was obviously one of great peril, and any competent mariner must have realized the necessity for a prompt leaving of the vessel. But when Bolger returned to the Eureka the lifeboat was still attached to the main vessel. We do not know the purpose of his return. It may conceivably have been a legitimate purpose, and one that might have been accomplished in a few moments. The entire episode, from the order to lower the boats to the final abandonment of the ship, occupied but a brief time. Bolger may well have thought that he could do what he set out to do on the vessel, and get back before the occupants of the boat should cast off. Some allowance may be made for errors of judgment in times of sudden emergency and stress. There can be no presumption that a man recklessly imperils his own life. In view of all the facts, we think the commission took no unreasonable view of the evidence when it found that Bolger was not guilty of willful misconduct. His actions were not those of one intending to refuse compliance with the captain's order to get into the boat. On the contrary, he showed his purpose of doing as he was bid. He was remiss, perhaps, in not following out the directed course as speedily as he might have done, but it cannot be said as a matter of law that his brief delay amounted to willful misconduct. This view of the commission's conclusion derives some additional support from the testimony of one witness, who stated that, when Bolger left the boat to return to the ship, the captain was in the same boat and made no objection to Bolger's return. This is some evidence to indicate, either that the captain did not regard Bolger's return as a violation

of his orders, or that Bolger was justified in thinking that the captain assented to his conduct.

[7] A further point is made. Section 29, (b), of the Workmen's Compensation Act authorizes the commission to—

> "fix and determine and allow as a lien against any amount to be paid as compensation:
>
> "(1) A reasonable attorney's fee for legal services pertaining to any claim for compensation. * * *"

The findings declare that Joseph A. Brown, attorney at law, has rendered legal services on behalf of applicant in this proceeding, of the reasonable value of $25. The award directs the steamship company to pay to the widow the sum of $3,750.30, to be paid as follows: (1) To Joseph A. Brown, attorney for applicant, the sum of $25 as a reasonable attorney's fee; (2) the balance to the widow in specified installments.

It is claimed that the act does not authorize the allowance of a sum of money to be paid directly to the attorney. It is difficult to see how the petitioner is injured by the form of the order, since the amount of the attorney's fee is deducted from the compensation allowed to the petitioner. But beyond this we think the order complies with the intention of the act. It is provided that the commission may allow the attorney's fee as a lien against the amount to be determined as compensation. The petitioner does not suggest any method by which such a "lien" can be made effective otherwise than by intercepting the amount before it passes from the employer to the applicant. The method adopted by the commission seems to be the only available way of enforcing the lien.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

(174 Cal. 588)

GONZALEZ v. GONZALEZ. (S. F. 6862.)

(Supreme Court of California. March 13, 1917. Rehearing Denied April 12, 1917.)

1. Arbitration and Award 🔑3 — What Constitutes Arbitration — Prior Dispute.

An arbitration, strictly speaking, has to do with settlement of existing controversy, and if there is no matter in dispute, there is no question for arbitration.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 11–21.]

2. Partition 🔑6—Arbitration — Compliance with Statute.

Where there had been no dispute as to shares of heirs in property, but they agreed to a partition by disinterested persons, the partition was not a statutory arbitration, where the award was not filed with the clerk of court in accordance with Code Civ. Proc. § 1283, and no hearing for the purpose of taking evidence was had in accordance with section 1287, although the agreement provided that the award should be binding and might be enforced in judicial proceedings.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 4.

For other definitions, see Words and Phrases, First and Second Series, Arbitration.]

3. Partition 🔑6—Reference.

Where heirs of one deceased agreed to have a partition of the property made by disinterested persons, the proceeding was not an arbitration and award, but a mere reference, although the arbitrators were sworn in accordance with Code Civ. Proc. § 1285.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 4.]

4. Partition 🔑6—Relief—Owelty.

Where parties have voluntarily agreed to a partition of the estate to which they are the heirs, the partitioners to whom the matter is referred have the power to award owelty as a necessary incident to the partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 4.]

5. Partition 🔑6 — Equitable Division — Water Rights.

Where heirs of an estate which owned water rights agreed to a partition, it was not necessary that the shares in the water company be divided share for share, but, their value depending upon their relative position on the ditch, it was proper to estimate the value of each right and award an unequal number of shares having approximately equal value.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 4.]

6. Partition 🔑6 — Partition by Agreement—Right of Way.

Where heirs of an estate agreed to refer partition to certain persons, and the land was so divided as to necessitate giving one heir a right of way over the land given to another heir, the power of the referees to award such right of way would be implied in the agreement in view of Civ. Code, §§ 1655, 1656, implying all things in law which are considered incidental to a contract and necessary to effectuate it.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 4.]

7. Partition 🔑6—Rights of Parties—Necessity of Hearing.

In a voluntary partition of land belonging to an estate which was referred to disinterested partitioners, it was not essential that the parties be given an opportunity to introduce evidence and be heard.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 4.]

8. Partition 🔑6—Voluntary Partition—Powers of Partitioners.

Where heirs of an estate agreed to a partition by disinterested partitioners, it was not an abuse of power or misconduct for one partitioner to hire an expert upon land values to verify conclusions already reached by such partitioner.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 4.]

9. Partition 🔑6—Voluntary Partition—Powers of Partitioners.

Where heirs of an estate agreed to partition by disinterested partitioners, the mere fact that one of the partitioners was a guest of one of the heirs, while requiring strict scrutiny, did not necessarily vitiate the partition made.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 4.]

10. Partition 🔑6 — Agreement — Enforcement.

Where a partition agreement recited that the award made should be binding upon all parties, a decree of specific performance of such agreement could not be disturbed in the absence of showing that the partition was unfairly made or that the partitioners were guilty of fraud.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 4.]

Sloss and Shaw, JJ., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Suit by Edie W. Gonzalez against Anita C. Gonzalez. From a judgment for complainant, defendant appeals. Affirmed.

Charles W. Slack, of San Francisco, for appellant. Charles S. Wheeler and John F. Bowie, both of San Francisco, for respondent.

LAWLOR, J. Appeal from a judgment decreeing specific performance of an award given under two agreements providing for the partitionment of certain realty holdings and personalty in Monterey county.

By virtue of a contest instituted against the will of Mariano E. Gonzalez, deceased, the plaintiff and defendant, who are respectively the widow of the deceased and daughter by his former wife, had become possessed in equal undivided shares of the estate of the deceased, except a certain tract, 9.23 acres in extent, a part of the homestead and constituting the "dwellings and out buildings and yards about the same," which was distributed absolutely to the plaintiff. The original homestead awarded to the plaintiff in the probate proceedings included about 300 acres. But subsequent to the commencement of the said contest, and prior to the revocation of the probate of the will, the plaintiff and defendant entered into the first of the agreements between themselves, dated March 13, 1909, whereby it was agreed, among other things, that the parties thereto should petition "for the final distribution of all of the estate of the said deceased [including the said homestead except for the nine-acre tract referred to] to the parties hereto, share and share alike." The will was revoked, and the decree distributing the property to the plaintiff and defendant in accordance with the agreement was duly entered on April 5, 1909. One of the objects of the agreement was to give to the parties equal rights to the homestead. It was thus provided in the agreement that, in the event the will was adjudged invalid, the remaining portion of the homestead should be either "partitioned into two parts of equal value," or a portion of the estate adjacent thereto and of equal value should be set apart to the defendant; or the homestead tract should be "appraised at its fair market value," and that the plaintiff should pay the defendant one-half of this amount. The plaintiff, who was given the right to elect the method to be ultimately employed, decided to retain the land embraced in the homestead, thereby having the property partitioned in accordance with the provisions of the second alternative. That provision, stated in full, is as follows:

> "(2) Property adjacent to the property included in the said homestead, of equal value and like quantity thereto, exclusive of the property above excepted shall be set apart absolutely to the party of the second part [referring to the defendant], and the property included in the said homestead shall be set apart absolutely to the party of the first part [referring to the plaintiff]."

For the purposes of setting apart the property, it was provided in the agreement that three "arbitrators" should be chosen. The plaintiff selected Warren R. Porter, the defendant Robert F. Johnson, while these two chose Wellington Gregg, Jr. It was further provided that:

> "The arbitrators shall forthwith proceed to make such partition, such setting apart, or such appraisement and the determination of any two of the arbitrators upon any matter submitted to them shall be binding."

But thereafter on July 19, 1909, and before the "arbitrators" had completed their work, the plaintiff and defendant entered into the second agreement referred to, whereby the "arbitrators" were directed also to "partition and divide between the parties hereto and * * * set off to each of the parties in severalty" one-half of the remaining real estate, "quality, quantity, and improvements considered," consisting of about 6,000 acres of farming and grazing land, various lots in a town known as Gonzales, and certain personal property consisting of 70 shares of the capital stock of the Gonzalez Water Company, farming implements, vehicles, household furniture, and the like. A plan of partition embracing all the property covered in the two agreements was submitted on February 25, 1910, which was concurred in by Porter and Gregg. Although the parties had agreed that they "shall execute such instruments of conveyance, one to the other, and shall do such other things as shall be necessary to carry into force and effect said award," the defendant refused to abide thereby; whereupon the plaintiff brought her action for specific performance. Evidence was introduced at the trial on behalf of both parties, and the court, having viewed the real property at the request of the defendant, rendered judgment for the plaintiff decreeing specific performance as prayed. The defendant appeals from the judgment and the order denying her motion for a new trial.

It is contended by the defendant that the judgment and order must be reversed for the following reasons:

> "(1) An award must conform strictly to the submission. The arbitrators were without authority to divide the land unequally, allowing compensation to the one receiving the smaller portion, or to divide the shares of stock unequally, or to burden one portion with an easement in favor of the other.
>
> "(2) The court erred in enforcing an award reached by arbitrators who refused the defendant the right to a hearing and to adduce evidence.
>
> "(3) The award is void because of the gross misbehavior and neglect of the arbitrators.
>
> "(4) A court of equity will not enforce specifically an award unless the plaintiff proves that it is just and reasonable. This the plaintiff failed to do."

These objections explain themselves. They will be considered in the order stated.

[1] 1. But first it is necessary to determine in what capacity the three persons selected to set apart and partition the property were expected to serve, whether as arbitrators in the strict sense, or merely as agents of the parties appointed to divide the property on their behalf. It is the theory of the defendant that they were arbitrators who were bound to exercise such authority as is common to arbitrators strictly in accordance with the rules prescribed by law for the arbitration of controversies. But the proceeding in this case was not based upon a prior controversy. At the time the first agreement for the division of the property with reference to the homestead was made the parties were laboring under no dispute; indeed, they had no certain knowledge that they would prevail in the contest for the revocation of the will, and that there would be any property to be divided between them. And there is nothing to suggest that any dispute had arisen prior to the entering into of the second agreement. A reasonable inference may be drawn from the facts that the object of the parties was rather to prevent future disputes than of settling existing ones. The court found:

> "That at the time the parties to this action entered into the contracts * * * no difference or dispute existed between them, nor had they themselves made any attempt to divide the properties therein mentioned between themselves."

Yet, "the decided weight of authority is to the effect that an arbitration, strictly speaking, has to do with the settlement of existing controversies between parties. If there is no matter in dispute, there is no question for an arbitration." 5 C. J. 27, § 25.

[2] That the proceeding to partition the property cannot be supported as a statutory arbitration is further apparent. It does not appear that the award of the alleged arbitrators was filed with the clerk of the court as provided by the Code (Code Civ. Proc. § 1283), although the contracts provided that the award "shall be binding" and "may be enforced by either of the parties hereto by proper judicial proceedings." Nor was any hearing held for the purpose of adducing evidence. Code Civ. Proc. § 1287.

[3] On the other hand, an examination of the evidence, and a study of the situation of the parties leading to the making of the agreements, convinces us that this is nothing more than a reference to disinterested persons. While there is little authority on the subject of effectuating a partition by such means, there are numerous instances where the practice has been followed. Allnatt points out that Littleton, in enumerating the various methods of arranging and choosing the shares on a partition of coparceners, gives the second as "where they chose certain friends to make partition of the lands or tenements." Allnatt on Partition (Ed. 1820) p. 14; Litt. § 243.

> "I have reason to know," Allnatt further states, "that in many instances where several persons have been entitled to lands, as tenants in common, in fee, or have been proprietors of waste grounds, in respect of different farms, etc., of which they were seised in fee, the only steps taken for the purpose of effecting a partition have been to enter into a deed of covenant, to refer the partition and allotment to the arbitration of some indifferent person."

It is said by Freeman:

> "A deed of partition may appoint certain persons as commissioners to make a division of the lands therein described, and to allot the same among the cotenants according to certain terms specified in the deed." Freeman on Cotenancy and Partition (2d Ed.) § 395.

In Phelps v. Harris, 101 U. S. 370, 383, 25 L. Ed. 855, the court, approving the action of a trustee in leaving a division of certain properties to others, makes the following pertinent comment:

> "And it seems to us that the intervention of disinterested persons for appraising the property and making the allotment was judicious and proper. It is the course most commonly pursued by those who desire to make a division of property."

See, also, Emeric v. Alvarado, 64 Cal. 529, 569, 2 Pac. 418; Tewksbury v. Provizzo, 12 Cal. 20.

Such a proceeding is not necessarily an arbitration, although there may be circumstances where, through a controversy as to the proper division to be made of the property, or otherwise, a partition may be properly made the subject of arbitration. Code Civ. Proc. § 1281. It is rather analogous to that of an appraisement or a valuation of property (see M. E. Church v. Seitz, 74 Cal. 287, 15 Pac. 839); the distinguishing feature being that, after the value of the property has been determined, it is necessary that it be divided or set apart so as to bring about a separation into two parcels according to the terms of the agreement of submission under which the award is to be made. Nor is this conclusion affected by the incident that the persons chosen to make the partition were sworn in accordance with the provisions of section 1285 of the Code of Civil Procedure.

> "As partition by act of the parties rests on their agreement, it is obvious that they may resort to any method which to them seems best, and that it must be impossible to specify all the methods that may be resorted to, for human ingenuity may devise ways not hitherto employed and which nevertheless satisfy all the interested parties." 30 Cyc. 154.

To iterate, the parties here, instead of endeavoring to divide the estate among themselves, agreed to effectuate the partition by selecting three disinterested persons, hereafter referred to as the partitioners, to determine the matter for them.

[4] 2. As to defendant's first contention, it is shown that the partitioners did not actually make an equal division of the tract of land, but awarded to the defendant an owelty of $3,304. From the earliest times the power to award owelty has been regarded as necessary to the act of partitioning property; for, as said in 30 Cyc. p. 261, speaking generally of the nature of the right:

> "It is not essential, and in truth it can rarely be proper, even where the interests of two or more are equal, to allot each an equal part."

In the year 1682 a case is reported where coparceners, making a partition, expressly agreed upon an owelty of partition. Hulbert v. Hart, 1 Vern. 133. In Lacy v. Gard, 60 Ill. App. 72, a father possessing two tracts desired to arrange a partition between his children and grandchildren. "He selected three neighbors; requested them to view the premises and suggest to him a fair and equal division." Yet as to one of the tracts their report was that it be divided into unequal parcels, "and that the difference in value should be equalized by requiring the party to whom it should be allotted to pay the sum of $300 to the persons to whom the other 20-acre parcels should be given." Also in Long v. Long, 1 Watts (Pa.) 265, a partition was made by "certain persons appointed for that purpose," and, apparently without express authority being given, owelty was awarded. The rule is thus laid down:

> "Partition among the parties is usually effected by the division of the property into as many portions as there are cotenants, such portions being as nearly equal as possible, and the allotment of one of such portions to each of the cotenants. And in case of any considerable inequality between the shares it is usual for those cotenants who receive shares of a lesser value to receive a payment from those receiving the more valuable shares, which payment is termed owelty." 21 Am. & Eng. Encyc. of Law (2d Ed.) p. 1135.

It is also stated:

> "In making a voluntary partition, or a partition by parol agreement, the parties may agree

for the payment of owelty to equalize the shares." Id. p. 1183.

That the parties could have expressly delegated such a power cannot be questioned. This was recognized by Freeman:

> "The power which every cotenant has of joining with his companions in interest in making a partition of the common property, may, no doubt, be delegated by him to another; and, when so delegated, it may be exercised by the agent as effectually as it could be exercised by the principal." Freeman, etc., § 417.

And with equal force the delegation of such power may under proper circumstances be implied.

It is reasonable to infer that the parties here knew the character and extent of the property to be divided. The maps contained in the record and other evidence show the estate to consist of three irregular tracts, separated by the Salinas river and the Southern Pacific Railroad, but practically surrounding the town of Gonzales, the whole embracing 6,263.25 acres, which consist for the most part of farming land, pasturage, and alfalfa fields, marked by numerous canals, roads, fences, hills, and ravines, and occupied at various points by dairy houses, farm buildings, and other structures. Porter testified:

> "From my standpoint, it was physically impossible to divide that property justly acre by acre, share by share, of the land, and do justice to both parties. It can't be done, I think, owing to the topography of the country."

The award itself states that the land could not be divided between the parties in such a way as to equalize the differences in value "without injury to the same." The court, having personally viewed the property, made the following findings:

> "That the property to be divided could not have been partitioned in kind with absolute equality between the parties, quality, quantity, and improvements thereon considered, without detriment to the interests of the owners, for the character of said property was such that the best interests of both of the parties require that some inequality exist in the partition thereof, and that the difference be equalized by a monetary payment; * * * that, in view of the subject-matter to which said contracts related, it was reasonable and conformable to usage to imply therefrom an authority and power in the parties thereby appointed to equalize comparatively slight and necessary inequalities of value in a division of the property, by pecuniary compensation, and such implication is incident to said agreements and is necessary to carry them into effect, and to make possible a fair and equitable partition of the said property."

From these considerations we think it is reasonable to imply from the agreements the power to award owelty, and, as the sum awarded herein is but a trivial amount compared with the total value of the property, the award thereof must be upheld.

[5] The partitioners did not divide the 70 shares of the capital stock of the Gonzalez Water Company share by share, but divided them according to the acres of land lying below the irrigation ditch belonging to the water company. The court found that, although the ownership of the shares was, in fact, severable from the ownership of the land, the stock was of little or no value to persons who did not own land beneath the ditch of the water company, as a share of stock merely entitled the holder thereof to receive water on land below the ditch, and that it was just and reasonable in furtherance of the intention of the parties that the shares be divided in proportion to the number of acres lying below the ditch and irrigable therefrom. The court also found:

> "That the inequalities of value so existing when said properties are considered as deprived of the rights to water incident to the said water stock are fully and fairly corrected and compensated for by the award of said water stock as the same has been made, and the allowance and direction for payment to said Anita G. Gonzalez of the sum of $3,304."

These findings are not only supported by the evidence, but obviously are in accord with the intention of the parties to partition the property as an entirety. Indeed, it cannot be assumed that the parties otherwise would have found it advisable to submit 70 shares of stock to third persons in order to obtain an equal division thereof.

[6] The defendant also contends that the partitioners exceeded their authority in that they awarded a perpetual right of way to the plaintiff over the lands allotted to the defendant, notwithstanding no such authority was expressly conferred by either of the contracts of submission. There is evidence to show that the way or easement was merely the right to use an existing road which was necessary to furnish proper facilities for access to the land to which it was appurtenant, and there were findings that it was reasonable and conformable to usage to award the right of way under the circumstances shown, in order to make possible a fair and equitable partition of the property. It is our opinion that the intention of the parties to vest the partitioners with such authority must be implied, not only from the facts shown, but under the provisions of the Civil Code which implies all things in law which are considered incidental to a contract, and necessary to carry it into effect. Sections 1655, 1656.

> "Though it is not usual to create an easement over another person's land, yet it is otherwise when a separation of property takes place, and it is necessary that a certain part of it should be assigned to a person who cannot have the use of it without a right of way." Lister v. Lister, 3 Y. & C. 540.

[7] 3. The second point raised by the defendant is obviously based upon the theory that the proceeding for the partitionment of the property is a statutory arbitration. It cannot be questioned, under the facts, that the partitioners did not grant the parties an opportunity for a hearing or the right to adduce evidence. After they had determined upon the award Gregg sent a letter to the

defendant to attend at a certain meeting if she wished to be heard. But subsequently it was decided by Porter and Gregg to sign the award without further consideration. We do not think, however, that a hearing before the partitioners for the purpose of taking testimony and determining such questions as the parties might choose to raise was anticipated by the parties, or embodied in the terms of their agreements. Porter stated that the question of hearing evidence was never suggested to him by any one prior to the meeting referred to. Gregg testified to like effect. Rather the plain import of the contracts was that the three persons to be selected should go upon the land, make the necessary investigations, and otherwise inform themselves so they might be able to make a fair division of the property. There is, in fact, no provision in either of the agreements calling for any hearing, and we can conceive of no reason why, if the parties should choose to leave such matters wholly to the judgment of the three persons to be selected, they should not be permitted to do so. Such was the procedure which was followed in Casstevens v. Casstevens, 227 Ill. 547, 81 N. E. 709, 118 Am. St. Rep. 291, where three disinterested persons "sometimes in the record called 'arbitrators,' and sometimes 'commissioners,'" went upon the land and decided how the property should be allotted. This was the procedure followed herein, and elaborate plans were prepared by the partitioners in their effort to arrive at a just and equal division. Each of them made personal inspection of the property. Porter and Gregg, who concurred in the award, prepared, or had prepared under their supervision, elaborate drawings showing the location of the various parcels of land and indicating the proposed plan of partition. It is obvious that the parties, not contemplating a formal hearing, desired to leave the whole matter to the skill and unbiased judgment of the three persons who were to be selected to make the partition. Referring to a case of valuation or appraisement, it was said in M. E. Church v. Seitz, supra:

> "Certainly, if parties expressly say in their agreement that the 'arbitrators' are to determine the question upon their own skill and judgment without examining witnesses or hearing argument, there could be nothing to prevent such agreement from being carried out. And if this can be expressed, it can in a proper case be implied."

See, also, Bottomley v. Ambler, 38 L. T. N. S. 545; Hall v. Norwalk Fire Ins. Co., 57 Conn. 105, 17 Atl. 356.

As is said in the first of the two cases last cited:

> "Considering the position and experience of the three gentlemen who were appointed, it may well be that they were perfectly qualified to decide the matter themselves. In such a case as this the arbitrators are not arbitrators in the sense in which arbitrators are appointed in an ordinary case, when they are appointed to ascertain facts and apply the law to the facts brought them on evidence."

While these are cases of appraisement or valuation, there is no difference in principle between them and the case before us.

[8] 4. In support of the defendant's third main contention that the award should be vitiated because of the misconduct of the "arbitrators" two minor points are raised. It is contended that the partitioner Gregg did not sufficiently familiarize himself with the extent and character of the property to be partitioned, by personal investigation or inspection, but left the major part of this work to Harry R. Verrue, who was selected by him as an expert on land values. It appears that Verrue devoted much labor and time carefully considering the matter, personally going over the land, and otherwise determining the most advisable manner in which the partitionment could be made. He submitted his report to Gregg, who discussed the matter with his colleagues, and then the award was made. Gregg testified as to the employment of Verrue as follows:

> "The conclusion embodied in the award is one I reached on my own account. In reaching that conclusion I had employed Mr. Verrue. After visiting the property, I thought it would be well to have the opinion of a man who was well versed in the valuations and conditions of the land in that county, and, knowing that Mr. Verrue had considerable experience, I engaged him for that purpose. I paid him personally."

The court's findings on this point are in part as follows:

> "That said Warren R. Porter and Wellington Gregg, Jr., examined the property to be set apart and the property to be divided and did devote such time to the performance of their duties as was reasonably necessary in order to arrive at an accurate, fair and just conclusion; * * * that said Warren R. Porter and Wellington Gregg, Jr., who signed said award, correctly informed themselves concerning the quantity, quality, improvements, and values of said properties."

It is noteworthy that Porter's plan of partitionment, prepared independently of that made by Gregg with Verrue's assistance, differed only in minor details from that of Gregg's. The award was based on these two plans, as Johnson's plan was found to be, in the opinion of the other two partitioners, unsatisfactory. The court also found:

> "That the award actually made was the product of individual judgment and study of said Warren R. Porter and Wellington Gregg, Jr."

It cannot be doubted that the partitioners, in the performance of their duties, represented the parties in a fiduciary capacity. They were selected because of the confidence the parties reposed in their personal integrity, discretion, and ability, and were intrusted with special powers of agency. There is abundant reason why this trust should not be delegated. Yet it has been said:

> "But it is entirely proper for arbitrators, in a case requiring it, to obtain from disinterested persons of acknowledged skill such information and advice in reference to technical questions submitted to them as may be necessary to enable them to come to correct conclusions, provided that the award is the result of their own judgment after obtaining such information." 1 Mechem on Agency (2d Ed.) § 310.

See, also, Simons v. Mills, 80 Cal. 118, 22 Pac. 25; Phelps v. Harris, 101 U. S. 370, 383, 25 L. Ed. 855; Emery v. Wase, 5 Ves. Jr. 846, 31 Eng. Rep. 889.

With equal force, similar comment may be made regarding partitioners in the situation presented here.

[9] The other point made to the effect that the award is void is based upon the fact that both Porter and Gregg were guests of the plaintiff while they were on the property making their investigations, and that Porter, at least, discussed with her the matter of the proposed partitionment prior to the time that the award was made. The partitioners both denied that either of them was in any manner influenced in making the award by any entertainment provided or courtesy shown by the plaintiff. This was the finding of the court. It is evident that such conduct on the part of the partitioners selected to divide the land in which the plaintiff was directly interested should be scrutinized with care. But we think the facts here are insufficient to even raise the suggestion that the two persons were prejudiced against the defendant by the hospitality of the plaintiff, or that the fairness of their award was in any way affected by it. The finding of the court cannot therefore be disturbed. Were they to be regarded as arbitrators our conclusion might be otherwise in view of such authorities as Grosvenor v. Flint, 20 R. I. 21, 37 Atl. 304, and Robinson v. Shanks, 118 Ind. 125, 20 N. E. 713, for arbitrators are clothed with much of the dignity and attributes of courts, and must exercise their authority with the utmost propriety and caution until they have completely executed their trust. But partitioners do not exercise judicial functions in the same sense as arbitrators. They are, as we have seen, special agents of the parties, rather than quasi judicial officers. What is said here, however, does not necessarily apply to referees appointed by a court to divide or partition property between the litigants before it. In the absence of proof of partiality, or circumstances from which partiality may be inferred, the award must be upheld.

The defendant contends that the findings of the court that the "arbitrators" were selected because of their skill and experience, and that they did inform themselves as to the quality, quantity, improvements, and values of the property, are not sustained by the evidence, but from what has been said it is clear that the contention is without merit.

[10] 5. The final objection, that the plaintiff is not entitled to specific performance because there was no proof that the award was as to the defendant just and reasonable, is equally untenable. The evidence supporting the award is full and complete, consisting, as it does, not only of various maps, testimony by the partitioners and various experts, but in addition the court personally viewed the property. While there is some conflict in the evidence, and although it may be claimed that many of the facts testified to support the defendant's argument that the land awarded the plaintiff, notwithstanding the owelty, was worth more than that awarded the defendant, the court has found otherwise, and we cannot disturb that finding. The lower court, in fact, has resolved the mass of evidence in favor of the plaintiff, and has satisfied itself that the award was fair, just, and equitable. Moreover, the contracts, by their express terms, provide that the award shall be binding upon the parties, and it is admitted in the answer that the contracts themselves were just and reasonable. The provision reads:

> "The said parties further mutually covenant and agree each with and to the other that forthwith upon the making by the said arbitrators of the partition and award herein provided to be made by them each will execute and deliver to the other a grant, bargain, and sale deed of the portion of the above-described lands so awarded to such other, and will receive from such other party a grant, bargain, and sale deed of the portion of the above-described lands so awarded to her, and shall do such other things as shall be necessary and proper to carry into force and effect the said award. The award of the said arbitrators shall be in writing signed by said arbitrators or by a majority of them, and the determination of any two of said arbitrators upon any of the matters herein submitted to them shall be binding, and the said award may be enforced by either of the parties hereto by proper judicial proceedings."

Inasmuch as there is no showing that the partition was unfairly made, or that the partitioners were guilty of fraud, the award cannot be inquired into for alleged mistakes in drawing conclusions from the facts before them, and the parties must be held to the terms of their agreements. See Utah Construction Co. v. Western Pac. Ry. Co., 162 Pac. 631; Dore v. Southern Pac. Co., 163 Cal. 182, 196, 124 Pac. 817.

No other points require notice.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

SLOSS, J. I dissent. Without regard to other points made, I think it should be held that the trial court erred in enforcing the award, made, as it was, by the arbitrators without giving the defendant notice of any hearing, or the opportunity to be heard or to introduce evidence. It appears that Messrs. Porter, Johnson, and Gregg made independent examinations of the property, and prepared separate plans for partitioning the land. The differences between Porter's plan and that of Gregg were harmonized at conferences between them. All of this consumed a number of months, during which there was some informal discussion between counsel for the two parties with reference to the proposed partition, but no agreement was ever reached. Finally, on February 24, 1910, Mr. Gregg addressed a letter to the defendant, Miss Gonzalez, and Charles W. Slack, Esq., her attorney, informing them, on behalf of his colleagues and himself, that a meeting of the arbitrators would be held on the 25th day of February, 1910, at his (Gregg's) office. It is interesting to note that at this time the arbitrators entertained the view that the granting to the parties of a hearing was, if not a matter of strict legal right, at least within the proprieties of the situation. Mr. Gregg's letter concluded with these words:

> "If you desire to be heard further in the said matter, please be present 11 o'clock."

At the time and place specified Mr. Slack appeared on behalf of Miss Gonzalez, stated, in effect, that she was dissatisfied with the proposed partition, and requested an opportunity to present evidence to show that a division of the lands on the basis which had been suggested would not be equal, and would be unjust to Miss Gonzalez. Notwithstanding this request, made in answer to their own invitation, Messrs. Porter and Gregg determined that no evidence should be heard, and proceeded at once to sign the award which had been prepared.

If the agreement of July 19th provided for an arbitration, it is plain—and this is conceded by the majority opinion—that the arbitrators could not render a valid award without giving to each of the parties notice of a hearing and an opportunity to present evidence. These rights are of the very essence of an arbitration. Curtis v. Sacramento, 64 Cal. 102, 28 Pac. 108; 5 C. J. 84.

> "There are two time-honored rules in relation to arbitrators—one that courts will not enforce an agreement to submit to arbitration, or in other words, that it can be revoked; and the other that arbitrators must give notice of their sessions so as to afford the parties a right to be heard. These rules rest upon the same idea, viz. that an arbitration is a substitute for proceedings in court. It being considered against sound policy to allow parties to deprive themselves of their right of resort to the courts, agreements to that effect are not binding so long as they are executory; but if the parties choose to resort to other tribunals, such tribunals are held to the more important rules which govern courts in their proceedings." M. E. Church v. Seitz, 74 Cal. 287, 291, 15 Pac. 839.

Not every difference of opinion between parties is, however, a proper subject for arbitration. A contract by which the value of property is, for the purposes of the contract, to be fixed by designated persons, is not a submission to arbitration. M. E. Church v. Seitz, supra; Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817. But the agreement in the present case goes far beyond this. The question submitted for determination was not merely one of valuation or appraisement. It involved the partition of lands owned in common and the allotment to each of the parties of a portion of the land in severalty. The result of the arbitration was to divest each party of title to a part of the premises, and to vest sole ownership thereof in the other. Such partition is a proper subject for the determination of a court, and we see no reason for holding that, when it is committed to the determination of persons selected by the parties, the resulting proceeding does not constitute a true arbitration.

It is said that there was no controversy between the parties, and therefore no basis for a submission to arbitration. The court found that, when the parties entered into the second agreement, "no difference or dispute existed between them, nor had they themselves made any attempt to divide the properties therein mentioned between themselves." No doubt, the existence of a controversy or dispute is a prerequisite to a submission to arbitration. 5 C. J., 27. But this does not mean that actual litigation between the parties shall have been commenced or threatened, or that they must have engaged in an acrimonious quarrel. It is enough if either of them asserts a right which requires judicial ascertainment and enforcement. For the purposes of the rule, the right of cotenants who have not agreed upon a division of their property to have the same partitioned presents a sufficient controversy to furnish a basis for submission and award. Brown v. Wheeler, 17 Conn. 345, 44 Am. Dec. 550. Section 1281 of the Code of Civil Procedure provides that:

> "Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them. * * *"

If a submission to arbitration has its essential basis in a controversy, so, too, does a civil action between parties presuppose a controversy which furnishes the occasion for setting the judicial power in motion. The "controversy" contemplated by section 1281 is one which "might be the subject of a civil action." A complete case for partition by civil action is made out when "several cotenants hold and are in possession of real property," and any one of them desires a partition. Code Civ. Proc. § 752; De Uprey v. De Uprey, 27 Cal. 329, 87 Am. Dec. 81. Each cotenant is entitled to demand partition as a matter of right. Freem. Cot. & Part. § 424. It is not necessary that the other cotenants or any of them shall have objected to a partition. It is enough that the parties in interest have not agreed upon a division between themselves. See Frankfurth v. Steinmeyer, 113 Wis. 195, 203, 89 N. W. 148. That they had not so agreed in this case is apparent from the very fact of their entering into the agreement for submission.

Section 1281, Code of Civil Procedure, after excluding from arbitration questions of title to real property in fee or for life, goes on to provide that:

> "This qualification does not include questions relating merely to the partition or boundaries of real property."

This is, in effect, a declaration that the partition of real property is a proper subject for arbitration. And such appears to be the view taken by the Supreme Court of Wisconsin under a similar statute. McCord v. Flynn, 111 Wis. 78, 86 N. W. 668; Frankfurth v. Steinmeyer, 113 Wis. 195, 89 N. W. 148.

The right to notice and hearing may, no doubt, be waived. But we find nothing in the conduct of the appellant or in the language of her agreement which can support a finding of such waiver. The agreement itself is silent on the subject. If the parties contracted for a submission to arbitration, properly so called, the right to notice and hearing are implied, unless expressly waived by the terms of the submission. Curtis v. Sacramento, 64 Cal. 102, 106, 28 Pac. 108.

> "A right so valuable to the parties and so essential to the accomplishment of justice should not, in any case where the language upon which the claim of waiver is based is doubtful or equivocal, be held to have been surrendered. Nothing short of plain and clear words should be considered sufficient for that purpose." Hart v. Kennedy, 47 N. J. Eq. 51, 61, 20 Atl. 29; 5 C. J. 84.

For these reasons, I believe that the decree enforcing the award should not be sustained.

I concur: SHAW, J.

(174 Cal. 297)

NORTHWESTERN PAC. R. CO. v. INDUSTRIAL ACCIDENT COMMISSION.

(S. F. 7651.)

(Supreme Court of California. Jan. 27, 1917. On Application for Rehearing, Feb. 26, 1917.)

1. Master and Servant ⚷371—Workmen's Compensation Act—Injuries Covered.

To justify an award to the widow and minor children of a deceased employé, it must be established that the death resulted from accidental personal injury sustained by the employé arising out of and in the course of his employment.

2. Master and Servant ⚷405(4)—Workmen's Compensation Act—Injuries Covered—Evidence.

Evidence *held* to show deceased freight traffic clerk was not injured in the course of employment, so that an award of compensation to his widow and minor children was improper.

3. Master and Servant ⚷375(2) — Workmen's Compensation Act—Injuries Covered—"Course of Employment."

A local freight traffic clerk who was sent to inspect the books at another station, and who while on his way to such station descended from the train when another individual was injured, thereby departed from the course of his employment, and when he was killed by the train his widow was not entitled to compensation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

In Bank. Petition for writ of review by the Northwestern Pacific Railroad Company to review an award of the Industrial Accident Commission in favor of the widow and minor children of Charles A. Bowdish, a deceased employé of petitioner. Award annulled.

On application for rehearing. Opinion modified.

Stanley Moore and Elliott Johnson, both of San Francisco, for petitioner. Christopher M. Bradley and Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondent.

HENSHAW, J. Charles A. Bowdish was in the employ of the petitioner as chief clerk of its freight auditing department. His duties, as the title of his position indicates, were clerical, and for the most part were performed in the city and county of San Francisco, where is located the main office of the company. The company also employed traveling agents, who inspected and corrected the books of local freight agents, and instructed them in the proper keeping thereof. Occasionally Mr. Bowdish was called upon to perform like work. In February, 1914, it appeared that the local agent of the company at Ukiah, a city on one of its lines of railway, was experiencing difficulty in making up his books of account, and Mr. Bowdish was instructed to go to Ukiah, over the railroad of petitioner, and there to aid the local agent in overcoming his bookkeeping difficulties. Mr. Bowdish, in the performance of his duty, left San Francisco in the afternoon of September 14th. In its progress his train arrived at a station known as Asti at about 6:30 p. m. In was dark and raining. As the train was leaving Asti station one Hagemeyer attempted to board it, slipped, fell, and was seriously injured. The train was immediately brought to a stop and aid given to the injured man. In rendering this aid Mr. Hagemeyer was placed upon a stretcher at the scene of his accident, and the train was backed down to that point so that the stretcher could be lifted and placed in the baggage car. This having been done, the conductor and his brakeman shouted the warning signals to the passengers, who had gathered about the scene of the accident, to embark as the train was about to start. The engineer gave the customary signals, the passengers and trainmen boarded the train, and the train got under headway. As it was thus leaving the station for the second time, a brakeman who was standing on the rear platform of the first passenger coach following the baggage car, prepared to close the vestibule. He heard a noise on the steps below him, and looking down noticed a large heavy man attempting to jump aboard the moving train. His hands slipped from the side bar, and before the train could be stopped this man had fallen between the two cars and was so badly injured that he died almost immediately. This man was Charles A. Bowdish. Application by his widow and minor children was made to the Industrial Accident Commission for an award on account of the death thus sustained. An award was granted and petitioner has sued out this writ of review.

[1] The facts above stated are not in controversy. To justify any award it must be

established that the death resulted "from accidental personal injury sustained by the employé, arising out of and in the course of his employment." Petitioner contends: First, that no word of evidence establishes this fundamental proposition; and, second, that the findings, in so far as they declare to this effect, are wholly unsupported by the evidence. The findings of the commission upon this point are as follows:

> "On the day in question the deceased had been ordered by his employer to proceed to Ukiah for the purpose of checking up the accounts at that station, and in pursuance of such order he was riding on a train of the defendant; his transportation for that purpose having been supplied by the defendant. Just as the train left Asti, it ran over and injured a man, and when it stopped, on account of such accident, the deceased alighted from the train, and without orders or request from the conductor or train crew. Upon signal being given by the conductor for the train to proceed, said deceased, after the train had started, attempted to board the same, and in some manner his hold slipped and he fell under the wheels, and was almost instantly killed.
>
> "That the act of said employé in alighting from the train as aforesaid was a natural and reasonable act upon the part of any person traveling upon business of an employer, and was not such a departure from the course of the duties of his employment as to take him outside of the protection given by the Workmen's Compensation, Insurance, and Safety Act to employés traveling upon the business of their employment; further that the act of the deceased in alighting from the train, thereby to be available in case his services should be useful, was a portion of his implied duties as an employé of the defendant, and therefore that said accident happened while said employé was performing a service growing out of, incidental to and in the course of his employment.
>
> "That the act of the deceased employé in boarding the train after the same had started, but while still moving at a moderate speed, was not in violation of any orders or instructions of the defendant, and did not constitute more than ordinary negligence."

The determinative findings upon which the award was based and over which this controversy arises are those set forth in the two last paragraphs above quoted. It becomes necessary to consider seriatim the statements of fact therein contained. The first of these statements, in so far as it declares that it was a natural and reasonable act for the deceased to have alighted from the train under the indicated circumstances, calls for little comment. It is quite natural and quite usual for a passenger thus to alight where he knows that a human being has sustained injury, whether the motive which prompts him be one of curiosity, or humanity, or of a commingling of the two. The further declaration to the effect that the act of alighting "was not such a departure from the course of the duties of his employment" as to take the employé out of the provisions of the act is, of course, but a conclusion of law, which will be considered in the discussion to follow. It is sufficient here to point out that the statement seems to imply or admit that his act in alighting was outside of his duties and a departure therefrom. But, singularly enough, this is negatived by the statement immediately following, to the effect (though here again the finding is not direct but is made by way of implication) that in alighting he was actually performing a duty to his employer, although but an implied duty, and that therefore the "accident happened while said employé was performing a service growing out of or incidental to and in the course of his employment."

The transcript of evidence will be searched in vain to discover one word arising to the dignity of evidence, to establish the statement that the deceased alighted from the train "to be available in case his services should be useful," or that if he did that it was any part of his express or implied duties as an employé of the defendant so to do. The testimony of the president and general manager of the road was taken at great length. That testimony is positive and uncontradicted that there was no rule, written or unwritten, and no custom, whereby employés riding upon a train other than and outside of the train crew were called upon or expected to enter into an investigation in case of an accident, to secure the names of witnesses, or to perform any like service. He says:

> "Such duties are entirely confined to the conductor of the train, or special agent, or one of his authorized assistants, or one of our railroad policemen who might be on the train. The conductor has authority to call upon any other employé that may be there for assistance, but it is not considered their duty to volunteer, nor is there any obligation on their part so to do. * * * Furthermore, the conductor or special agent or other official whose duties are naturally such matters would consider it an interference and likely to prove a mix-up."

Moreover, in case of an injury such as this, so far from the rules, customs, or desires of the company being that an outside employé should busy himself over the matter, the company objected—

> "to the extent that he might interfere with efficient service that is being rendered by employés whose direct duty it is to do so. * * * Our conductors and trainmen carry in their pockets a card which says to keep the public away and allow two or three men, or one or two men, who can render assistance."

This is "ordinarily the train crew." It might be "the engine crew." Asked if it was not a fact that his company considered it "a meritorious effort upon the part of any employé, even an employé who was not a member of the crew, rendering assistance to the crew and to the conductor at the time that an accident happens en route," the record shows the following:

> "It is entirely a matter of circumstances and conditions. If we had an employé who was standing on the platform and who saw a passenger fall and could reach a hand out and help him, we would expect him to do it."

Still further in this connection the witness is asked the following:

> "I want to ask you if it isn't a fact that if such a thing is done at any time that you consider it a meritorious effort or endeavor on the part of the employé? This refers to any person injured at all. I am referring to an employé

who is not a member of the crew and who renders assistance to a person who is injured en route, if you do not consider that a meritorious act on the part of the employé? A. Absolutely."

Again asked:

"If the conductor and members of the crew are rendering assistance to an injured person and are not in a position to obtain the names of witnesses and facts concerning the accident, wouldn't you expect the employé to render whatever service he could in this particular matter?"

—the witness answered:

"I would expect him to render service to the injured party, not to the company."

Repeatedly was the witness subjected to interrogatories dealing with supposititious cases manifestly designed to secure a statement lending color to the proposition that the deceased had alighted from the train in the performance of his duty to render service to the injured man. In every instance the witness denied such to be a part of the employment, making answer in varied form, but always to the following effect:

"I would simply say that, in so far as the man is concerned, if he was a man who was in an entirely different line of service, and traveling as a passenger, there would be no obligation on him unless called upon."

In this case it will be noted that there is no finding either that he was called upon or that he rendered any service; the finding being merely that he alighted so as to be "available in case his services should be useful." It would require a repetition of many pages of this evidence to show the persistency with which the endeavor was made to secure the desired evidence from the witness. But one page of it, as it is a page relied upon by respondent to the writ, in support of the finding may be quoted:

"Q. In a case where a passenger falls off a train or slips off a train and is injured—I am asking you to assume such a case without respect to your opinion concerning this particular case—wouldn't you consider it, and do you not consider it, a meritorious service upon the part of any employé of the company upon the train to render assistance as best he can to the injured party? A. I would think that it would be— I would consider it his duty as a man to render any assistance that he could. Q. It is the desire of the company, is it not, to have the injured party treated in the best way possible? A. Absolutely. Q. I will ask you, then, if it is not a fact that the company would consider it the duty of the employé where he was in a position to give better aid to the injured party who falls off the train or slips off the train than the crew is in a position to give such assistance? The company in its desire to give first aid and the best treatment possible to the injured party to a party falling off the train considers it a duty of an employé on the train to do whatever he can towards giving that kind of assistance? A. If the man happens to be the nearest to the injured man, as I said, and he can render that assistance more rapidly than any other person on the train, the same as would a passenger or anyone else, it would be his duty as a man to do it. Q. If a passenger and an employé of the company were in a like position concerning the matter, wouldn't you consider it more incumbent upon your employé to do it than you would the passenger? A. I would consider it more incumbent; yes."

Another witness was Mr. Love, a traveling auditor of the company. Like interrogatories were put to him. The answers were the same in substance as those given by Mr. Palmer, the president of the company. Thus he is asked:

"You know, do you not, that the company, the Northwestern Pacific Railroad Company, and every other company, wants its employés to act in a humane manner after an accident happens? A. Yes, sir; I should naturally expect that. * * * It would be quite natural for anybody to offer their services to the conductor. If I was on a train probably I would offer my services for the relief of the injured only if humane impulse prompted me—prompted by humane impulse only. Q. Suppose you were on a train at Asti station. Suppose the train started up and a passenger getting on the train is injured, and you are in a position to give them aid, irrespective of whether the conductor is also in a position to give that party aid. I would ask you if you would not, under the circumstances, leave your seat in the train and get off and administer what aid you could to the injured party? A. Yes."

And again:

"Q. In fact, you know, do you not, that the company employé is expected to render what assistance he can in the matter, and this rule or these rules, and all other regulations of the company that you know of are dictated for the purpose of giving better aid to the injured party? A. That is right."

Here in fullness has been set forth all the evidence quoted in respondent's brief as supporting this finding. Even as detached from its context, it shows no conflict whatsoever with the direct and positive statements of these witnesses touching the duties of such an employé, and read with the context, it leaves not even the shadowiest ground for argument that the witnesses meant other than to declare what a man, actuated by the impulse of humanity—a passenger as well as an outside employé—might do under the supposititious conditions presented by the questions.

The utmost that was elicited was that it would have been the duty of the deceased to have assisted if his services had been requisitioned by the conductor in charge of the train. It is not contended that the deceased was requested to help. To the contrary, the direct and positive testimony of the conductor and train crew is that they themselves, and they themselves alone, without asking assistance of any, promptly and efficiently rendered aid to the injured man. And in thus stating that there is no conflict in the evidence, the testimony of Hoyle, a passenger upon the train, has not been overlooked. Hoyle does not testify, as respondent states, that "neither the conductor nor any other member of the crew took part in the relief work," and that "Mr. Bowdish took charge of the situation." Mr. Hoyle's testimony is this:

Upon the occasion of the last stopping of the train which preceded the accident to the deceased, Hoyle's wife, who was a passenger with him upon the train, looked out of the car window, saw that some one had been injured, and said that she believed it was Hagemeyer. "Of course, he is the man whom my wife and I both have known for 20 years. I said, 'I will look and see.'" He took for his post of observation a platform of the car and stood there after the vestibule had been opened and others had debarked. He "had a fair view of the body lying on the ground, and saw it was Hagemeyer. The conductor and the brakeman were on the ground. It was, I should judge perhaps, roughly estimating, 15 or 25 minutes before anything apparently was done, any more than people simply standing around, watching the man lying on the ground. In the meantime there was some one, I don't know who he was, a rather chunky built man, seemed to be taking an interest in what was going on, and apparently endeavoring to direct the movements of different ones. He was in civilian's clothes. He, as I recall it, made the suggestion that they better get a cot to put this man Hagemeyer on, and soon a cot was brought, I suppose from the baggage car, and the body was lifted onto the cot, and then the train was backed up, and of course when the train backed up he passed out of sight." The witness did not know Mr. Bowdish. "The color of his clothes [of the man last injured who was Bowdish], as near as I could say, was practically the same [as those worn by the man who, as he recalled it, made the suggestion that they better get the cot]; in fact, it struck me when I went back to the rear of the train after Bowdish had been run over that it was the same man whom I had seen directing the movements, although I could not say that it was."

Furthermore, testifies the witness:

> "I would not state positively he was the same person. He was apparently dressed in the same clothes and about the same size."

This, we repeat, does not rise to the dignity of evidence, and that without regard to the fact that he "roughly estimates" the time as from 15 to 25 minutes after the train stopped before it started again, while all of the trainmen, whose duty it was to note this time, placed the total lapse as between 3 minutes and 5, and without regard to the additional fact that they performed their duties of obtaining a stretcher, placing the man upon it, backing the train up, and putting a man in the baggage car, without suggestion from any other person and without invoking the aid of any other person. Finally, it is notable in this connection that the findings of the commission, which are made as favorable as possible in support of the award, are silent upon the matter of Hoyle's testimony that Bowdish took charge or gave directions, or did any single act in aid of the injured man; the sole finding in this regard being put in the form of a fact, inferentially stated, that Bowdish alighted from the train "to be available in case his service should be useful."

[2, 3] But in addition to this, and accepting this statement as a supported finding of fact, and with it the further statement that his action in alighting from the train "was a portion of his implied duties as an employé," there remains a consideration equally determinative against the validity of this award. The findings proceed to say that, because he alighted in the performance of an implied duty, "therefore that said accident happened while the said employé was performing services growing out of, incidental to, and in the course of his employment." This, of course, is but a conclusion. Up to this point the findings have not declared upon the exact act which Bowdish was performing when he met his death—the act of endeavoring to climb on board a moving train. That is covered by the next declaration:

> That the act of the deceased "in boarding the train after the same had started, but while still moving at a moderate speed, * * * did not constitute more than ordinary negligence. * * * And said employé was not intoxicated at the time of said accident, and therefore that said accident was not caused by the willful misconduct or intoxication of such employé."

Heretofore in our decisions it has been frequently pointed out that the language of our law justifying an award only when an employé is performing services "growing out of and in the course of his employment" is taken from the earlier English act upon the same subject, and under familiar principles was adopted with the construction which the courts of that country had put upon that language. A consideration of the English adjudications will show, first, that upon principle it cannot be said that the accident here occurred while the deceased was performing service either growing out of or incidental to or in the course of his employment. Furthermore, a reading of those cases will disclose that not only upon principle, but upon adjudications presenting the precise question of an employé boarding a moving car under circumstances such as this, it has been uniformly held that injuries thus sustained are not within the purview of the law. Some of these cases have heretofore been considered in Ocean Accident & Guarantee Co. v. Industrial Accident Commission, 159 Pac. 1041. Others to the same effect are Anderson v. Fife Coal Co., S. C. 8, 4, Scott. L. R. 3, 3 B. W. Comp. Cas. 539; Fletcher v. The Duchess, A. C. 671, 81 L. J. K., B. (N. S.) 33; 55 Sol. Jo. 598, 4 B. W. Comp. Cas. 317, 105 L. T. (N. S.) 121; Losh v. Evans, 51 Week. Rep. 243, 18 Times L. R. 142; Hendry v. Caledonian Ry. Co., S. C. 732. The proposition is as stated in 1 Dresser, Employer's Liability, § 104:

> "When a servant of his own accord and without the direction of his master steps outside the scope of his employment, whether on the master's business or his own, the master owes him no duty as to the dangers he encounters and is not liable for any injury received."

And the particular principle clearly applicable to the case at bar is that an employé, even when in the performance of his duty, may not impose upon his employer any greater risk and responsibility than that inhering in the character of the duty itself. Thus to illustrate: An employé engaged in and about machinery, where a part of his duty is to keep that machinery clean and in running order, while in the performance of that duty may carelessly become entangled in moving cogs, and recover. A traveling man, using a railway train with ordinary precautions and injured by a collision would be granted a recovery. But if that same traveling man, seeking to catch a train to go to another station, still under his employment, should attempt to board a moving train, this being no part of his instructions and no part of his duty, he has added to his vocation perils not contemplated in the contract of employment, and for injuries sustained to him by reason of this added risk the employer is not liable. Such is the case of Wemyss Coal Co. v. Symon, 49 S. L. R. 921, 6 B. W. C. C. p. 298, where a messenger boy, given money to buy his ticket to travel to a certain destination, undertook to board a slowly moving tram car and was injured. It is said:

> "No question of serious or willful misconduct arises in the case. The sole question in the case is whether the accident arose out of and in the course of the respondent's employment."

It was held that no order and that no orderly performance of his duty compelled him to take the risk of mounting the moving car, and that in doing so he was "willfully taking an outside risk not incident to the reasonable requirements of duty." Such also is the case of Jibb v. Chadwick, 8 B. C. C. 152, where a workman's regular course of employment compelled him to travel on trains. He was furnished by his employer with a season ticket enabling him so to do. He was expected to return to Rotherham and report at his employer's office at 6 p. m. each day. Arriving at the station at Sheffield he attempted to board a train while in motion, this train being the last train which would bring him to his place of service on time. He fell and suffered injury, and the unanimous holding was:

> That in attempting to enter the train while in motion "the workman exposed himself to an additional risk by doing an unauthorized and illegal act, which was not in any way incidental to his employment, and that therefore the accident did not arise out of and in the course of his employment."

For these reasons, it follows that the award must be annulled, and it is adjudged accordingly.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.; LAWLOR, J.; SHAW, J.

On Application for Rehearing.

ANGELLOTTI, C. J., and SHAW, LAWLOR, and SLOSS, JJ. The judgment annulling the award is sufficiently supported by what is said in the opinion on the question first discussed, viz.: Whether or not the deceased was acting in the course of his employment in alighting from the train or at any time thereafter. The conclusion that in alighting from the train, and in what occurred thereafter, the deceased was not performing a service growing out of, incidental to, or in the course of his employment disposes of the case, and renders unnecessary the decision on the further question discussed, viz., whether, assuming that the deceased was in alighting from the train and in what he did thereafter acting in the scope of his employment, he did not step without such scope when he attempted to board the train while it was moving, with the result that solely because of such attempt, the consequent accident did not arise out of or in the course of his employment. Upon that one question we are not entirely satisfied as to the correctness of the views expressed in the opinion, and, without expressing any contrary view, we prefer to leave the question undecided in this case, by withdrawing, as we do, our assent to the portion of the opinion dealing therewith.

(174 Cal. 582)

JOHNSON v. CLARK et al. (L. A. 3884.)

(Supreme Court of California. March 13, 1917.)

1. MINES AND MINERALS 🔑53—"OPTIONAL CONTRACT" TO PURCHASE MINING CLAIM.

A contract for the purchase of mining claims, $100 to be paid by the buyer on execution of the contract as part payment, $1,000 to be paid "on acceptance" within 30 days from date, $1,000 in 30 days thereafter, etc., was an optional agreement; when, by the terms of an agreement, the owner of property binds himself to sell on specified terms, and leaves it discretionary with the other party to the contract whether he will or will not buy, it constitutes simply an "optional contract."

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 147, 148.

For other definitions, see Words and Phrases, Optional Contracts.]

2. MINES AND MINERALS 🔑53—OPTION CONTRACT—ACCEPTANCE.

Where plaintiff understood that defendant, optional buyer of plaintiff's mining claims, was going on the property with his employé solely to examine and prospect to determine whether he would accept or not, the fact that defendant went into possession of the property did not amount to an acceptance.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 147, 148.]

3. MINES AND MINERALS 🔑53—OPTIONAL CONTRACT—ACCEPTANCE.

Where the holder of an option contract for the purchase of mining claims agreed to convey to each of three persons an undivided one-fourth interest in the property, making no present conveyance, but only agreeing to do so in the future, and not assigning his optional contract or any interest in it, but agreeing that, if he closed the optional contract to purchase from plaintiff, he would convey three-fourths of the property acquired under it to the three persons, the action of one of the three persons in paying plaintiff, the optional seller, $1,000, and executing notes, was not an acceptance of the optional contract.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 147, 148.]

Department 2. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by J. S. Johnson against W. L. Clark and others. From a judgment for defendants and an order denying his motion for a new trial, plaintiff appeals. Affirmed.

Z. B. Stuart, of Los Angeles, for appellant. Neighbours & Sproul and Chas. W. Hoag, all of Los Angeles, for respondents.

LORIGAN, J. This is an action to enforce specific performance of a contract made by plaintiff with defendant Clark on November 4, 1911, relative to the purchase of certain placer mining property in Humboldt county, in this state. The other defendants were made defendants with Clark under allegations in the complaint that they had acquired an interest from defendant Clark in the contract of purchase subsequent to its execution. The complaint, among other allegations, sets up the contract with Clark hereafter particularly referred to, alleged an assignment by Clark to the other defendants of an interest in said contract; payment by defendant Neighbours on behalf of himself and all the other defendants of $1,000 specified in the contract to be paid; failure on the part of defendants to further comply with the terms of the contract; and full compliance by plaintiff on his part. No point is made of the sufficiency of the complaint, so that nothing further of its allegations need be stated. Aside from an answer by all the defendants denying the allegations of the complaint, the defendant Maulhardt (though plaintiff alleged that defendant Neighbours paid it for the benefit of all the defendants), filed a cross-complaint seeking a judgment against plaintiff for the repayment of the $1,000 alleged to have been paid by him to plaintiff and the return to him of two promissory notes which he alleged he had executed and deposited with plaintiff under an alleged verbal and contingent agreement made by him with plaintiff.

The court rendered judgment for all the defendants for their costs and in favor of defendant Maulhardt on his cross-complaint for the repayment to him of the $1,000 and the return of the promissory notes referred to. Plaintiff appeals from the judgment and an order denying his motion for a new trial.

The findings, with a recital of some of the evidence, will sufficiently present the points on appeal. The court found that plaintiff entered into an optional contract with defendant Clark on November 4, 1911, for the sale and purchase of the placer mining claims heretofore referred to on the following terms: $100 paid by defendant Clark on the execution of the contract as part payment for the claims. The price was $6,100, and payable as follows: $1,000 on acceptance within 30 days from date; $1,000 in 30 days thereafter, and $1,000 in 60 days from date of second payment; $2,000 in 9 months and $1,000 in one year, at 7 per cent. per annum. The gravel worked from said mines to pay 25 per cent. of the proceeds to plaintiff to apply on said notes for the deferred payments which were to be secured by mortgage on the property. Title to be perfect; deed to be executed by plaintiff to Clark, or his assigns, on or before February 2, 1912, together with an abstract showing a merchantable title, provided, however, that the payment of $3,000 is paid at said date, but if not paid on or before February 2, 1912, then the contract to be of no effect, and in that event the said $100 to be retained by plaintiff as liquidated damages.

Upon the issue tendered under an allegation of the complaint that Clark had assigned an interest in the said agreement to the other defendants Neighbours, Maulhardt, and Grant, and that on January 18, 1912, Maulhardt, one of the assignees of Clark, together with Neighbours and Grant, pursuant to the terms of the optional agreement, paid plaintiff the sum of $1,000 and deposited in his favor two promissory notes in bank, the court found, and the evidence shows, that an optional agreement was made by plaintiff and Clark at the date alleged; that Clark had never assigned his interest, or any part thereof, in said optional agreement to all or either of the defendants; that a transaction between defendants Maulhardt and Neighbours and plaintiff of January 18, 1912, was had; that at that time Maulhardt made payment of $1,000 to plaintiff and deposited with plaintiff two promissory notes, but that said transaction was all made, had, done, and performed by said parties in the absence of defendant Clark and subject to his approval; and that Clark, upon being notified forthwith of said verbal agreement between plaintiff and defendants Maulhardt and Neighbours and the payment of said $1,000 and the depositing of said notes, immediately refused to approve said agreement and repudiated all the acts done and performed thereunder. The evidence shows that in the same notice of repudiation of February 14, 1912, Clark also notified plaintiff that he would not take the property.

An additional finding was that plaintiff did not execute a deed conveying said real property to Clark, nor did he cause an abstract of said property to be made or tender the same to defendant Clark. It may be said here, however, that at the time of the transaction of January 18, 1912, between plaintiff and Maulhardt and Neighbours when the $1,000 was paid, plaintiff executed a deed to Clark and to Grant, Maulhardt, and Neighbours conveying to them an equal undivided one-fourth interest each in said mining property and deposited said deed in escrow in the bank to be delivered on compliance on the part of defendants with the terms of the agreement.

The court further found that Clark, and Grant as the employé of the latter, went into possession of the real property towards the end of November, 1911, with the consent of plaintiff; that Clark remained in possession by such consent until the latter part of March, 1912; that neither the defendant

Clark nor any person acting under his authority or by his consent exercised the right to purchase granted under the terms of said optional agreement between plaintiff and Clark.

It appears from the evidence that prior to the commencing of this action plaintiff made a written demand on Clark and the other defendant (on the theory that they were the assignees of Clark under the said optional agreement) that they make the payments and perform the other terms of the contract and take the property, a demand to which they gave no attention, and plaintiff thereupon commenced this action.

Having presented these matters with sufficient fullness to discuss the points made by appellant, we will proceed to their consideration.

[1] He contends, first, that the agreement between himself and Clark was more than a mere option for the purchase of these mining claims, but that, even if it was not, the subsequent acts of Clark and Grant in entering into possession of the property with the consent of plaintiff and working it constituted an acceptance which changed the optional contract into a contract of sale between plaintiff and Clark subject to specific performance as such. But it is quite clear that under any fair consideration of the terms of the agreement between plaintiff and Clark it was simply an optional agreement. When by the terms of an agreement the owner of property binds himself to sell on specified terms and leaves it discretionary with the other party to the contract whether he will or will not buy, it constitutes simply an optional contract. This was all the contract involved here amounted to. Plaintiff agreed to sell to Clark on certain terms of payment. By the agreement itself as will appear in the finding first quoted, it was provided that Clark should have 30 days from the 4th of November, 1911, within which to accept its terms if he wished to do so. Subsequently this time was extended 45 days. The only effect of the agreement as far as Clark was concerned was that if he should fail or refuse to take the property he should lose his $100.

[2] Nor did the fact that Clark went into possession of the property amount to an acceptance. It was not understood by either plaintiff or Clark that it should amount to this. Plaintiff understood that Clark was going on the property with his employé Grant solely to examine and prospect it for the very purpose of determining whether he would accept it or not. This is apparent from a letter from plaintiff to Clark of January 8, 1912, while the latter was working on the property asking for some assurance that there would be no liens for labor or material "should you (Clark) conclude not to buy." True, he remained in possession, working the property, after he refused to purchase it on February 14, 1912, but it appears he did so in order to perform the annual assessment work on the claims which he had orally promised plaintiff he would. In fact, the case of plaintiff was tried on the theory that the contract between himself and Clark was an optional agreement which had subsequently been accepted, it being claimed as additional evidence in support thereof that the other defendants were assignees of Clark of an interest in this optional agreement and by right of this assignment and the written consent and understanding of Clark, one of them, Maulhardt, for the benefit of all, paid the $1,000 and executed the two promissory notes referred to in the evidence and findings, all of which, it is claimed, constituted an acceptance of the optional agreement by all the defendants.

[3] The court found against this contention, and appellant challenges the accuracy of the finding, but the evidence fully supports it. It appears therefrom as to these matters that, while it is true that an agreement was made by Clark with the other defendants the same day that this optional agreement with plaintiff was entered into, Clark nevertheless did not thereby assign or transfer to them the optional agreement or any interest in it. He agreed to convey to each an undivided one-fourth interest in the property. He made no present conveyance, but only agreed to do so in the future. He did not assign his optional contract or any interest in it. He agreed that, if he closed the optional contract to purchase with plaintiff, he would convey three-fourths of the property acquired under it to his codefendants. Until Clark exercised this option there was nothing upon which his contract with the other defendants could operate. The rights they acquired under the agreement with Clark were matters of concern only between themselves; Clark conveyed them no rights under his optional contract. That option was a matter respecting the acceptance or rejection of which the plaintiff and defendant Clark were alone directly interested.

As to the payment of the $1,000 and the delivery of the notes on January 18, 1912, by Maulhardt. Upon this date Clark and Grant were in Humboldt county at the mines. Plaintiff and the other defendants were in Los Angeles. These defendants, other than Grant, called on plaintiff on January 18th and told him of their agreement with Clark, which was the first he seems to have known of it, and as the 45 days extension which had been granted Clark was about to expire they asked for a further extension on behalf of Clark, which plaintiff refused to grant. He refused also to grant one even until the defendants could communicate with Clark, though they told him they could do nothing without consulting with Clark. Plaintiff, however, persisting in his refusal to grant any extension Maulhardt then offered to pay plaintiff $1,000 and place the notes in a bank upon the agreement with plaintiff that they

(Maulhardt and Neighbours) should communicate with Clark, and if their action met with his approval the transaction should stand and the sale should go through. If Clark did not approve, then the money would be returned, as also the notes. The evidence leaves no room for question but that the court was warranted in finding that this payment of the money and the delivery of the notes it was agreed by plaintiff and the other defendants should be subject to the approval of Clark; nor can there be any question but that on learning of it defendant Clark promptly repudiated the transaction. The defendants Maulhardt and Neighbours and the plaintiff wrote to Clark of what had been done in this regard, and upon the receipt of their letters Clark immediately wrote to the defendants refusing to approve their action, and likewise wrote to plaintiff saying that he had not authorized the action of the other defendants and "would not stand for it"; that he did not want the property and refused to accept it.

As this disposes of the only points involved on the appeal that require any special consideration, the judgment and order appealed from are affirmed.

We concur: MELVIN, J.; HENSHAW, J.

(174 Cal. 580)

HYATT v. COLKINS et al. (L. A. 3870.)

(Supreme Court of California. March 12, 1917.)

1. QUIETING TITLE ⚿35(3) — MAINTENANCE OF ACTION BY PARTY OUT OF POSSESSION—COMPLAINT—STATUTE.

Under Code Civ. Proc. § 738, authorizing actions to quiet title, an action to quiet title may be brought by one out of possession, so that the complaint need not allege possession in plaintiff.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 74.]

2. QUIETING TITLE ⚿34(5)—NATURE OF DEFENDANT'S CLAIM—STATUTE.

In an action to quiet title under Code Civ. Proc. § 738, the complaint need not set forth the nature of defendant's claim to an interest in the land.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 71, 72.]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Winslow P. Hyatt against A. Colkins and others. From a judgment against defendant Colkins, he appeals. Affirmed.

Otto Danaker and E. M. Barnes, both of Los Angeles, for appellant. Winslow P. Hyatt and Frank S. Adams, both of Los Angeles, for respondent.

LORIGAN, J. This action was to quiet title to a lot of land in the city of Los Angeles. The complaint contained the usual allegations in such an action, that plaintiff was the owner and entitled to the possession of the land, that defendants claimed an interest in it adverse to plaintiff, which claim was alleged to be without right, and that none of the defendants had any right or interest in the property, with the usual prayer that defendants be required to set forth their claim or interest in the property, that it should be adjudged invalid, and that the title of plaintiff was good and valid, and the defendants be barred from asserting claims to said premises adverse to plaintiff.

Defendant Colkins filed a general demurrer to the complaint, which was overruled, and, failing to answer, judgment was entered against him, from which he takes this appeal.

[1] Taking up his points on appeal: He contends that the court erred in overruling his demurrer. His argument is that his demurrer was well taken, because the complaint did not allege that the plaintiff was in possession of the premises when the suit was brought, and, further, that nowhere in the complaint is it stated in what the invalidity of the instrument which is said to constitute the cloud upon the title of plaintiff consists, or any facts which show its invalidity. We are at a loss to understand how, under the long-settled law of this state, the appellant can see any merit in his contentions. As to the point that the complaint does not state that the plaintiff was in the possession of the property: It was unnecessary to do so. An action to quiet title may be brought by one out of possession. In People v. Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481 (decided in 1885), it was held on this subject that section 738 of the Code of Civil Procedure (enacted in 1872) is like section 254 of the former practice act, except that since the adoption of the Code the action to quiet title may be brought by one out of possession. In Casey v. Leggett, 125 Cal. 664, 58 Pac. 264, in meeting a similar objection as that urged by appellant, the court said:

> "The owner of land does not have to be in possession in order * * * to maintain an action to quiet title."

See, also, Brusie v. Gates, 80 Cal. 462, 22 Pac. 284; Landregan v. Peppin, 94 Cal. 465, 29 Pac. 771; Reiner v. Schroeder, 146 Cal. 411, 80 Pac. 517.

[2] As to the point that nothing specific is alleged in the complaint concerning the invalidity or a recital of any facts showing the invalidity of the instrument asserted to be a cloud against the title of plaintiff: It is well settled that there is no merit in such a claim. It was held directly in Castro v. Barry, 79 Cal. 443, 21 Pac. 946, that the plaintiff is not required to set forth the nature of the claim of defendant. In Rough v. Simmons, 65 Cal. 227, 3 Pac. 804, a general demurrer to a complaint like the one at bar was sustained by the trial court, and the judgment reversed in this court. Appellant

cites Hibernia S. & L. Society v. Ordway, 38 Cal. 681, as sustaining his claim of the necessity of setting forth in the complaint the nature of the instrument asserted to constitute a cloud upon title. But that was an entirely different action from the one instituted here. That was an action to have a particular instrument, which was specifically pleaded and which it was asserted constituted a cloud on the title of plaintiff, declared invalid. But that class of cases is different from the case at bar. They are provided for under sections 3412 and 3413 of the Civil Code. The present action is one provided for under section 738 of the Code of Civil Procedure. The distinction in this respect in which Hibernia S. & L. Society v. Ordway, cited by appellant, is discussed, is fully pointed out in Castro v. Barry, supra, to which reference for any further enlightenment on the point is directed.

The judgment appealed from is affirmed.

We concur: MELVIN, J.; HENSHAW, J.

(174 Cal. 570)

KOHN v. PARENT et al. (S. F. 7147.)

(Supreme Court of California. March 10, 1917.)

1. MORTGAGES ⚿38(2)—DEED ABSOLUTE ON FACE—EVIDENCE.

To establish that a deed absolute upon its face is a mortgage, thus varying its terms, requires clear and convincing evidence.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 109.]

2. QUIETING TITLE ⚿44(4)—PRIMA FACIE CASE.

An absolute deed to plaintiff in an action to quiet title established a prima facie case as against defendants claiming from the same source of title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 91.]

Department 2. Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Action by Isaack Kohn against C. E. Parent, Hugh Burns, and others. From a judgment for plaintiff, and an order denying motion for new trial, defendants appeal. Affirmed.

Charles F. Hanlon and S. C. Denson, both of San Francisco, for appellants. James W. Cochrane, D. Freidenrich, and Heller, Powers & Ehrman, all of San Francisco, for respondent.

HENSHAW, J. Plaintiff sued to quiet title to a certain piece of land. The defendant A. B. Kreft was trustee of the estate of Phillip Kohn in bankruptcy, plaintiff having acquired his title by deed from Phillip Kohn and wife. The other defendants appealing are judgment creditors of the insolvent. Their contention is that the deed of Phillip Kohn to his father, the plaintiff, was intended as a mortgage, to secure the payment of $10,000, and that their judgments duly docketed are valid and subsisting liens on the property subject to this mortgage, and that title to the property is in the trustee in bankrupty, subject to the mortgage and to these judgment liens.

The deed was absolute in form. The testimony of plaintiff was that he paid $10,000 for the property, and this is abundantly established by his canceled check drawn in favor of and paid to Phillip Kohn. Since the date of the deed he has occupied the property and spent over $6,000 in improvements thereon. He has continuously resided upon the property since the date of the deed, and paid all city, county, and state taxes upon it. His testimony was supported by that of his son that the transaction between himself and his father was an absolute sale. The deed to the father was executed by the son Phillip and by his then wife, Stella Kohn. She testifies that her father-in-law told her that he was going to lend the son $10,000 upon the security of the property to enable him to adjust the property disputes between the husband and the wife in the matter of their divorce suit then pending or in prospect; that her father-in-law said that the property was valued at $25,000; that he thought it was good security; that the security was so good that he was willing to loan $25,000 on the strength of it. The occasion of this conversation was the first time that she had ever spoken to her father-in-law. Called in rebuttal, he testified that he had never seen his daughter-in-law, except in court; he had never had any such conversation with her; that the property in fact was not worth what he gave his son for it; and that he gave him this money over and above the value of the property because of the son's difficulties. Further evidence was introduced to the effect that the property was assessed for but little over $2,500; that Phillip Kohn, when owner, had in vain offered it for sale to the assessor for $7,500.

[1] It scarcely needs the citation of authority in support of the statement that to establish that a deed absolute upon its face requires clear and convincing evidence thus to vary its written terms and establish that it is a mortgage. Mahony v. Bostwick, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175; Sherman v. Sandell, 106 Cal. 373, 39 Pac. 797; Sheehan v. Sullivan, 126 Cal. 193, 58 Pac. 543; Woods v. Jensen, 130 Cal. 200, 62 Pac. 473. Mrs. Kohn's testimony touching her execution of the deed, that she glanced over it, did not understand its meaning, and was told that it was a mortgage, is flatly contradicted by Mr. Cochrane, an attorney. He was not Mrs. Kohn's attorney, but was present at her execution of the deed. He denied that he made any such misrepresentations to her, and testified that it was explained to her that the instrument was a deed at the time she executed it, and that no reference whatever was made to it as being a mortgage.

[2] All of the parties to this controversy claim from a common source of title—Phillip Kohn. His deed to plaintiff, therefore, as against all of the appellants, established a prima facie case (Brusil v. Gates, 96 Cal. 265, 31 Pac. 111; McGorray v. Robinson, 135 Cal. 312, 67 Pac. 279), and the case, as established by plaintiffs, for the reasons given, was not overcome.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

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174 Cal. 612

HERRINGTON v. BAKER. (L. A. 3876.)

(Supreme Court of California. March 14, 1917.)

1. Appeal and Error 🔑1058(2)—Harmless Error—Exclusion of Evidence.

Where the witness who was prevented by a ruling of the court from answering a question was subsequently permitted to testify freely on the subject, the ruling of the court was harmless to the complaining party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4201.]

2. Appeal and Error 🔑1011(1)—Review—Finding on Conflicting Evidence.

A finding on conflicting evidence cannot be reviewed by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988.]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by S. G. Herrington against J. M. Baker. From a judgment for plaintiff and an order denying his motion for new trial, defendant appeals. Affirmed.

Anderson & Anderson, of Los Angeles, for appellant. Frederick Baker, of Los Angeles, and J. R. Gilliland, of San Diego, for respondent.

LORIGAN, J. This action was on contract. The complaint alleged that plaintiff and defendant entered into an agreement whereby defendant purchased from plaintiff all the trees in the nursery of plaintiff at Glendora, Cal., which on or about July 1, 1912, should be of a specified size, it being understood that the nursery contained 8,000 trees of three different varieties of citrus fruit trees, the price being 65 cents per tree; that defendant agreed to remove all the trees from said nursery on or before July 1, 1912, and to make therefor certain payments on designated dates up to May 1, 1912, and the balance as the trees were removed from the nursery which was to be not later than July 1, 1912; that plaintiff agreed to "irrigate, cultivate and care for said nursery stock at his own expense and in a good and husbandlike manner until July 1, 1912," which the complaint alleged he had done, and, further, that he had duly performed all the conditions of the contract on his part to be performed; that on or about July 1, 1912, defendant removed all but 3,763 trees from said nursery, refused to remove any more of them, or to pay the balance of $2,604.35 due therefor under the contract, and plaintiff sued to recover that amount.

Defendant in his answer denied that plaintiff had "irrigated, cultivated and cared for said nursery stock at his own expense in a good and husbandlike manner," and as to the trees, the purchase price of which was sought in the action, alleged, among other things, that said trees had not been and are not of a kind or character referred to in said contract; that they have not been and are not up to the standard prescribed in said contract, and have not been and are not fit for the purposes of removal and for the purposes for which defendant contracted to take them.

Judgment was given the plaintiff for the amount prayed for. Defendant appeals from said judgment and an order denying his motion for a new trial.

There are but two points presented on this appeal. One pertains to a ruling against the admission of evidence; the other being that a certain finding of the court is not sustained by the evidence. The theory of the defendant under which his counsel framed his answer and attempted to present the testimony which he claims was erroneously rejected by the court was that as this contract related to certain nursery stock to be raised by plaintiff, but which was to be removed by defendant, it was the duty of the plaintiff to cultivate the said stock so as to keep it in proper condition to be removed at any time, and that he failed to do so. A witness called by defendant, aside from testifying as a witness to the condition in which he observed this nursery, was examined as an expert nursery man and asked:

> "What in your opinion would be a proper amount of water for irrigating that nursery, to keep it in proper cultivation, and in a good state or condition, during the months of May and June, for the removal of nursery trees?"

An objection to the last part of the question "to irrigate the ground sufficient for the removal of nursery trees" was made, on the ground that it was a duty which plaintiff was not required under the contract to fulfill. This objection was sustained by the court, and this is the ruling which defendant complains of, it being asserted that the ruling sprang from an erroneous construction which the court placed on the provision of the contract respecting irrigation and cultivation of the nursery stock by plaintiff.

It is insisted by appellant that the agreement on the part of plaintiff "to irrigate, cultivate and care for the nursery stock in a good and husbandlike manner until July 1, 1912," necessarily implied that the nursery stock should be kept in condition in whatever respect was necessary so as to be properly and safely transplanted when the defendant desired to remove it; that the con-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tract was dealing with nursery stock in the possession and control of plaintiff, and, if a particular amount of irrigation was necessary to put it in proper condition of cultivation for removal by respondent, then, from the language of the contract and the subject-matter affected by it, there was an implied duty on the part of plaintiff to keep it in that condition.

We are not required to dispose of this claim of appellant as to the construction of this contract (with which respondent, however, does not agree), because our examination of the evidence in the case satisfies us that, whatever the proper construction of this provision of the contract might be, still, if it was conceded that the construction of the court respecting it as reflected by the ruling on the question asked was wrong, no injury resulted to appellant thereby. As a fact, the only matter which was contested in this case was the condition of the nursery during the months of May and June, 1912—the amount of irrigation which was necessary, not only for general good husbandlike care, but particularly for the keeping of it in a proper condition for the removal of the nursery stock—and, except as to the ruling called in question here, there was no limitation whatever put on either side from going fully into that matter. A large number of witnesses on the subject were called by appellant, as well as respondent. Both sides seem to have used their pleasure in that respect except in the single instance when appellant claims it was denied to him under the ruling of the court. The matter was very thoroughly gone into, drifting early in the trial into the particular question whether proper irrigation required that the nursery soil be kept at all times in such a wet condition that the trees might be removed by "balling" them, or only so irrigated as to permit the removal of the trees with loose roots. There were but few witnesses called who did not feel qualified to testify on the subject and did so in favor of one condition or the other being the proper one. The only apparent limitation, as we have said, which was placed on appellant, was the one asserted to have been worked by the ruling of the court. But in fact there was no limitation whatever, for it appears that, though this witness did not testify on the subject embraced in the question of defendant at the time it was asked him, nevertheless he did so later on in his testimony. He went over the ground for both sides on direct and cross examination, and stated that for the purpose of keeping the nursery in good, husbandlike care, an irrigation every 21 days would be proper, and that nursery stock would "ball" very satisfactorily up to ten days after the irrigation was had—in effect, that if removal by "balling" was contemplated, the irrigation should be made every ten days. As far as removal by "balling" or by loose roots was concerned, he testified that there was no particular method adopted by nurserymen; some preferred one system and some the other.

[1, 2] So that as the very witness who was prevented from answering the question asked in the first instance was subsequently permitted to testify freely on the subject, it is evident that the ruling of the court could not possibly have prejudiced defendant. The trial court found upon this issue of the proper condition of the nursery for the removal of the trees against the defense interposed by defendant and in favor of the plaintiff, so that, the ruling being harmless and the court having found on the issue, the only question is the further one raised by appellant as to the sufficiency of the evidence to sustain the findings. On that point it is only necessary to say that, there being a substantial conflict in the evidence, the finding cannot be reviewed here.

The judgment and order appealed from are affirmed.

We concur: MELVIN, J.; HENSHAW, J.

(174 Cal. 606)

In re STODDART'S ESTATE. (L. A. 4669.)

(Supreme Court of California. March 14, 1917. Rehearing Denied April 12, 1917.)

1. Pleading 🔑8(16)—Revocation of Probate—Conclusions.

In petition to revoke probate of will, mere averment that the will was induced by fraud or undue influence is a statement of a legal conclusion and of no avail.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 28½.]

2. Wills 🔑155(1)—Execution—Undue Influence—Fraud.

Undue influence and fraud are separate grounds of attack upon a will, although undue influence may be exerted by means of fraudulent representations.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375, 379.]

3. Wills 🔑155(1)—Execution—"Undue Influence."

A will is obtained by "undue influence," where improper pressure or other unfair conduct has overcome the volition of the testator and resulted in his executing a paper which represents in fact not his will but that of the person exercising the influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375, 379.

For other definitions, see Words and Phrases, First and Second Series, Undue Influence.]

4. Wills 🔑278—Revocation of Probate—Undue Influence — Pleading — Sufficiency.

A petition for revocation of a probate of a will, alleging that deceased was advanced in years, blind, and infirm, that proponents resided with her and attended to her business affairs, and that she was dependent on them, and that representations made by them to her were false and made with intention of prejudicing her, with the result that such misrepresentations controlled her mind, was sufficient to raise the issue of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 636, 637.]

5. WILLS ⟹155(5)—EXECUTION—UNDUE INFLUENCE—MATTERS OF OPINION.

Conceding alleged misrepresentations to have been matters of opinion, they could yet, if designedly and unfairly used as part of a scheme to overcome the will of the testatrix, be regarded as undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 381.]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Proceedings in the estate of Eliza J. Stoddart, deceased, for the revocation of the probate of her will. Judgment dismissing the contest, and petitioners appeal. Reversed.

J. Wiseman Macdonald, of Los Angeles, for appellants. Gray, Barker & Bowen, Bowen & Bailie, and William A. Bowen, all of Los Angeles, for respondent.

SLOSS, J. A paper purporting to be the will of Eliza J. Stoddart, deceased, was admitted to probate in the superior court of Los Angeles county on January 25, 1914. The decedent was a widow and left surviving, as her sole heirs, a son, four unmarried daughters, and two married daughters. The son and the two married daughters filed a petition for revocation of the probate of the will. Demurrer to this petition was sustained, and the contestants filed an amended petition. The second pleading was also demurred to, and the demurrer sustained, whereupon the petitioners filed a second amended petition. A demurrer was again interposed, and was sustained without leave to the petitioners to amend. Thereupon the court entered judgment dismissing the contest. From this judgment the petitioners appeal.

The question for decision is whether the second amended petition states facts sufficient to constitute a cause of contest. At the time of her death, Eliza J. Stoddart had been a widow for about 40 years. She left an estate valued, according to the petition for probate, at about $160,000, and derived from the estate of her deceased husband, David Stoddart. In 1905, Mrs. Stoddart had made a will in which, after appointing as executrices her daughters, Mary Euretta and Evelyn Louise Stoddart, and bequeathing to them the sum of $10,000 for purposes not specified in the will, she gave the residue of her estate to her seven children, or the survivors of them, in equal shares. This document provided that in no case should any portion of her estate "be used in the business ventures of my daughters' husbands or son's wife, but shall remain the separate property of the child to whom given." The will now in controversy was made at Oakland on the 7th day of January, 1910. It gave to the four unmarried daughters, Mary E., Florence E., Evelyn L., and Bessie D. Stoddart, the residence occupied by the decedent with her said daughters, and certain personal effects; to each of the married daughters, Grace Shattuck and Emily Newton, the sum of $5,000; to the son, Augustus W. Stoddart, the sum of $1,000, and all sums theretofore advanced to him; to Evelyn L. and Mary E. Stoddart, the sum of $10,000 in trust to pay the income thereof to Augustus W. Stoddart during his life, the principal, upon his death, to vest in the six daughters, or the survivors of them. The residue of the estate was given to such of the daughters as should survive the testatrix, in equal shares, provided that, if the married daughters, or either of them, should survive the testatrix, and not then be widows, their shares were to be held in trust, the income to be paid to said married daughters during their lives, or until widowhood. In the event that either married daughter should become a widow, the trust fund should at once vest in her. If she should die, leaving her husband surviving, her share should vest in the unmarried daughters, or the survivors of them, in equal shares; unless the unmarried daughters should all predecease their sisters, in which event the trust funds should vest in the married daughters. Mary E. and Evelyn L. Stoddart were named executrices of the will, with power in a majority of the daughters to select successors to them.

Revocation of the probate was sought on the ground of undue influence. The allegations are substantially these: After the making of the will of 1905, and prior to the execution of the will of January, 1910, Florence E., Evelyn L., and Bessie D. Stoddart frequently stated to their mother, Eliza J. Stoddart, that Augustus W. Stoddart had already received a great portion of his inheritance, and that he was entitled to but very little more from Mrs. Stoddart's estate, whereas, in fact, he had received only $4,000, and his share of the estate, if it were equally divided among the seven children, would be about $43,000; that said Florence E., Evelyn L., and Bessie D. Stoddart also stated on many occasions to the decedent that her married daughters should not receive their portion of her estate during the lifetime of their respective husbands, because said husbands were of extravagant habits and were engaged in speculative enterprises, and, if said married daughters should receive their portions, the said husbands would get the same from them, and would spend or lose the same in speculation. The said three unmarried daughters also represented to their mother on many occasions that it would be imprudent to leave any portion of her estate to any of the children of said daughters, for the reason that, if such were done, the respective fathers of the said children would get the same, and would spend or lose it in speculation. All of these representations, it is alleged, were untrue, and were made to the decedent for the purpose of prejudicing and influencing her against the petitioners and the husbands of the married daughters, so that she would not leave to the son or the married daughters as great a share of her estate as would go to any of the unmarried daughtes. Said Florence E., Evelyn L., and Bessie D. Stoddart urged these misrepresentations upon the decedent, and pressed her not to leave her property so that the husbands of her married daughters could get the shares of their wives from them, "and said decedent was unable to resist such importunity and pressure, and the same controlled her mind at the time said alleged last will was made, and without the same decedent would not have made said will." It is alleged further that, at the time these representations were made, Eliza J. Stoddart was advanced in years, and was growing blind and infirm; that her four unmarried daughters resided with her, and she depended upon them, and all of her business matters were transacted by them; that they would not permit the married daughters to talk alone with their mother on business matters. The petition alleges, on information and belief, that the decedent did not wish to change her will of 1905, and would not have changed it but for the misrepresentations made to her, as heretofore set forth, or but for the urging and importuning of her said four unmarried daughters to leave her property in the manner set forth in the will of January, 1910. If the misrepresentations had not been made, and the decedent had not been urged and importuned by her unmarried daughters, and if they had not dominated her mind, she would not have executed the will of January, 1910, and would have died leaving the will of June, 1905. There is a further allegation that at all times the mother entertained feelings of devotion and affection toward all of her children.

[1] It must be borne in mind, throughout this discussion, that we are considering the sufficiency of a pleading, and nothing else. A quite different question would be presented if the contest had been tried, and we were called upon to decide whether the evidence introduced warranted a verdict in favor of the contestants. No doubt the petition, whether based upon fraud or undue influence, must allege facts from which it can be seen that one or the other of these grounds of contest exists. The mere averment that the will was induced by fraud or by undue influence is the statement of a legal conclusion, and of no avail by itself. But certainly a pleading of any kind is required to state only ultimate facts, and need not specify in detail the evidence by which it is designed to prove those facts.

[2, 3] As we have already said, the charge sought to be made by the appellants is that the will was procured to be made by undue influence. Misrepresentations are set forth, but they are not relied on as an independent ground of contest. Undue influence and fraud are separate grounds of attack. Est. of Ricks, 160 Cal. 467, 117 Pac. 539. But fraud or misrepresentation may be an element of undue influence. Undue influence, in other words, may be exerted by means of fraudulent representations. Est. of Snowball, 157 Cal. 301, 107 Pac. 598; Est. of Ricks, supra. A will is obtained by undue influence where improper pressure, or other unfair conduct, has overcome the volition of the testator, and resulted in his executing a paper which represents, in fact, not his will, but that of the person exercising the influence over him. Est. of Ricks, supra; Est. of Snowball, supra; Est. of Arnold, 147 Cal. 583, 82 Pac. 252.

[4] Respective counsel have indulged in elaborate analyses of the facts alleged, and from them have drawn their opposing inferences. These arguments might appropriately be addressed to the trial court or jury after the introduction of the evidence, or to this court on appeal from a judgment revoking the probate of the will. It may well be that the petition discloses various circumstances which may be viewed as supporting the claim that the document executed by Mrs. Stoddart was the expression of her free and independent desires. It may be, too, that the facts which the appellants will be able to prove in support of the averments of their petition would not sustain a verdict against the validity of the will. But on this appeal, which raises a question of pleading alone, we can look only to the petition, and are limited to the inquiry whether it contains, within its many allegations, the statement of any facts constituting a charge of undue influence.

We find that the petition alleges that, at the time of the making of the will, Mrs. Stoddart was advanced in years, and was growing blind and infirm; that her unmarried daughters resided with her, and attended to her business affairs; and that she had become dependent upon them. It is alleged that the representations made to her regarding the claims upon her bounty of her son and her married daughters were false, and were made with the intention of prejudicing her against such son and daughters; that these misrepresentations were frequently and repeatedly made and urged upon her, and that she was unable to resist them; with the result that the misrepresentations and urgings controlled her mind at the time her will was made, and she would not have made the will without them. There are further allegations that one of the unmarried daughters was present at the time of the execution of the will, and arranged the details of its execution, and that the fact of the making of the will, although known to all of the unmarried daughters, was concealed from one of the contestants, although she was then living in the same hotel with the decedent and the respondents.

We are not prepared to say that these allegations are not sufficient to entitle the petitioners to a trial of the issue of undue influence. The pleading alleges, in effect, that the will was not "the natural result of the uncontrolled will of the testatrix." Est. of Snowball, supra. This is the ultimate test of the existence of undue influence. The petition does not state this as a mere conclusion, but sets forth, in addition, the means by which the will of the respondents was imposed upon the testatrix. These means consisted of repeated importunities and misrepresentations designed to compel, and alleged to have been effective in compelling, the execution of a will in accordance with the desires of the respondents, rather than with those of the testatrix, herself. While it is not claimed that Mrs. Stoddart lacked testamentary capacity, the fact of her advanced years and debilitated condition was material, as bearing upon her alleged inability to resist importunity and pressure of this kind. So, too, the circumstance that she was dependent upon her unmarried daughters, and was by them kept from communication with the contestants, is a statement of fact which, although not sufficient in itself to show undue influence, may be considered in connection with the other averments.

[5] The respondents argue with great earnestness that the misrepresentations set out in the petition related to matters of opinion, and that they would not be sufficient to support an attack on the ground of fraud. But conceding this, they may still, if designedly and unfairly used as part of a scheme to overcome the will of the testatrix and compel her to carry out the will of the respondents, be regarded as constituting, together with the other facts alleged, the exercise of undue influence.

We think the demurrer should have been overruled.

The judgment is reversed.

We concur: SHAW, J.; LAWLOR, J.

(174 Cal. 616)

UNITED STATES FIDELITY & GUARANTY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (two cases). (L. A. 4711, 4712.)

(Supreme Court of California. March 14, 1917.)

1. MASTER AND SERVANT 🔑403—WORKMEN'S COMPENSATION ACT—WILLFUL MISCONDUCT AS MATTER OF AFFIRMATIVE DEFENSE.

In proceedings under the Workmen's Compensation Act (St. 1913, p. 279) for compensation for death of a servant, the claimant need not establish innocence of willful misconduct on the part of the deceased workman, willful misconduct, like contributory negligence, being matter of affirmative defense, though the question of willful misconduct goes to the jurisdiction of the Accident Commission in the sense that no award may be made lawfully when the employé's willful misconduct contributed to the injury.

2. MASTER AND SERVANT 🔑378—WORKMEN'S COMPENSATION ACT—CONTRIBUTORY NEGLIGENCE.

Negligence, or lack of it, on the part of an injured employé, is not the determinative factor in a proceeding before the Industrial Accident Commission.

3. MASTER AND SERVANT 🔑380—WORKMEN'S COMPENSATION ACT—WILLFUL MISCONDUCT.

Willful misconduct barring the right to compensation involves something more than negligence, and does not even include every violation of a rule.

4. MASTER AND SERVANT 🔑380—WORKMEN'S COMPENSATION ACT—NEGLIGENCE—WILLFUL MISCONDUCT.

An inexperienced employé of a winery was not negligent in entering the suffocating atmosphere of a wine vat to clean it without lighting a candle to test the atmosphere unless he knew of the general practice to make such test, much less with willful misconduct.

5. MASTER AND SERVANT 🔑405(1) — WORKMEN'S COMPENSATION ACT — WILLFUL MISCONDUCT—SUFFICIENCY OF EVIDENCE.

In proceedings under the Workmen's Compensation Act for compensation for death of an employé of a winery found in a dying condition in a wine vat, which he had been cleaning with another employé, evidence *held* to sustain the finding of the Industrial Accident Commission that there was no such willful misconduct on the servant's part as should defeat his dependents' right to compensation.

6. MASTER AND SERVANT 🔑375(1) — WORKMEN'S COMPENSATION ACT—INJURY IN SERVICE.

An employé of a winery, overcome after going to the aid of another employé who was cleaning a wine vat, was injured while engaged in his employer's business.

7. MASTER AND SERVANT 🔑361—WORKMEN'S COMPENSATION ACT—STATUS AS EMPLOYÉS.

The act of individual partners in placing the firm business under a general manager by general power of attorney authorizing him to act as such, and to receive and control the funds of the copartnership, was merely a private arrangement, not binding, as an assignment for the benefit of creditors, on the workmen employed, who did not cease to be employés of the partnership.

Certiorari to State Industrial Accident Commission.

In Bank. Two proceedings, under the Workmen's Compensation Act, by Roberto Maffia, for Maria Robusto Maffia, and by Victor Zanotti and others, to recover compensation for the deaths of Daniele Maffia and Roberto Zanotti. Compensation was awarded by the Industrial Accident Commission, and, to review the action of the Commission, the United States Fidelity & Guaranty Company, the insurer, brings certiorari. Awards affirmed.

Gurney E. Newlin and H. W. Kidd, both of Los Angeles, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

MELVIN, J. These proceedings in certiorari are taken to review the action of the Industrial Accident Commission in awarding compensation to the dependents of Daniele

Maffia and Roberto Zanotti, who were asphyxiated in a wine tank while they were employed at a winery in Los Angeles. Maffia was a foreman. Zanotti was a workman under Maffia's direction.

The Industrial Accident Commission found that the men were working "upon certain wine tanks which were required to be cleaned after emptying them of wine." Regarding the usual manner of doing that kind of work the finding of the commission was as follows:

> "The custom in cleaning said tanks was for one person to work inside and one outside the tank, and that it was forbidden and contrary to the custom then in use for two persons to work inside of a tank at once, because of the danger of asphyxiation; that the custom of said employés, Maffia and Zanotti, was for Maffia to work outside the tank and Zanotti inside, while cleaning it; that there were no eyewitnesses to the accident, but that when discovered both Maffia and Zanotti were found inside of the tank they had been cleaning, in a dying condition; and that death resulted within a few minutes after their being removed."

There were further findings in the Maffia matter in the following language:

> "That it is proper and customary among winemakers before entering a vat to clean it, to test the atmosphere in the vat by a lighted candle, to determine the presence of poisonous gases; that the deceased Daniele Maffia was well acquainted with such custom and the necessity for its exercise; that no rules had been issued by the employer requiring such test to be made, and that there is no evidence to show that the deceased Roberto Zanotti had ever been instructed in the necessity of making such test; that there is no evidence to show whether or not such candle test was made by either of the deceased employés prior to entering the tank in which the accident occurred; that the evidence is therefore insufficient to establish that the death of the said Daniele Maffia was caused by willful misconduct; that no charge of intoxication contributing to said death is made by the defendants herein."

There were findings to the same effect in the case of Zanotti.

Petitioner's first contention is that recovery of compensation should have been denied because of the willful misconduct of the two men, but as a preliminary to a discussion of that point counsel for petitioner insist that proof of innocence of willful misconduct is one of the burdens placed upon all claimants before the Industrial Accident Commission. Counsel rely in part upon the following language found in Great Western Power Co. v. Pillsbury et al., 170 Cal. 180–186, 149 Pac. 35–38:

> "The question whether the accident was caused by the 'willful misconduct of the employé' is one that goes to the jurisdiction of the board, and is therefore open to inquiry on certiorari. Under the terms of the act, the liability exists only where there is a concurrence of certain conditions, one of which is the absence of such willful misconduct."

In using the language above quoted, Mr. Justice Sloss, who prepared the court's opinion, was not discussing the burden of proof in proceedings before the Industrial Accident Commission, but he was disposing of the contention that the finding of the commission upon the question of willful misconduct of the employé was not reviewable by this court. He concluded that as a matter going to the jurisdiction of the Industrial Accident Commission it was subject to examination on certiorari. But the decision does not hold, nor does any authority to which our attention has been called, that innocence of willful misconduct on the part of the injured or killed workman must be affirmatively established in the proceeding before the commission. If this were the rule the petitioner would be compelled in every case to establish all of the rules passed by the employer for the safety of the employés, and then prove that no one of these regulations had been broken by the workman killed or injured in the alleged accident. It is contended that the very definition of the right of an injured workman to receive compensation or of the surviving dependents of a deceased employé to obtain an award provided by law in proper cases depends upon the absence of willful misconduct. In this behalf McDougald v. Boyd, 172 Cal. 753, 159 Pac. 168, is cited as authority for the proposition that a statute may prescribe proof of a negative as an essential part of a plaintiff's cause of action. That was a tax proceeding—one in invitum—and it was held that, as the statute did not impose a tax generally upon all transfers of property made in contemplation of death, but only upon those made "without valuable and adequate consideration," the burden was placed upon an officer seeking to collect an inheritance tax of showing that a transaction involving such transfer was in fact without sufficient consideration. The matter at bar is quite different. We are here considering not a proceeding in invitum, but one in which the law contemplates a fair weighing of all of the facts and the rights of the parties with as little formality as is compatible with justice.

[1] "Willful misconduct," in a proceeding such as this, like "contributory negligence" in a damage case, is matter of affirmative defense. While the question of "willful misconduct" goes to the jurisdiction of the Industrial Accident Commission in the sense that no award may be made lawfully by that tribunal when the employé's "willful misconduct" has contributed to his injury, nevertheless the commission has the right to hear and determine all controversies between employers and workmen holding relatively the positions occupied by the decedents' petitioners and the firm that employed them. In that sense the matter of "willful misconduct" is not jurisdictional, but purely defensive. The rule has been so declared in British Columbia Sugar Refining Co. v. Granick, 44 Can. Sup. Ct. Rep. 105, 2 N. C. C. A. 852. This court has held that, while the burden of proof in a matter before the Industrial Accident Commission is upon the applicant, it is not necessary that every possibility of death by other than accidental means should

be negatived. Rideout Co. v. Pillsbury, 159 Pac. 435, 436.

The circumstances surrounding the death of Maffia and that of Zanotti do not show whether or not they or either of them made any test of the atmospheric conditions in the tank before entering. For all that appeared in the evidence they may have made tests and may have been satisfied in their own minds that they might safely venture within the tank, or it may have been that one of them entered the tank, was overcome by the fumes, and that his companion seeking to rescue him was also suffocated. These are all matters purely of speculation. But, even if it be conceded that going into the wine tank under the circumstances revealed was negligence of a high degree, that does not help us in the solution of the problem presented to us.

[2] Negligence or lack of it is not the determinative factor in a proceeding before the Industrial Accident Commission. Great Western Power Co. v. Pillsbury et al., 170 Cal. 180–189, 149 Pac. 35.

[3] Willful misconduct involves something more than negligence, and it does not even include every violation of a rule. Casey v. Humphries, [1913] 6 B. W. C. C. 520. According to the finding of the commission, which is supported by the evidence, there had been no rules formulated by the employer prohibiting an employé from entering a tank or vat before testing the atmosphere therein with a lighted candle.

[4] True, it was the custom, as found by the commission, to make such tests, but Zanotti, in the absence of proof that he knew of such general practice, could not even be charged with negligence in entering the suffocating atmosphere without employing the common preliminary precaution. Boin v. Spreckels Sugar Co., 155 Cal. 612, 102 Pac. 937. Much less might he be charged with willful misconduct.

[5, 6] Regarding Maffia the facts were different. He was a man of experience, and we could perhaps construct an hypothetical case in which such a workman might be held guilty of willful misconduct in the violation of a custom crystallized by long and universal practice into a rule, although not formulated by the employer into a written precept or a spoken command; but we cannot say that under the circumstances presented by this record the commissioners erred in finding the evidence insufficient to establish such misconduct on Maffia's part as ought to defeat the efforts of his surviving dependents to obtain compensation for his death. It might have been that Maffia was overcome after going to the aid of Zanotti, in which event he would have been engaged in his employer's business. Dragovich v. Iroquois Iron Co., 269 Ill. 478, 109 N. E. 999, 10 N. C. C. A. 475; Waters v. Taylor Co., 218 N. Y. 248, 112 N. E. 727. Indeed, a number of explanations are possible not merely to excuse, but logically to account for, Maffia's being in the tank; and we cannot say, therefore, that his mere presence therein and in a dying condition proves circumstantially his guilt of willful misconduct.

[7] The two workmen were employed by the Aquilino-Lagomarsino Wine Company, a partnership for which petitioner wrote compensation insurance. Petitioner disclaims liability on the ground that the partnership business had been assigned for the benefit of creditors, and that the men who were killed had ceased to be employés of the copartnership. The commission found that one week prior to the accident F. A. Lucas had been appointed general manager of the business under a general power of attorney authorizing him so to act as manager and to receive and control the funds of the co-partnership; that neither in form nor substance was this transaction a sale or transfer of the partnership business to Lucas, but was placing partnership business and assets under his control until Lucas and certain other creditors should be paid; and that Aquilino and Lagomarsino at all times remained the owners of the partnership business and the employers of Maffia and Zanotti. These findings are supported by the evidence. The alleged assignment was not made by the copartnership, but by the partners individually. It was a private arrangement which could not be binding upon the workmen employed in the winery. There was no pretense that it was made in accordance with the statutes (section 3457, Civil Code, et seq.) The mere transmission of the custody and management of the business to Lucas was not a sale, a transfer or an assignment for the benefit of creditors.

No other matters discussed in the briefs require attention.

The awards are affirmed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SLOSS, J.; SHAW, J.; LORIGAN, J.; LAWLOR, J.

(174 Cal. 660)

In re CROCKER.
FREEMAN v. PHIPPS.

(Sac. 2528.)

(Supreme Court of California. March 16, 1917.)

1. INSANE PERSONS 🔑33(1)—GUARDIANSHIP—APPOINTMENT OF GUARDIAN—EVIDENCE—ADMISSIBILITY.

In a proceeding for the appointment of a guardian for the person and estate of an insane person, it was not prejudicial to admit in evidence the writing made by the late husband of the insane person requesting the appointment of a certain individual as his successor.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 44–46, 48, 50, 51.]

2. INSANE PERSONS 🔑34 — GUARDIANSHIP — APPOINTMENT OF STRANGER.

In view of Code Civ. Proc. § 1763 et seq., giving the court a broad discretion to conserve the best interests of the insane persons, it is within the power of the court to appoint as guardian a stranger to the person who is familiar with the estate of the insane person by his acting as attorney for the former guardian.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 49.]

Department 2. Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Proceedings in the matter of the guardianship of Josephine H. Crocker, an incompetent person, by Josephine B. Freeman, against W. T. Phipps. From a decree for the defendant, the petitioner appeals. Affirmed.

Alexander & O'Donnell, D. E. Alexander, and John O'Donnell, all of San Francisco, for appellant. W. T. Phipps, of Sacramento, guardian, in pro. per.

MELVIN, J. For about 12 years before he died Calvin E. Crocker was the guardian of the person and estate of his wife, Josephine H. Crocker, an incompetent person. For several years prior to his death, which occurred in January, 1916, Mr. Crocker had been an invalid, and during that time much, if not all, of the business connected with the estate of his wife was committed to the management of Mr. W. T. Phipps, an attorney at law, whose offices are at Sacramento. After Mr. Crocker's death Mr. Phipps petitioned for letters of guardianship of the person and estate of Josephine H. Crocker, and a similar petition was filed by Josephine B. Freeman, a cousin of the incompetent, who is the nominee of all of the relatives of said Josephine H. Crocker. The court heard both petitions at the same time, and appointed Mrs. Freeman guardian of the person and Mr. Phipps guardian of the estate of Mrs. Crocker. From that part of the judgment appointing Mr. Phipps, an appeal is taken by Mrs. Freeman.

[1] The court admitted in evidence a writing made by Calvin E. Crocker dated January 18, 1912, by which he requested the proper court, upon his death, to appoint W. T. Phipps guardian of Mrs. Crocker. The admission of this instrument is specified as error. It must be conceded, of course, that a guardian has no statutory right to nominate his successor who shall take his place upon said guardian's death, but we do not see that appellant was harmed by the admission of this instrument. She objected to the receiving of it in evidence, but Mr. Oatman, who identified the signature and told of the execution of the writing, testified without objection to the essential facts set forth therein, namely, that Mr. Crocker preferred Mr. Phipps as his successor; and he added that this preference existed because of the lawyer's familiarity with the affairs of the incompetent's estate, and because Mr. Crocker did not want her relatives to have any control of his wife's property. After this testimony had been given without objection, the document was offered in evidence, and then appellant's counsel objected for the first time. If the court errod, therefore, in admitting the writing, no serious injury was inflicted upon appellant.

[2] It is the theory of appellant that the court abused its discretion in appointing a stranger and in refusing to ratify the choice of all of the incompetent person's kinsfolk. Appellant's counsel concede that no statute compels a court thus to select a guardian from the relatives of the ward, but her counsel say that "analogies of the law" should have governed the court's action, and that the rules prescribed for granting letters upon estates of deceased persons should have been followed.

To this objection the obvious answer is that, even if we regard Mr. Phipps as a "stranger" to Mrs. Crocker in the sense that he did not know her very well personally, the evidence showed without conflict that he was familiar with her business affairs—probably more so than any other person; and the equally obvious reply to the argument in favor of "analogies of the law" is that such analogies have not impelled the Legislature to adopt them. Section 1763 et seq. of the Code of Civil Procedure, prescribing the methods to be followed in matters of guardianship of insane and incompetent persons and the powers of the courts in such proceedings, give a broad discretion quite analogous to that vested in courts of chancery to conserve the best interests of their wards. This court has held valid and proper the appointment of a stranger as guardian of the person and estate of an incompetent who was a married man and preferred, if a guardian of his person was to be appointed, that his wife should be selected. Matter of Coburn, 165 Cal. 218, 131 Pac. 352. Undoubtedly the fact that petitioner Phipps was acquainted with Mrs. Crocker and familiar with the affairs of her estate gave him sufficient standing to justify his application as "a friend" of the incompetent person. Estate of Schulmeyer, 171 Cal. 340–344, 153 Pac. 233. The only duty of the court is to select a proper person for a guardian. Halett v. Patrick, 49 Cal. 590; Guardianship of Sullivan, 143 Cal. 462, 77 Pac. 153. And we find nothing in this record to justify even a suspicion that the court violated its discretion in bestowing the appointment upon Mr. Phipps. In this behalf appellant, while disclaiming any reflection upon the character or capacity of Mr. Phipps, suggests that his intimate business relations with Mr. Crocker during that gentleman's later years should have governed the court and should have impelled a refusal to apoint him guardian of an estate having claims against the estate and property of Calvin E. Crocker, deceased. There is no force in this suggestion. This record discloses the fact that Mr. Phipps was employed about the affairs of this very estate of which he now assumes guardianship under the court's order. There is nothing to indicate that he was ever concerned with other or conflicting interests. We must assume that he is not an attorney for the executor of decedent's estate, because, naturally, the court would not appoint him guardian of Mrs. Crocker's estate if he were. We see no reason to disturb the court's action in any particular.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(174 Cal. 568)

WOODARD v. GLENWOOD LUMBER CO. et al. (S. F. 6615.)

(Supreme Court of California. March 10, 1917.)

BROKERS ⟹71—COMMISSIONS FOR OBTAINING CONTRACT—AMOUNT.

Where defendant agreed to pay plaintiff ten cents per thousand for all lumber cut by defendant on another's land on contract secured by plaintiff and defendant did not cut all the timber on the land, plaintiff was entitled to commissions only on the amount cut, since his contract was entirely dependent upon the amount cut by defendant on latter's contract with owner.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 56.]

Department 2. Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by L. Woodard against the Glenwood Lumber Company and others. Judgment for plaintiff, and defendant William M. Aydelotte appeals. Affirmed.

A. H. Jarman, of San Francisco, for appellant. Geo. Clark, of San Francisco, J. A. Elston, of Berkeley, Beasly & Fry, of San Jose, and Charles B. Younger and W. P. Netherton, both of Santa Cruz, for respondents.

HENSHAW, J. The general facts in this case are set forth in another appeal taken from the same judgment. The decision of this court will be found in 171 Cal. 513, 153 Pac. 951.

For his services in securing for the Glenwood Lumber Company from L. Woodard a contract authorizing the former to cut and remove timber from the lands of the latter, the Glenwood Lumber Company, by written contract, agreed to pay appellant Aydelotte ten cents per thousand feet "for each and every one thousand feet of lumber that the first party or its successors or assigns may become indebted to said Woodard for under the said contract between them." Plaintiff Woodard in time brought suit for a cancellation of the contract for sundry breaches of it, and for a decree quieting his title and restoring him to the possession of his timber lands. Bloom and Miller, who, by assignment, had successively succeeded to the rights of the Glenwood Lumber Company under the contract, were made parties defendant, as was this appellant. It appeared that Bloom and Miller accepted the assignment of Woodard's contract with the Glenwood Lumber Company, subject to appellant's rights under his contract with the Glenwood Lumber Company, and the court so found. It found also that if these defendants had performed their contract and cut the millions of feet of timber upon these lands, appellant would have been entitled to several thousand dollars by virtue of his contract of ten cents per thousand feet. They did not, however, perform their contract nor cut this wood nor "become indebted to Woodard under the contract" for any wood cut. The court, finding all of these facts, found that his fellow defendants had not breached their contract with Aydelotte, and that he was therefore not entitled to a recovery. Upon this appeal it is argued that under the facts found he was entitled to a recovery for the full amount of ten cents per thousand feet of the fifty or more million feet of timber left standing on the land. The difficulty with appellant's position, however, arises from the very terms of the contract itself. It has been sufficiently pointed out that his codefendants did not agree with appellant to cut all or any part of the timber upon the land. Their agreement to do this was with Woodard alone. All, so far as appellant is concerned, that they agreed to do was to pay him ten cents per thousand feet for such portion as they did cut, and this in fact they did, and, as their contract went no further, the court's judgment was correct, and is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(174 Cal. 566)

JUDSON MFG. CO. v. LUTGE. (S. F. 7109.)

(Supreme Court of California. March 10, 1917.)

1. DAMAGES ⟹142—PLEADING—BREACH OF CONTRACT—DELAY IN DELIVERY.

Damage suffered by the buyer of materials from delay in delivery is damage which must be specially and specifically pleaded, and pleading that defendant had been damaged by reason "of plaintiff's said breaches of its said contract" was insufficient.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 413.]

2. FRAUD ⟹30—FRAUD UPON OWNER OF BUILDING.

Where plaintiff materialman, in furnishing iron rods rather than steel rods to the contractor for a building, furnished precisely the rods which it had agreed to furnish by its contract with the contractor, if there was any fraud upon the owner of the building it was a fraud of the contractor, and not of the materialman.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 35.]

Department 2. Appeal from Superior Court, City and County of San Francisco; W. M. Conley and Geo. A. Sturtevant, Judges.

Action by the Judson Manufacturing Company, a corporation, against Richard Lutge, doing business under the name and style of the Folsom Street Iron Works. From a judgment for plaintiff and an order denying his motion for new trial, defendant appeals. Affirmed.

Leon Samuels, of San Francisco, for appellant. Thomas, Beedy & Lanagan, of San Francisco, for respondent.

HENSHAW, J. Plaintiff sued to recover for the value of materials furnished to defendant. It charged in two counts; the first an express contract with a fixed price for the materials; the second in quantum valebat. The court gave plaintiff judgment in the amount sued for, and from that judgment and from the order denying his motion for a new trial defendant appeals.

The material which plaintiff agreed to and did furnish was steel and iron to be used by defendant in the performance of his contract in the construction of the "New Coliseum Building" in the city and county of San Francisco. By his contract with the owners defendant agreed to perform his contract within eighteen working days. He pleaded that plaintiff had delayed in the delivery of the material and did not deliver the material until after the agreed time, "and that by reason of the failure of said plaintiff to perform its said contract with defendant according to plans, specifications and details as aforesaid, said Coliseum Amusement Company (the owner of the premises) has claimed and does claim that this defendant has caused a damage in the sum of $4,000."

The court found that plaintiff duly performed its contract in all respects, saving that it did not furnish the defendant the material within the agreed time. It further found that the material when furnished was accepted and used by the defendant and that the defendant was not in any respect damaged by the delay. The court, however, found both the value of the material under the count in quantum valebat, and found also the contract price of the material in the same sum, as it further found the performance of the contract, excepting in the matter of the delay of the delivery, and that this delay worked no damage to defendant, the allowance of interest was proper as addressed to the finding of the contract price.

[1] Defendant's own testimony was to the effect that he suffered no damage saving for the delay. But in this regard he merely pleads:

> "That by reason of plaintiff's said breaches of its said contract with this defendant, this defendant has been damaged in the sum of $4,000."

The damage for which recovery is here sought is, under every rule of pleading and authority as to damage, one which must be specially and specifically pleaded. Cole v. Swanston, 1 Cal. 51, 52 Am. Dec. 288; Stevenson v. Smith, 28 Cal. 102, 87 Am. Dec. 107; Nunan v. San Francisco, 38 Cal. 689; Mitchell v. Clarke, 71 Cal. 163, 11 Pac. 882, 60 Am. Rep. 529; Harron-Rickard-McCone v. Wilson-Lyon & Co., 4 Cal. App. 488, 88 Pac. 512; 2 Sutherland, Damages (3d Ed.) § 419. Defendant's failure specifically to plead this special damage, which here he asserts he suffered, justified the court's refusal to receive evidence upon it, and demanded the finding which the court made against it.

[2] Something is said about a concerted fraud practiced upon the owner of the building by plaintiff and defendant in the substitution of iron rods for steel. But the evidence establishes that plaintiff in furnishing the iron rods furnished precisely those which by its contract with defendant it had agreed to furnish, and, if this were in fact a fraud upon the owner, it was a fraud of the defendant and not of the plaintiff.

The judgment and order appealed from are affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(174 Cal. 654)

LANDWEHR v. GILLETTE et al.

(L. A. 3804.)

(Supreme Court of California. March 15, 1917.)

1. JUDGMENT ⚷120 — DEFAULT — CLERK'S POWER TO ENTER.

The authority of a clerk to enter judgment after default is purely ministerial, and confined strictly to the statutory provisions, and any judgment otherwise entered by him will be void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 210.]

2. JUDGMENT ⚷126(1)—DEFAULT JUDGMENT —ENTRY BY CLERK—ALLOWANCE OF ATTORNEY FEES.

Where a note sued on provided for recovery of a reasonable attorney fee and defendants were defaulted, the clerk had no authority to enter judgment for $500 attorney fee claimed in complaint, under Code Civ. Proc. § 585, subd. 1, empowering clerk to enter judgment on default "in an action arising upon contract for the recovery of money or damages only, if no answer has been filed."

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 223, 224, 228.]

3. JUDGMENT ⚷126(1)—DEFAULT — CLERK'S POWER TO ENTER—STATUTE.

Code Civ. Proc. § 585, subd. 1, empowering clerk to enter judgment on default in actions "arising upon contract for recovery of money or damages only," is limited to cases where contract provides definite sum as liquidated damages, or where the clerk's duty will be merely that of computation, and does not authorize such action merely because the complaint claims a certain amount as damages, the reasonableness of which by section 2 is to be determined by the court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 223, 224, 228.]

4. JUDGMENT ⚷112—MATTER ADMITTED BY DEFAULT—ATTORNEY'S FEES.

A defendant's failure to answer in suit upon note providing for recovery of reasonable attorney fee did not admit the complainant's allegation that $500 was a reasonable attorney fee, but merely that something was recoverable under that provision.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 203-206.]

5. JUDGMENT ⚷112—MATTER ADMITTED BY DEFAULT—AMOUNT DUE.

In action for value of goods sold alleged to be reasonably worth the sum charged, a default does not admit liability to the extent charged, but merely some liability to be determined by the court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 203–206.]

Department 2. Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by H. A. Landwehr against G. G. Gillette and others. Default judgment for plaintiff set aside, and plaintiff appeals. Affirmed.

Williams, Goudge & Chandler, of Los Angeles, for appellant. Jones & Evans, B. J. Bradner, and S. F. Macfarlane, all of Los Angeles, for respondents.

LORIGAN, J. This is an appeal from an order of the superior court of Los Angeles county setting aside a judgment.

The action in which the judgment was entered was brought to recover upon a promissory note executed by defendant Fundenberg and indorsed by the other defendants. As set out in the complaint, the note was for $3,000 principal, with 6 per cent. interest, and contained a provision that "in case suit is instituted to collect this note, or any portion thereof, I promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit," and it was alleged in the complaint that the sum of $500 was a reasonable attorney's fee to be paid to the plaintiff on the bringing of said suit. The prayer was for a judgment for the principal and interest on the note, $500 attorney's fee, and costs of suit.

Defendants were duly served with summons, but made no appearance in the action. Thereafter their defaults were entered by the clerk of the court, who on the same day himself entered up a judgment against defendants for the amount prayed for in the complaint, including therein the sum of $500 as attorney's fees. Subsequently certain of the defendants moved to set aside said judgment, which motion being granted, this appeal is taken therefrom by plaintiff.

The sole question presented on this appeal is as to the authority of the clerk of the court on default to enter a judgment in the action, including reasonable attorney's fees. The authority of the clerk of the court to enter up a judgment where a defendant has defaulted after personal service of summons on him is given by subdivision 1 of section 585, Code of Civil Procedure, and, quoting from such portion as is material here, provides that:

> "In an action arising upon contract for the recovery of money or damages only, if no answer has been filed * * * the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount demanded in the prayer of the complaint, including the costs. * * *"

Subdivision 2 of said section provides that:

> "In other actions, if the defendant has been personally served and no answer has been filed * * * the clerk may enter the default of the defendant; and thereafter the plaintiff may apply to the court for the relief demanded in the complaint."

These embrace the only provisions respecting an entry of judgment upon default made after personal service, and the question is: Was the action upon this promissory note, as far as the claim respecting reasonable attorney's fees is concerned, such an action "upon contract for the recovery of money or damages only" where judgments shall be entered by the clerk, or did it fall within "those actions" where the plaintiff must apply to the court for the relief demanded in the complaint?

[1] It is, of course, well settled that the authority given the clerk to enter judgment after default is, when properly exercised, a ministerial one solely. His power must be conferred by the statute, and in exercising it he must conform strictly to the provisions of the section or any judgment entered by him will be void. Kelly v. Van Austin, 17 Cal. 564; Wharton v. Harlan, 68 Cal. 425, 9 Pac. 727; Crossman v. Vivienda Water Co., 136 Cal. 574, 69 Pac. 220; Farrar v. Steenbergh, 159 Pac. 707.

[2] Was the suit in which the judgment therein was entered an action "upon contract for the recovery of money or damages only," within the purview of subdivision 1 of the section in which the clerk could enter up a judgment as prayed for in the complaint? We are satisfied that it was not.

While the note provides that reasonable attorney's fees, if incurred by the bringing of an action, shall be fixed by the court, we do not attach particular importance to that circumstance. In the view we take of the construction to be put on the subdivision of the Code referred to, that particular reference to the court would require no different construction if it were not contained in the note.

[3] While it is true that the language used in subdivision 1 of the section is quite broad and authorizes the clerk after default to enter up judgment in all actions "arising upon contract for the recovery of money or damages only," still what is meant by that language is that the contract to warrant the exercise of such authority by the clerk alone in entering judgment must by its terms as set forth in the complaint call for the payment of some fixed and definite sum in money or damages. In the nature of things this provision of the Code must be construed to apply to contracts which provide for some definite fixed amount of damages ascertainable from the contract sued on or from the

terms of which a certain computation or calculation may be made by the clerk. As the duty of the clerk is purely ministerial, his power could only be exercised and properly apply in the case of such a contract, and must be limited thereto. If the contract declared on is indefinite and uncertain in the amount of damages which plaintiff is entitled to recover on it, and in the nature of things must be ascertained and fixed, the matter then is necessarily one for judicial determination by the court, and not for ministerial action by the clerk. Hence it must appear from the contract sued on, either from its terms as set forth in the complaint or from the allegations in the latter respecting it, that a definite or liquidated sum of money is to be paid as damages; an amount which is definitely fixed by the contract sued on or which from the allegations of the complaint may be ascertained by mere computation or mathematical computation of the clerk. When this is the situation the clerk in entering judgment acts simply in a ministerial capacity. Nothing more is required of him than to figure up from exact data in the contract or in the complaint what plaintiff is entitled to, and hence, an entry of judgment would be authorized under the section. But this is not the situation presented here. The contract—the note—does not amount to a liquidated demand for a certain, definite, fixed sum of money consisting of principal and interest which would leave to the clerk on a default only the duty of making a mere calculation of interest to fix the exact amount of damages for which judgment should be entered. It is rendered uncertain or indefinite by reason of the provision for reasonable attorney's fees to be allowed on the contingency of suit to collect the note as special damages. While the complaint alleges that $500 is a reasonable attorney's fee, it does not lie with plaintiff to determine what shall constitute a reasonable attorney's fee, nor can his counsel bringing the action fix the amount thereof for purposes of a judgment by alleging in the complaint a sum which he may think would be reasonable. Its reasonableness could not be ascertained by computation, because no data has been furnished in the note or complaint for doing so. It must remain uncertain and indefinite until resolved into a certain sum by some one authorized to do so. Certainly it is not a ministerial duty for the clerk, but is one pre-eminently judicial to be performed by a court.

[4] It is argued that the failure of defendants to answer was an admission by them that the sum alleged was a reasonable attorney's fee. But this is not the legal consequence which follows from such default as far as entering a judgment by the clerk is involved. The default is an admission of some things. In an action of this character, for instance, it admits that by the terms of the note sued on the defendants are liable, in addition to principal and interest, for the payment of some amount as a reasonable attorney's fee, and that the plaintiff is entitled to have a recovery therefor. But this is as far as the default constitutes an admission. It simply admits that something is due as a reasonable amount for attorney's fees, but not that the amount alleged in the complaint constitutes it. This, under the contract and under the law, is a matter peculiarly for judicial determination which a defaulting defendant knows or is presumed to know, and while he admits the breach of the contract by his default and his liability for general damages, in those amounts which can be determined by exact computation from the note or the complaint setting forth its terms, yet as to the recovery of reasonable attorney's fees, which are special damages authorized to be recovered in addition to the general damage, his default only admits he is liable in some sum, but only in such a sum as may be determined after his default by the judgment of the court itself. In 23 Cyc. 753, speaking on this subject, it is said:

> "If the action is in tort or upon an unliquidated claim or demand, default admits plaintiff's right to recover, but not the amount to which he is entitled, and therefore further proceedings will be necessary to determine the amount of the judgment. But if the cause of action is such that plaintiff is entitled to recover a fixed sum, or nothing at all, or if the amount of the damages is ascertainable by mere calculation, the default admits his right to recover the sum demanded in the declaration or complaint, and the judgment may be entered therefor."

[5] An action like this, in as far as it involves a recovery of reasonable attorney's fees under the terms of a note providing therefor in case of suit, is no different from an action brought for the recovery of the reasonable value of goods, wares, and merchandise sold and delivered to defendant and alleged to be reasonably worth the sum charged, or an action for services rendered to defendant which are alleged to be reasonably worth a certain sum. It is settled in those cases that, as the contract sued on is not certain or definite as to the amount for which defendant is liable, although the complaint alleges a fixed sum as the reasonable value, a default does not admit the liability to the extent charged, but simply a liability to some extent and the amount of the recovery is to be determined by the court to which application must be made therefor, and respecting which the clerk has no right to make entry of judgment. B. & M. R. R. Co. v. Marchand, 5 Iowa, 471; B. & M. R. R. Co. v. Shaw, 5 Iowa, 563; Wynne v. Prairie, 86 N. C. 73; also Witt v. Long, 93 N. C. 391; Wolf v. Hamberg, 8 S. C. 84; 1 Black on Judgments (2d Ed.) § 89, p. 117.

There is nothing in the case of Alexander v. McDow, 108 Cal. 25, 41 Pac. 24, cited and relied on by both sides, which directly aids in the solution of this question either way, although inferentially it seems to support the claim of respondent. In that case there was a default judgment, but there was no question raised in the case of the right of the clerk to enter up the amount of a reasonable attorney's fee. There was no allegation of a reasonable fee, for the reason that the note sued on there provided that in the event of suit the plaintiff should recover 10 per cent. of the total amount found due on the note as attorney's fees. There was no question about the power or want of power of the clerk to enter a default judgment in the case as to an attorney's fee. As far as any question about the entry of judgment for attorney's fees in that case was concerned, the claim was that the complaint in the action did not contain a sufficient allegation to support its allowance. As the complaint set forth the note in full which embraced a provision for an attorney's fee and alleged the amount due for principal and interest, it was held that there was a sufficient allegation on which to base an allowance of such fee as a simple matter of computation; that the provision in the note itself as to attorney's fees and the allegation of the amount due for principal and interest in the complaint left only a ministerial duty for the clerk to perform, namely, to figure up the attorney's fee at 10 per cent. on the principal and interest due. This is a very different matter from the clerk entering up a judgment for an attorney's fee under the provision of a note stipulating only for the payment of reasonable fees.

The order appealed from is affirmed.

We concur: MELVIN, J.; HENSHAW, J.

(174 Cal. 572)

THOMPSON et al. v. HANCE, City Treasurer, et al. (L. A. 3882.)

(Supreme Court of California. March 10, 1917. Rehearing Denied April 9, 1917.)

1. Municipal Corporations 🔑413(1)—Street Improvements—"Tunnels."

The word "tunnels" in the "Vrooman Act" (St. 1885, p. 147), as amended by St. 1911, p. 626, authorizing various street improvements, with assessment of their cost, does not include independent subterranean avenues for travel, but by its association is limited to auxiliaries to proper drainage.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1014, 1020.

For other definitions, see Words and Phrases, Second Series, Tunnel.]

2. Municipal Corporations 🔑413(1)—Street Improvements—Tunnels.

A tunnel for travel from points, on the two sides of a hill, of a street passing over the hill, with no intermediate connection with the street above, and at places deviating from the lines of the street, is not part of the street, within the Vrooman Street Improvement Act.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1014, 1020.]

3. Municipal Corporations 🔑413(1)—Street Improvements—Assessments—Construction of Tunnels.

No power to assess for initial establishment of a tunnel for travel, as distinguished from repair or improvement of an existing tunnel, is given by Los Angeles City Charter, § 2, subd. 19, as amended by St. 1911, p. 2059, authorizing assessment for improvement of streets, or for construction in a street or other public place, of sewers, drains, water or gas mains, and lines and conduits for transmitting electric currents, and other pipes, mains, lines, and conduits or for other public improvements; as the words "for other public improvements" must be construed under the rule of ejusdem generis.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1014, 1020.]

4. Municipal Corporations 🔑935 — Improvements—Power to Assess—Curative Bond Act.

The validating clause of the bond act making issuance of bonds conclusive of the regularity of the proceedings prior thereto does not eliminate the question of power of a city council to levy an assessment for the improvement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1951.]

In Bank. Appeal from Superior Court, Los Angeles County; Willis I. Morrison, Judge.

Action by Ellen Thompson and others against C. H. Hance, Treasurer of the City of Los Angeles, and others. From an adverse judgment, plaintiffs appeal. Reversed.

Delmas, Imel & Banks, of Los Angeles (Delphin M. Delmas, of Los Angeles, of counsel), for appellants. Albert L. Stephens, E. R. Young, Marshall Stimson, F. C. Austin, and Swanwick & McCormick, all of Los Angeles, for respondents.

MELVIN, J. Plaintiffs appeal from a judgment entered after defendant's demurrer to the complaint had been sustained. The action was instituted for the purpose of resisting payment of bonds which were sought to be made a lien upon property within a district assessed to pay for certain improvements on a portion of Hill street, in the city of Los Angeles, and for the cost of the construction of a tunnel extending for a part of the distance traversed by it under a portion of said street. It appears from the averments contained in the complaint that on December 29, 1911, the city council of the city of Los Angeles adopted and the mayor of said city approved a certain ordinance declaring the intention "to improve a portion of Hill street, and to construct a public tunnel under a portion of said street, and determining that bonds shall be issued to represent the cost thereof, and declaring the work or improvement to be of more than local or ordinary public benefit and that the expense of said work shall be assessed upon a district."

By the first section of said ordinance it was declared that the public convenience required and that it was the intention of the city council to order certain work, including a tunnel, which was to pierce a hill some 90 feet in height intervening between the level portions of said Hill street, at First street and at Temple street. Hill street had been previously graded officially upon the part of it extending over the mound through which the tunnel was to pass. Some of the sections of the ordinance related to the performance of street work on the official grade of Hill street.

By the second section the contemplated work was declared of more than local or ordinary public benefit and the council designated a district thus to be benefited, and by the next section announced that certain described lots of lands should be assessed to pay for the cost of that improvement.

The ordinance contained a direction to the city engineer to prepare a diagram; a finding that the cost of work along the line of the street to be improved would be more than 50 cents per front foot; a statement of the determination of the council to issue serial bonds (describing them in detail); and an announcement that the bonds were to be issued in accordance with the provisions of "'An act to provide a system of street improvement bonds to represent certain assessments for the cost of street work and improvement within municipalities, and also for the payment of such bonds,' approved February 27, 1893, and of all acts supplementary thereto or amendatory thereof." This by-law also contained provisions for posting and publication of notices of the work and of the passage of the ordinance itself.

The pleading recites in detail the proceedings following the adoption of the ordinance including the preparation and approval of the city engineer's diagram and the other necessary steps done in conformity with "'An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers within municipalities,' approved March 18, 1885, and the acts amendatory thereof," culminating in the letting, execution, and performance of a contract for the work. Then follow allegations of the acceptance of the work, the assessment by the board of public works to cover the cost of the improvement; the issuance of a warrant to the contractor's assignees; and the delivery to them, after the full expiration of 35 days of certain street improvement bonds. Plaintiffs aver that they own property against which certain of these bonds have been issued; their refusal to pay the claims represented by said bonds; and the consequent threat and preparation to sell their land to pay the said bonds. They pray for the equitable relief suitable to prevent such results, and ask that the bonds be declared invalid and void. It is to be remembered also that the complaint contains an accurate description of the tunnel and a statement that it was designed and is used solely for the passage of pedestrians and vehicles, being one of the most frequented thoroughfares of the city.

Appellants contend that the improvement —or that part of it represented by the tunnel—was made without authority, and that the city was not clothed with power to levy a local assessment to pay for said tunnel. Respondents assert that ample authority is provided by the statute commonly known as the "Vrooman Act" (St. 1885, p. 147) and the amendments thereto, especially that of 1911 (Stats. 1911, p. 626). This law gives to the city council authority, whenever the public interest or convenience may require, to order—

"the whole or any portion, either in length or width, of any one or more of the streets, avenues, lanes, alleys, courts, places, boulevards, highways, crossings, intersections or public ways of any such city graded or regraded to the official grade, planked or replanked, paved or repaved, * * * and to order the construction or reconstruction therein of sidewalks, crosswalks, culverts, bridges, gutters, * * * and channels for sanitary and drainage purposes, * * * hydrants and appliances for fire protection, tunnels, viaducts, conduits and subways, breakwaters, levees, bulkheads and walls of rock or other material to protect the same from overflow or injury by water, * * * and the construction or reconstruction in, over or through property or rights of way owned by such city, of tunnels, sewers, ditches, drains, conduits and channels for sanitary and drainage purposes or either or both thereof, with necessary outlets, * * * and to order any work to be done which shall be deemed necessary to improve the whole or any portion of such streets, avenues, sidewalks, lanes, alleys, courts, places or public ways or property or rights of way of such city."

[1] It is evident to us that this statute does not, in and of itself, give to the city council the power to construct such a tunnel as the one described in the complaint in this case. Nor does the "Vrooman Act," or any one of its amendments, confer upon the city council authority to assess the cost of any such improvement upon a local district. The "Vrooman Act" is a street improvement act. The instrumentalities mentioned therein and in the amendments thereto are those used in connection with the improvement of streets. The word "tunnels," as employed in these statutes, is not susceptible of the interpretation which respondents would give to it, namely, independent subterranean avenues for travel. The word is used in such manner as to leave no doubt that it has reference to tunnels for the purpose of draining surface streets. As first used in the above quotation the word appears in association with "viaducts, conduits," and other words applying to means of controlling surplus waters, and is followed by the expression "to protect the same from overflow or injury by water." The words "the same" refer to the streets and other public places enumerated in the first section of the act. It is plain that the "tunnels" here mentioned are mere auxiliaries to proper drainage of a street, square, or other public

place. Used a second time in section 2 of the "Vrooman Act," as amended in 1911, we find the word "tunnels" embraced in the part of the act giving power to the council for the construction over or through rights of way or property owned by the city of "sewers, ditches," etc., "for sanitary and drainage purposes or either or both thereof," indicating that the "tunnels" designated were to be mere instrumentalities for the elimination of storm waters or sewage. The closing words of section 2 of the act of 1911 quoted herein emphasize the fact that the statute is a street improvement act, and not one for the authorization of the construction of a tunnel for the accommodation of part of the traffic of a great city. It is argued that as only commas are used in the section from which we have quoted it is possible to divorce the words "to protect the same from overflow," etc., from the enumeration of instrumentalities preceding that expression. If there were any possible doubt upon this subject it would be removed by an examination of another act of 1911 approved two days later than the amendment to the Vrooman Act." The statute sometimes known as "The Improvement Act" (Stats. 1911, p. 730), has a section 2 exactly like the one similarly numbered in the amendment to the "Vrooman Act," except that semicolons are used to divide the groupings of words. We find the following expressions therein punctuated as here indicated:

> "Pipes, hydrants and appliances for fire protection; tunnels, viaducts, conduits and subways, breakwaters, levees, bulkheads and walls of rock or other material to protect the same from overflow or injury by water."

This punctuation amounts almost to a demonstration that the legislative intent did not extend to the conferring upon city councils of power under the "Vrooman Act" to construct tunnels for purposes of public travel. In the case of Gassner v. McCarthy, 160 Cal. 82, 116 Pac. 73, this court held that provisions of the charter of the city and county of San Francisco, substantially identical with those of the "Vrooman Act," did not authorize a district assessment to meet the cost of a tunnel.

[2] It is equally clear that the tunnel here under discussion does not come within the purview of the "Vrooman Act" as a mere part of the street itself. Respondents cite Sears v. Crocker, 184 Mass. 586, 69 N. E. 327, 100 Am. St. Rep. 577, as authority upon the proposition that a subway, under certain conditions, may be regarded as legitimately a part of a public street. It is true that the Supreme Court of Massachusetts in that case decided that no additional servitude was taken by the city of Boston in constructing a subway below the surface of a public street, but the facts before the court in that case differed greatly from those presented by this record as a brief quotation from the opinion of the learned Chief Justice of the Supreme Court of Massachusetts will indicate:

> "In the present case the travel which is being provided for is from place to place within the city. There are stopping places on the subway at convenient points. In that respect it is different from a tunnel designed only or chiefly for travel for long distances. The new method is a substitution in part of a subterranean use of the streets for a use of their surface for the same general purpose. It is impracticable to have direct communication between the premises of abutters and the cars in the tunnel, but by going a short distance access to them may be had from any place. We are of opinion that this use of the streets is within the purposes for which the lands were taken, and that no additional servitude is created by it."

The tunnel we are dealing with is one having no intermediate connection between its terminal portals with the surface above, and moreover, it does not follow the lines of Hill street throughout its entire length. In that respect it is more unlike a part of the street than the Stockton street tunnel in San Francisco, of which Mr. Justice Sloss, in delivering the opinion of this court in Mardis v. McCarthy, 162 Cal. 94–103, 121 Pac. 389, 393, said:

> "We doubt whether the construction of a tunnel 'in or under' a street is fairly to be regarded as a repair or improvement of the street."

[3] It being clear that the general statutes relating to street improvements are not sufficient in and of themselves to uphold the assessment attacked by plaintiffs, we will examine the argument of respondents to the effect that in the charter of the city of Los Angeles is found the authorization and the conferring of power which supports the proceedings taken to construct the Hill street tunnel, and to assess the cost thereof upon a benefited district. Prior to the passage of the ordinance by which the construction of the Hill street tunnel was ordered the charter of Los Angeles had been amended. By section 2 of the amended charter (Stats. 1911, p. 2059), it is provided that:

> "The city of Los Angeles, in addition to any other powers now held by, or that may hereafter be granted to it under the Constitution or laws of the state, shall have the right and power * * *"

These words are followed by the enumeration of many specific rights and powers. The eleventh subdivision gives to the city power:

> "To acquire by purchase, lease, condemnation or otherwise, or to construct, and to own, maintain, equip and operate tunnels, conduits, viaducts and subways; to regulate and control the use thereof, and to fix and collect charges for such use."

The thirteenth subdivision is in the following language:

> "To establish, lay out, open, extend, widen, narrow, or vacate, pave or repave, or otherwise improve streets, lanes, alleys, boulevards, crossings, courts, and other highways and public places."

The nineteenth is as follows:

> "To levy and collect, or cause to be levied and collected, assessments upon property according to frontage, or upon property in districts according to benefits, to pay for the improvement of streets, or for the construction in any public street, alley or other public place, or in any right of way owned by the city, of sewers, drains,

water or gas mains, and lines and conduits for transmitting electric current, and other pipes, mains, lines and conduits, or for other public improvements."

The thirty-ninth subdivision of section 2 provides that:

> "The powers conferred by this article shall be exercised by ordinance, except as otherwise provided in this charter."

Respondents assert that these provisions give to the city council the right to construct tunnels, to assess districts to pay for such improvements, and to proceed to do these things either by power conferred by general statute or by authority given by virtue of the charter. Examining these parts of the charter we fail to find any authority in the city to levy an assessment upon a district for the cost of such construction. Conceding that subdivision 11 gives the power to construct a tunnel such as this for the use of the public, and that subdivision 13 extends such power to include the subsequent improvement and repair of a tunnel, we find nothing in subdivision 19 or in any other part of the charter authorizing the assessment of a district for the purpose of raising the amount necessary for the initial establishment of a tunnel, as distinguished from the repair or improvement of an existing subterranean avenue. The words "or for other public improvements" must be construed in connection with the other parts of the subdivision which relate to the improvement of public streets or the construction in public streets or places of conveniences for sanitation, drainage, and the transmission of water, heat, electricity, gas, and the like. To construe the words "for other public improvements" as conferring a power to assess for a tunnel of this sort would be to wrench them from their context, and, ignoring the rule of ejusdem generis, to give them a meaning at variance with the obvious legislative intent. It is difficult to believe that, in a provision intended by the framers of the charter to confer in terms the right to assess a district for the improvement of existing streets, the higher power to raise money for the construction of a costly tunnel would be given in the general phrase "for other public improvements."

Respondents cite Mardis v. McCarthy, supra, as sustaining their claim of authority under the charter, but the provisions of the charter of the city and county of San Francisco which we reviewed in that case were explicit, and by them the board of supervisors was clearly authorized to order the construction of tunnels and to provide therefor by district assessments. In that case and in the later case of Hayne v. City and County of San Francisco, 162 Pac. 625, we were dealing with a charter which in its enumeration of the powers of the supervisors with reference to tunnels went far beyond the provisions of the charter of Los Angeles in respect to the city council. Neither of those decisions supports the position of respondents in this case.

[4] Respondents contend that the validating clause of the bond act makes the issuance of the bonds conclusive of the regularity of the proceedings prior thereto, but this question is not involved. The city council lacked power to levy the assessment on the property in the designated district. Therefore the method employed is not material.

It follows that the judgment must be reversed, and it is so ordered.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; SHAW, J.; LAWLOR, J.

(174 Cal. 622)

GRAY et al. v. RECLAMATION DIST. NO. 1500 et al. (Sac. 2555.)

(Supreme Court of California. March 14, 1917. Rehearing Denied April 12, 1917.)

1. NAVIGABLE WATERS 🔑2—EQUAL INTEREST OF STATE AND NATION.

In the preservation and development of navigable inland waterways, the nation and the state have a common interest.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 2, 63.]

2. NAVIGABLE WATERS 🔑6—RECLAMATION PROJECT—REPORT OF COMMISSION.

St. 1911 [Ex. Sess.] p. 117, declaring that navigation and reclamation problems shall be solved according to plan of California Débris Commission with such amendments and modifications as the state reclamation board might make, made the report of the California Débris Commission to this extent the law.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 17, 19, 20, 22–24.]

3. DRAINS 🔑13—CREATION OF RECLAMATION DISTRICT—STATUTE.

St. 1913, p. 130, creating reclamation district 1500, is a public statute, and construction of levees therein provided is a part of its execution.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 4.]

4. DRAINS 🔑18 — DUTY OF RECLAMATION DISTRICT.

When Reclamation District 1500, created by St. 1913, p. 130, accepted its charter, it became obligated to build levees therein provided, and its duties were public and not private in nature.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 11, 13.]

5. NAVIGABLE WATERS 🔑2 — POWER OF STATE TO CONTROL.

The right of control over navigable waters embraces power to do anything subserving the purpose, and when the act is done, if private property is not taken, property owners must yield uncompensated obedience.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 2, 63.]

6. COMMERCE 🔑18—FEDERAL CONTROL—RELATION TO FEDERAL POWER.

The general power of the federal government to control navigable waters is found in the constitutional grant to regulate commerce, and state control is only secondary to such authority.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 12, 13.]

7. Navigable Waters ⚷2—Control—Police Power.

The federal or state control of streams for navigation purposes is an exercise of police power, although the question in a particular case of whether the proper limits of police power have been exceeded is one of fact.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 2, 63.]

8. Drains ⚷1—Reclamation Project—Police Power.

Drainage and reclamation of lands apart from question of navigability is a legitimate exercise of the state police powers.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 1.]

9. Drains ⚷57—Reclamation Project—Validity of Acts.

If a particular act in carrying out a reclamation project is within the limits of police power, it is valid, and individuals have no cause of action, although suffering injury; such loss being damnum absque injuria, and in some instances property may be completely destroyed for this purpose.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 67, 69.]

10. Drains ⚷57—Reclamation Project—Temporary Injury to Land.

The raising of a flood plane in a reclamation project temporarily flooding plaintiff's land, and which will end when the project is completed, and which plaintiffs may protect themselves against, is done under a legitimate exercise of police power, and plaintiffs' loss is damnum absque injuria.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 67, 69.]

11. Constitutional Law ⚷81—"Police Power."

Police power, in its final analysis, is the power to govern.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148.

For other definitions, see Words and Phrases, First and Second Series, Police Power.]

12. Constitutional Law ⚷81—Eminent Domain ⚷69—Distinction between "Police Power" and "Eminent Domain."

Uncompensated submission of property owners is exacted in exercise of police power, while in eminent domain, compensated obedience for taking or damaging private property is the owner's constitutional right.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Eminent Domain, Cent. Dig. §§ 171–179.

For other definitions, see Words and Phrases, First and Second Series, Eminent Domain.]

13. Eminent Domain ⚷70—Police Power—Reclamation Project—"Damaged."

Const. Ark. art. 2, § 22, providing that private property shall not be "taken, appropriated or damaged for public use," without compensation, does not abridge exercise of police power, and does not apply to temporary damage resulting from a reclamation project; the word "damaged" not referring to acts which are damnum absque injuria.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 174, 175.

For other definitions, see Words and Phrases, First and Second Series, Damage—Damages.]

14. Waters and Water Courses ⚷38—"Natural Water Course"—"Depth of Water of One Foot Along the Line of Greatest Depression"—Reclamation Project.

Sutter basin in reclamation district 1500 does not constitute a "natural water course," since it has no well-defined channel, a "depth of water of one foot along the line of greatest depression" meaning an expanse of water a mile on either side.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 30.

For other definitions, see Words and Phrases, First and Second Series, Natural Water Course.]

15. Evidence ⚷29—Judicial Notice—Reports of Commission.

The court will take judicial notice of reports of California Débris Commission, and of state engineers, which have been adopted by statutes.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 36, 37, 39, 43–46, 48.]

16. Evidence ⚷10(5), 11—Judicial Notice—Land and Water Conditions.

The court will take judicial notice in reclamation proceedings of state history, topography, and general land and water conditions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 13, 15, 16.]

17. Appeal and Error ⚷837(10)—Review—Evidence Not in Record—Court's View of Premises.

The fact that the court viewed premises to understand evidence, given concerning reclamation project, cannot be considered on appeal as the taking of independent evidence not contained in the transcript, and supporting his finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3267.]

18. Waters and Water Courses ⚷115—"Surface Waters."

"Surface waters" are those from rainfall, snows, or springs which finally, in obedience to natural law, gather into well-defined channels, then becoming defined streams.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 126.

For other definitions, see Words and Phrases, First and Second Series, Surface Water.]

19. Drains ⚷43—Right of Reclamation District—Protection Against Flood and Surface Waters.

A reclamation district may protect and levee against flood waters, and it is immaterial that surface waters may form some part of the volume; there being an adequate channel left to take care of the surface water.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 55.]

20. Constitutional Law ⚷92—Vested Rights—Abrogation of Property Rule.

Where a rule of property has grown up on the principle of stare decisis, it may be abrogated by court or Legislature, since a rule of property is not a vested right which may not be taken away without compensation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 174, 175, 178–180, 207, 225–227, 237.]

In Bank. Appeal from Superior Court, Sutter County; Emmet Seawell, Judge.

Action by Samuel Gray and others against Reclamation District No. 1500, and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

A. C. & H. L. Huston, of Woodland, and Devlin & Devlin, of Sacramento, for appellants. Sullivan & Sullivan and Theo. J. Roche, of San Francisco, amici curiæ. Lawrence Schillig, M. E. Sanborn, and Arthur W. Coats, all of Yuba City, and W. H. Carlin, of Marysville, for respondents.

HENSHAW, J. Above the confluence of Feather river with Sacramento river lies a vast V-shaped tract of land. Much of this land is swamp and overflowed land of the character contemplated by the Arkansas Act, and title to it passed to the state of California by virtue of that act. Defendant reclamation district 1500, organized for the purpose of reclaiming the portion of this land within its boundaries, was proceeding with the work of levee construction when, at the instance of these plaintiffs, who for general purposes may be described as owners of land within the same triangle, lying to the north and east of the lands of the reclamation district, and fronting upon Feather river, the work was stopped by a prohibitory injunction of the trial court. Still further, a mandatory injunction was decreed, by which the defendant reclamation district was ordered to destroy the levees which already it had constructed.

The district is the same district, the work the same work, the law of the creation of the district the same law, that were considered in Reclamation District No. 1500 v. Superior Court, 171 Cal. 672, 154 Pac. 845.

The geological and topographical conditions concerning these lands and others similarly situated have been the subject of frequent exposition by this and other courts. For a general review of these facts reference may be made to Kimball v. Reclamation, etc., Comm., 45 Cal. 344; Hagar v. Yolo Co., 47 Cal. 222; Dean v. Davis, 51 Cal. 406; North Bloomfield G. M. Co. v. Keyser, 58 Cal. 315; People v. Gold Run D. & M. Co., 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80; Lamb v. Reclamation Dist., 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775; McDaniel v. Cummings, 83 Cal. 515, 23 Pac. 795, 8 L. R. A. 575; Gray v. McWilliams, 98 Cal. 157, 32 Pac. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163; People v. Russ, 132 Cal. 102, 64 Pac. 111; People v. Sacramento Drainage Dist., 155 Cal. 373, 103 Pac. 207; Woodruff v. North Bloomfield G. M. Co. (C. C.) 18 Fed. 761; North Bloomfield G. M. Co. v. U. S., 88 Fed. 664, 32 C. C. A. 84; Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569. Summarizing for the convenient consideration of the questions here presented, those conditions are the following: The Sacramento river and its principal tributaries, rising in the Sierra Nevada Mountains, flow with high gradients onto the low lying lands of the Sacramento valley. It is declared that anciently this valley was a shallow arm of the sea, and has been reclaimed from the ocean by the soils carried down by the rivers and deposited in it. This valley is still low land, and upon entering it the high gradient of the Sacramento river necessarily drops off to a very low one, with a corresponding arrest of current and carrying capacity. Fed by the heavy rains and the melting snows of the mountains, the onrush of these waters overflows the banks of the river and the waters themselves spread out over vast areas of these low-lying lands. Under the well-known principle of physics that the capacity of water to carry foreign matter in suspension is dependent upon the velocity of the water, and that the instant the velocity is checked the water begins to deposit a portion of the matter held in suspension, the following conditions resulted: By the checking of the flow of the Sacramento river and its tributaries at its banks and edges and by the gradual deposit on top of these banks as the flood waters passed over them in slow moving sheets, the banks themselves and very considerable tracts of land upon either side were raised to a height greater than that of the lower lands beyond.

Thus the rivers themselves came to move along the center of ridges of their own construction. These ridges were highest in immediate proximity to the rivers, and sloped gradually downward to the lowest plane of the valley. As the flood waters poured out of the rivers they found their way into these vast areas of lower lands lying on either side of them. These low areas came to be known as "basins," and were bounded upon the river side by the high lands constituting its banks, and upon the opposite side by no well-defined boundary, but only by the natural and gradual rise of the land above the possibility of flooding. So both as to the higher lands near to the river and to the higher lands opposite their condition was that of susceptibility to occasional and unexpected flooding, depending in any year upon the quantity of water which the river, called upon and unable to carry in its natural bed, cast out over the surrounding country. Thus as to such lands a man's farm might escape flooding for ten years and be flooded on the eleventh. But the lower lying areas were subject to regular recurrent annual floods. We have spoken of these vast areas of low lying lands as basins. Such is the designation which has been given them by hydraulic engineers. There are several of them. Following down the course of the Sacramento river there is, to the east, first, the Butte basin, separated from the Sutter basin by a slight elevation of the land caused by the proximity of the Sutter or Marysville Buttes and by the embankment or ridge built up as we have heretofore described by Butte creek. Next the Sutter basin, in which are the lands of defendants, subject to overflow both by the waters of the Sacramento river and of the Feather river. Below Sutter basin and still upon the east side of the river is the American basin near the junction of the American river with the Sacramento, and finally below this the Sacramento basin, containing within it the city of Sacramento itself. Upon the west side of the river and opposite Butte basin and Sutter basin lies the Colusa basin, and below that and separated therefrom by Knight's Landing ridge, itself the ancient high bank of Cache creek which subsequently abandoned its former course into the river and turned southward, is Yolo basin. At all times there flow into these basins minor streams usually known as creeks, which upon the east of the river commonly have their sources in the foothills of the Sierra Nevada Mountains, and to the west of the river in the Coast Range Mountains. They gather up as well, of course, the surface waters coming from the rainfall upon the lands themselves. But both these elements of supply are insignificant as compared with the vast volumes of water delivered into these basins from the Sacramento river. The general characteristics of all these basins are similar. The river poured its excess waters into them in low places and breaks through the banks, known as sloughs, and over the banks themselves in sheets. These sloughs had well-defined channels as they cut through the higher lands of the river banks, which channels feathered out into nothingness as the sloughs poured their waters into the vast flat area of the basins' low lands. Here and there along the lines of these basins were such sloughs, and always at the lower end was one through which, as the river waters receded until they were below the level of the plane of the submerged area, the waters of these basins were gradually drawn back into the stream. Until the basin itself was filled to the level of the river, it was not unusual for the lower slough, as well as the upper, to be pouring the river waters into the basin, and, upon the other hand, as the waters in the river channel proper receded, it was not unusual for the upper as well as for the lower slough to aid in emptying the waters of the basin back into the mother stream. It is with Sutter basin and Butte basin lying immediately above it that we are here concerned. But this brief narration of the general conditions has been made necessary to an understanding of one important phase of this litigation which must be considered, and to the due consideration of which the following additional facts are necessary to be known:

[1] In what has already been said we have dealt with the condition of the Sacramento river in its state of nature before the advent of the white man. That river was and is a navigable stream. It and the San Joaquin river, which joins it in its lower reaches just above their common inflow into Suisun bay, are the two navigable inland waterways of the state of California. In the preservation and developement of these waterways the nation and the state have a common interest and certain incontestable rights. With the discovery of gold in the upper reaches of all the eastern streams tributary to the Sacramento, as well, indeed, as upon the upper reaches of the Sacramento river proper, hydraulic mining began. As a direct consequence of this, enormous quantities of débris were brought down stream and into the Sacramento river. In addition to this, farming operations, by tearing up the grass roots and loosening the soil, produced an erosion of all these lands theretofore not known. In combination, the beneficial result was merely an increase in the sedimentation of the low-lying swamp and overflowed land. The evil results were many. The immense quantities of detritus brought down by the streams raised enormously the bed of the river, necessarily lessened its depth, aggravated flood conditions, caused the precipitation of large quantities of "slickens" upon the adjacent farming lands to their great injury, shoaled San Pablo Bay, and (so ran the evidence) lessened the depth of water over the bar at the entrance of the Golden Gate. The navigability of the river itself was seriously impaired. These conditions were greatly intensified by the fact that individual works of reclamation and public works by levee districts, drainage districts, and reclamation districts had taken from the normal flood areas immense tracts of land, so that the waters were checked, and by the checking deposited greater quantities of their sediments in suspension and were forced over lands not theretofore subject to flood, and continuously imperiled leveed lands, as notably the city of Sacramento itself and its surrounding district. The attention of the national government was directed to these conditions. A California Débris Commission was appointed by congressional legislation, and hydraulic mining within the watershed of the river was limited to conditions to be prescribed and permitted by this Commission. This statute was upheld in United States v. North Bloomfield G. M. Co. (C. C.) 81 Fed. 243, and North Bloomfield G. M. Co. v. United States, 88 Fed. 664, 32 C. C. A. 84.

[2] In 1893 Congress passed the act creating the California Débris Commission (Act March 1, 1893, c. 183, 27 Stat. 507 [4 U. S. Compiled Stats., p. 4604]). The Commission gave to the question exhaustive study and research, and made its written report, which was approved by the Secretary of War and transmitted to the House of Representatives in June, 1911. Devastating floods had occurred in 1907 and 1908. As soon as the substance of the report was made known, the Governor of the state included in his call for a special session of the Legislature the consideration of this great question. This session was called to convene on November 27, 1911, and was directed—

"to enact laws and pass resolutions concerning the report of the California Débris Commission,

> * * * and to make an appropriation to pay the expenses of the state engineer in the performance of such additional duties as may be imposed, and creating a reclamation board and defining its powers."

The report of the Débris Commission formulated a general plan. It was recognized that modifications of this general plan might be necessary, and that the details of it were still to be worked out. The reclamation board created by the Legislature was called into existence to do these things. The Legislature declared that the problem of navigation and reclamation should be solved in accordance with the plan of the California Débris Commission, with such amendments and modifications as the state reclamation board might make. The report of the National California Débris Commission thus and to this extent became a part of the laws of this state. Stats. Extra Sess. 1911, p. 117.

A brief consideration of that report here becomes necessary. Primarily charged with the duty of maintaining and improving the navigability of the river, the Commission recognized that the solution of this problem was indissolubly and inseparably connected with the control of the flood waters. Says the report:

> "The interests of navigation, débris control and flood control in the case of this river are so inseparably connected that it is thought they should be considered under one general project."

The report found that in the American and Feather rivers alone there were at least 300,000,000 cubic yards of material which must eventually pass down the Sacramento river to tidewater, and this without reference to the necessity of deepening the lower courses and channel of the river below Sacramento, which were already greatly impeded by shoal water and sand bars. It pointed out the utter incapacity of the stream in times of high water to perform any considerable part of the duty of carrying these waters. It discussed at length the geographical and topographical conditions, and described with elaboration the "basins" as in outline we have hereinbefore described them. It declared in its estimate that a proper control of the floods would result in the reclamation of about 400,000 acres of most fertile land, in addition to protecting 300,000 acres more, now reclaimed but always in danger. Reviewing the various suggested methods, the Débris Commission adopted the "by-pass system" as recommended by engineers Grunsky and Jackson in 1894, with enlargements of the work made desirable by added knowledge of the enormity of the floods.

The by-pass system contemplates, first, the erection of levees along the Sacramento river and its tributaries, the closing up of crevasses and sloughs, so that the highest efficiency may be attained for navigability and as a necessary concomitant for enabling the river to carry débris and aid in the scouring and deepening of its own channel. Artificial spillways or wiers are to be constructed at designated points to take out of the river its excess or flood waters, which are thus immediately brought under control. These waters are to be carried down defined canals or channels in the basins, which are known as "by-passes." Through the ridges, as at Knight's Landing, these will be actual canals dug through the soil. In other places they will be in part surface canals bounded by appropriate levees upon either side. The greatest of these basins, and the one forming the most direct connection with tide water, is the Yolo basin. Beginning with the Colusa basin on the west side of the river, the by-pass in this basin leads through a canal in the Knight's Landing ridge into the Yolo basin. By this same system the waters of the smaller Butte basin are led by a by-pass into the larger Sutter basin by-pass. These accumulated waters are taken into the enlarged Feather river above its junction with the Sacramento, controlled by appropriate wiers and levees and diverted into the Yolo basin, and by another defined by-pass along Cache creek are carried into the main stream at the delta lands near its mouth.

It is with this contemplated work, as touching Butte basin and Sutter basin that we are here principally concerned. About 13 miles above Colusa, upon the east side of the river, there is a break in the bank known as "Moulton's break," through which the flood waters poured into Butte basin. This break is to be controlled by a wier. Into Butte basin flows Butte creek, whose waters, with the river waters of Moulton wier, are to be carried by a by-pass into Sutter basin, which, so far as may be observed by the eye, is but a continuation of Butte basin. Butte creek discharges its waters into Butte slough, which, as hereinbefore pointed out, is another break in the eastern bank of the Sacramento river, through which break the waters of the river pour into the basin in flood times, and through which break the waters of Butte creek are drawn into the Sacramento at its lower stages. Butte slough is to be cut off, and below it a wier known as the "Tisdale Wier" has been constructed, with a connecting by-pass from the river leading into the main by-pass of the Sutter basin. The water is thus to be carried within the defined boundaries of the Butte basin by-pass, connecting with the Sutter basin by-pass, into the Feather and Sacramento rivers as above outlined. Through Sutter basin the by-pass or canal is partly on the surface, and the waters are to be carried between controlling levees built on either side. The waters of the connecting Tisdale by-pass are likewise to be confined within levees.

This, for our purposes, sufficiently outlines the proposed work. In 1913 the state of California enacted a most comprehensive statute (St. 1913, p. 252) dealing with these matters. It declared (§ 7) that:

> "The purposes and objects of this act are to carry into effect the plans of the California Débris Commission for the control of the flood waters of the Sacramento and San Joaquin rivers and their tributaries, and to vest in said reclamation board control and jurisdiction over said plans," etc.

It gave the reclamation board power to acquire necessary lands by purchase or by condemnation to carry out the great purposes of the act. It forbade the further doing of reclamation work by individuals or districts, excepting under the approval of the board, to the end that such work might not interfere with and might be directed to the aid of the general scheme of reclamation. It provided for compensation to individuals or districts doing work in and of the general plan. It created a vast drainage district known and designated as "Sacramento & San Joaquin Drainage District," declared it to be a body politic and corporate, and empowered it to levy assessments according to the benefits for the prosecution of the work. All of the lands of plaintiffs, as well as of the lands of defendants, lie within this district.

Some idea of the magnitude of the undertaking may be gathered when it is stated that the actual flood volume of the Sacramento river is exceeded by only three rivers in the United States—the Mississippi below its confluence with the Missouri, the Ohio river, and the Columbia river; while taking into consideration the relative areas of drainage territory, the flood volume of the Sacramento is 15 times as great as that of the Mississippi and four times as great as that of either the Ohio or the Columbia.

Progress has been and is being made in the doing of this work. Thus, to accommodate the waters brought down by the Yolo by-pass, equal appropriations and expenditures are being made by the national and state governments to deepen and widen the mouth of the river, the national government superintending the work. Congress at its present session has appropriated $5,600,000 in furtherance of the plan, and the act has become law. The city of Sacramento has provided a large fund for the construction of a minor by-pass for its own protection. The canal through Knight's Landing ridge, allowing the waters of Colusa basin to flow into Yolo basin, has been constructed. Other work has been performed by individuals and by districts, as outlined and approved by the reclamation board.

[3] In 1913 reclamation district No. 1500, defendant herein, was created by a special act of the Legislature. Stats. 1913, p. 130. The lands of reclamation district No. 1500 are a part of the lands of Sutter basin. Their western frontage is on the Sacramento river. The northern boundary is the Tisdale by-pass. The eastern boundary (that is so far as reclamation works are permitted) is the proposed eastern line of the Sutter by-pass. In the terms of its creation it was declared:

> "It shall be the duty of said reclamation district No. 1500 to construct a levee forming the south side of Tisdale by-pass and a portion of the westerly side of the Sutter basin by-pass, the center line of which levee shall be substantially along the following lines, the same having been approved by the state reclamation board March 31, 1913."

The act creating this reclamation district is a public statute. The construction of the levees is the execution of this public statute. Reclamation Dist. 1500 v. Superior Court, supra. In the performance of this duty and under the direction and approval of the reclamation board, the defendant had constructed the levee forming the southern boundary of the Tisdale by-pass and was carrying on its work by the construction of the connecting levee, which was to form the western boundary of the Sutter basin by-pass, when by the injunction of the court it was ordered to cease work and destroy the levees which it had already constructed.

The foregoing statement has failed utterly in its purpose if it has not made it apparent that many different interests are here involved, with their corresponding rights and duties. Thus, there is primarily the interest of the United States in protecting and improving the navigation of the Sacramento river and its navigable tributaries. And as this navigability is inextricably associated with flood conditions, there are the rights of the United States to deal with those flood conditions in aid of navigation. Next there is the same interest upon the part of the state in navigation and the same rights in the matter of flood control. Upon these matters the nation and the state are acting, not only in harmony, but, it may be fairly said, under contract. Quite detached from these interests is the further interest of the state alone in the reclamation and bringing into use of its swamp and overflowed land—an interest which is accentuated by the duties which it may have assumed under its acceptance of the Arkansas grant. Next are the interest and the duty of defendant reclamation district to build the levees, which by the very charter of its organization it was called upon to build, and which by the acceptance of that charter it became in duty bound to build. Again, there is the interest of the owners of the land within the defendant reclamation district, which is, of course, essentially a private and personal interest. And, finally, as opposed to all of these, is the interest of plaintiffs in preventing, and their right to prevent, an illegal damaging of their property, which asserted illegal damage is the foundation of their action.

[4] In their complaint plaintiffs treat the action of the defendant reclamation district as being in its nature private and personal and as working a private nuisance to the unlawful injury of their land. Running

through the case, however, is the additional assertion that the construction of these levees, with the resultant backing up of the water over parts of their lands, is an unlawful exercise of the right of eminent domain, damaging their property without compensation first paid therefor.

And here it becomes necessary to outline the findings of the trial court upon which it based its judgment. It was imperative, of course, for plaintiffs to recognize that the major part of the vast volume of water in Sutter basin was flood water. Their efforts, therefore, were directed to establishing that they were not vagrant flood waters, but were waters under the river's control, and that the river carried these excess waters through a well-defined waterway or channel from a point above to a point below. In this effort they were successful and the court so found. The whole judgment rests upon this finding that Butte slough and Sutter basin in their entirety form a natural water course. From this finding follows the logical conclusion that defendant has not been protecting itself against flood waters, but has been illegally interfering, obstructing, and impeding the waters flowing in a natural watercourse. The court itself reasoned and declared that Butte slough is a well-defined channel extending from the Sacramento river southerly to the basin; that Butte creek empties much of its waters into Butte slough; that during flood or high-water periods the waters pouring into Butte slough from the Sacramento river deflected the waters of Butte creek from Butte slough, and the two combining flow into Sutter basin. As the water flows southerly through the basin it spreads out and forms a vast sheet of water, presenting the appearance of an inland sea. Sacramento slough, at the lower end of this basin, is a well-defined water course, and is the outlet of the basin when the waters of the river fall sufficiently to permit the drainage of the basin. Thus the inlet and outlet of the basin are well-defined water courses within the definition of Miller & Lux v. Madera Canal Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A. (N. S.) 391. Such, in brief, is the court's review, and it declares that:

> "The one controlling question in the opinion of the court, and which is practically decisive in both cases, is whether or not Sutter basin is to be regarded as a part of the Sacramento river, a continuation of Butte creek during the flood season, or whether it is to be classified as mere flood waters and brought within the rule announced in Lamb v. Reclamation District, 73 Cal. 125 [14 Pac. 625, 2 Am. St. Rep. 775]; McDaniel v. Cummings, 83 Cal. 515 [23 Pac. 795, 8 L. R. A. 575]; Gray v. McWilliams, 98 Cal. 157 [32 Pac. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163]; and Sanguinnetti v. Pock, 136 Cal. 466 [69 Pac. 98, 89 Am. St. Rep. 169]."

The first proposition which demands consideration as applicable to this and numerous other cases which have arisen or may arise goes to the power of the government, here both national and state, to do the projected work, assuming the finding to be true. This consideration deals with navigation alone, though as has been repeatedly said, in the present instance, the control of flood conditions is essential to the solution of the navigation difficulties. As in this matter the national government is working in harmony with the state government, we may, for convenience, use the word "state." The supreme control of the state over its navigable waters was early declared in Eldridge v. Cowell, 4 Cal. 80, approved in United States v. Mission Rock Co., 189 U. S. 391, 23 Sup. Ct. 606, 47 L. Ed. 865.

[5] This right of control embraces within it not alone the power to destroy the navigability of certain waters for the benefit of others, but extends in the case of streams to the power to regulate and control the navigable or nonnavigable tributaries, as in the débris cases, to the erection of structures along or across the stream, to deepening or changing the channel, to diverting or arresting tributaries, in short, to do anything subserving the great purpose; and, in general, when the act is done, if it does not embrace the actual taking of property, but results merely in some injurious effect upon the property, the property owner must, for the sake of the general welfare, yield uncompensated obedience. But a few of the innumerable cases to this effect need be cited. Lamb v. Reclamation District, 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775; Henry Dalton Sons v. Oakland, 168 Cal. 463, 143 Pac. 721; U. S. v. Chandler-Dunbar Co., 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063; Lewis Blue Point Oyster Co. v. Briggs, 229 U. S. 82, 33 Sup. Ct. 679, 57 L. Ed. 1083, Ann. Cas. 1915A, 232; Greenleaf Johnson Lumber Co. v. United States (D. C.) 204 Fed. 489; Black River Imp. Co. v. La Crosse Booming & T. Co., 54 Wis. 659, 11 N. W. 443, 41 Am. Rep. 66. See, also, Final Report of the National Waterways Committee, 15 Senate Documents, p. 45, 66th Congress (2d Sess.) 1911–12; People v. Russ, 132 Cal. 102, 64 Pac. 111; U. S. v. Rio Grande Dam, etc., Co., 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136.

[6] This general power, so far as the national government is concerned, is found in the constitutional grant to the United States of the right to regulate commerce with foreign nations and among the states, and the state's power in this regard is limited only by the supervisory control which the paramount authority may exercise over it. This power over navigable waters and over navigation is essentially an attribute of sovereignty, and some of its forms find expression in the exercise of the police power.

[7] When we come to this consideration it is perhaps well to point out and to be borne in mind that as the nation, in matters of navigation, is supreme, and as it has decided upon the method which shall be taken to pro-

tect and improve the navigability of the Sacramento river, and as the state is acting in conjunction with the federal government, the question might be treated as an exercise by the federal government alone of its powers over the matter. In such a case, so treated, as we shall see, these plaintiffs would have no grievance which in the federal courts would entitle them to redress. But owing to the inseparable connection between navigation and flood control, and owing to the further fact, often adverted to, that the state is interested in flood control, not alone as affecting navigation, but as affecting its general welfare and benefit in the reclamation of vast domains of land, the exercise of the police power under these circumstances presents a twofold aspect: First, the exercise of that power by the United States for purposes of navigation alone; second, the exercise of that power by the state for purposes of reclamation as well as navigation. In both aspects it is beyond question that the acts and conduct of the two governments are referable to the police power. Of this the decisions themselves remove all doubt. Though, of course, whether in any given instance, as in this instance, the proper limits of the police power have been exceeded, with the result that unlawful confiscation or damage is worked, remains still a question for consideration. But upon the general proposition that the police power is exercised in improving the navigability of a stream, it is sufficient to refer in our own state to Green v. Swift, 47 Cal. 536, Hoagland v. City of Sacramento, 52 Cal. 142, and Green v. State, 73 Cal. 29, 11 Pac. 602, 14 Pac. 610, while so far as the national government is concerned, it is sufficient to direct attention to Jackson v. United States, 230 U. S. 1, 33 Sup. Ct. 1011, 57 L. Ed. 1363, and Cubbins v. Mississippi River Comm. (D. C.) 204 Fed. 299. In both of these cases the Supreme Court of the United States was dealing with asserted damages inflicted by the levee system of the Mississippi river, whose conditions are in all vital respects similar to those of the Sacramento river.

[8] Upon the second proposition, viz. that the drainage and reclamation of lands, apart from any question of navigability, is a legitimate exercise of the police power of a state, it is sufficient, without quotation, to refer to Hagar v. Board of Supervisors, 47 Cal. 222; Lamb v. Reclamation Dist., 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775; People ex rel. Chapman v. Sacramento D. Dis., 155 Cal. 373, 103 Pac. 207; Laguna, etc., Dist. v. Martin Co., 144 Cal. 209, 77 Pac. 933; Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; Chicago & Alton R. R. Co. v. Tranbarger, 238 U. S. 67, 35 Sup. Ct. 678, 59 L. Ed. 1204.

[9] Still treating the question in its governmental aspect as being the state's exercise of its police power, we have reached the point in our discussion where it can be declared as beyond question that the general act under which this work was being done is referable to the police power, and therefore valid, and as a necessary corollary of this it follows that if in the doing of this particular piece of work the limits of the police power are not transgressed, the plaintiffs have no just cause of complaint, it is too well recognized to need the citation of authority that in its legitimate exercise the police power often works, not only damage to property, but destruction of property. Injury to property can, and often does, result from the demolition of buildings to prevent the spread of conflagration, from the abandonment of an existing highway, from the enforced necessity of improving property in particular ways to conform to police regulations and requirements. So full are the books of these instances that it is superfluous to cite authorities upon the proposition. And equally well settled and understood is the law that in the exercise of this same power property may in some and indeed in many instances be utterly destroyed. The destruction of buildings, of diseased animals, of rotten fruit, of infected trees, are cases that at once come to mind as applicable to both personalty and realty. Always the question in each case is whether the particular act complained of is without the legitimate purview and scope of the police power. If it be, then the complainant is entitled to injunctive relief or to compensation. If it be not, then it matters not what may be his loss, it is damnum absque injuria.

[10] Our present question then is: Is the state of California liable in damages in exercising the police power in the control of a nonnavigable water drain or water course of the Sacramento river when in so regulating this flow it causes the water to back against lands which otherwise would not have been affected thereby, with the result that those lands are temporarily flooded in whole or in part? Temporarily flooded, we repeat, because this case presents none of the features of Pumpelly v. Green Bay Co., 13 Wall. 166, 20 L. Ed. 557, where a public improvement—a dam—in navigable water, made under local statutory authority, permanently flooded the plaintiff's land and "destroyed its use for every purpose," and where the Supreme Court, declaring the case to be an extreme one, held that this was a taking within the meaning of the Constitution, for which the owner was entitled to compensation. In the case at bar it is to be observed that the flooding, occasioned only by reason of the diminution of the area of the Sutter basin, will in the first place be but temporary, and will end when the reclamation works in the Sutter basin are completed, and, in the second place, may be protected against by the levee district, in which most of plaintiff's lands are situated, and by the other property owners by a back

levee, or by the construction of the eastern levee of the Sutter basin by-pass, for their proportionate expense in building which their lands would be liable under assessment by the Sacramento & San Joaquin Drainage District; while, upon the other hand, the builders would be entitled to compensation from that district for any excess expenditure over their due proportion which they might incur in the construction of the work.

But that work of the character here enjoined is work done under a legitimate exercise of the police power, and that the damages which will result from it, such as are here contended for, are damages for which the owner of the land is not entitled to compensation, is, without the slightest conflict in them, established by all authorities, federal and state, at least where the constitutional provision forbids merely a taking. Our own cases, such as Green v. Swift, supra, and the cases of the Supreme Court of the United States, such as the Jackson Case and the Cubbins Case, supra, are the only references which need be made to support this incontestable declaration.

Such being the case, the final query upon this subject-matter is this: Has the amended provision in our Constitution, providing that private property may neither be taken nor damaged for public use without the prepayment of compensation, limited and abridged the exercise of the police power of the state in its efforts directed to the abatement of this great public nuisance?

[11, 12] Has it limited and abridged the exercise of the police power, which, by an adopted definition, this court has declared to be in its final analysis "the power to govern"? Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 694, 151 Pac. 398. Much has been said by the courts about the broad, the obvious distinction between the police power and the power of eminent domain. We will not unnecessarily enmesh ourselves in the intricacies of exact definition. Indeed, we think that so far as these powers meet and overlap, no precise definition can be given. But this much is incontestably true: Where the police power is legitimately exercised uncompensated submission is exacted of the property owner if his property be either damaged, taken, or destroyed. In the exercise of the power of eminent domain, compensated obedience for the taking or damaging of his property is the owner's constitutional right.

The problems do not arise from any similarity in the nature of the powers themselves. They arise in each case from the difficulty of determining whether or not the asserted exercise of the police power is but a disguise for evading the private owner's rights, with the result that his property is taken or damaged without compensation in a case where compensation is called for.

[13] But while it is unquestionably true that the addition of the word "damaged" to our constitutional law governing the exercise of the right of eminent domain gives in many instances a right to compensation which did not formerly exist, it did not, touching the exercise of the police power, give a right of action for damages which theretofore were damnum absque injuria. The slightest reflection, we think, must establish the soundness of this doctrine, for if it be not so, then must the law creating our Railroad Commission, which is a law enacted under the sanction of the police power (Pacific Telephone, etc., Co. v. Eshleman, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. [N. S.] 652, Ann. Cas. 1915C, 822), forbid that Commission from making any judgment necessitating the expenditure of money by these corporations, excepting after compensation made for the damage worked to property; for that a taking or damage is worked is universally conceded, and the sole ground upon which the denial of compensation is placed is that the judgment of the Commission is but a legitimate enforcement of the police power. The same is true of the Employers' Liability and the Workmen's Compensation Act. In every instance of an award where the employer is not in fault there is a manifest taking of property from the employer without compensation, and support for such decrees is rested solely upon the police power. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 Pac. 491. It cannot be said that the operation of these later laws are legitimate exercises of the police power and at the same time be said that the exercise of a law such as this even though it work consequential damage, is no longer, as heretofore it has always been, such a legitimate exercise.

But we are here particularly concerned with that phase of the police power which is directed to the abatement of a nuisance in aid of navigation and in the reclamation of vast tracts of state land. Where similar questions have arisen in states containing the same constitutional provision as does our own, the courts have found no hesitation in declaring that the principle of damnum absque injuria has not been modified by the provision added to the constitutional law of eminent domain touching the damaging of private property. The general rule, so far as the federal decisions are concerned, has been sufficiently declared. It may be summed up in the following language from 5 Ency. of the U. S. Sup. Court Reports, page 612:

> "Private interests are subservient to the right of the state in the exercise of the police power to carry out a system of drainage designed to benefit and protect the public health from the injuries arising from swamp and overflowed lands, and, except where property is taken for which compensation must be paid, such interests must give way to any general scheme for the reclamation or improvement of such lands. The drainage of large bodies of swamp and overflowed lands, even though done for the purpose of reclaiming them for agricultural purposes,

and not for the purpose of promoting the public health, is a public purpose and a proper exercise of the police power of the state, and damages resulting to property through the carrying out of such a scheme are damnum absque injuria, and do not constitute a taking of property under the Fourteenth Amendment."

We may briefly consider some of the cases arising under Constitutions identical with our own. The Constitution of Illinois contains the same provision found in ours. Chicago, etc., Ry. Co. v. People, 212 Ill. 103, 72 N. E. 219, drainage commissioners appointed pursuant to the law sought by mandate to compel the railway company to construct, enlarge, and deepen and widen a waterway over and across its own right of way, and to construct a new railroad bridge over this deepened waterway. The railroad company contested upon the ground that the demand was not within the legitimate exercise of the police power, but, to the contrary, that its enforcement would be a taking and damaging of the railroad property in the necessary expenditure of money to be made, without compensation. The Supreme Court of Illinois declared:

> "Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking or damaging, without just compensation, of private property, or of private property affected with a public interest,"

—and mandate issued accordingly. In the same case (200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175), the Supreme Court of the United States declared, upholding the judgment of the Supreme Court of the state:

> "We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. * * * 'Compensation has never been a condition of its exercise, even when attendant with inconvenience or peculiar loss, as each member of a community is presumed to be benefited by that which promotes the general welfare.' * * * But the clause prohibiting the taking of private property without compensation 'is not intended as a limitation of the exercise of those police powers which are necessary to the tranquillity of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments.'"

In Pennsylvania R. Co. v. Marchant, 119 Pa. 541, 13 Atl. 690, 4 Am. St. Rep. 659, the Constitution provided that in the taking of private property for public use there should be made "just compensation for property taken, injured, or destroyed by the destruction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction." It was held there that the meaning of the Constitution was "to give a remedy merely for legal wrongs and not for such injuries as were damnum absque injuria." This case, carried to the Supreme Court of the United States, was affirmed in 153 U. S. 380, 14 Sup. Ct. 894, 38 L. Ed. 751. The Georgia Constitution, containing the same provision, was construed in Peel v. City of Atlanta, 85 Ga. 138, 11 S. E. 582, 8 L. R. A. 787. The city, owning a lot of land, opened a public street upon it. The plaintiff complained that her land was damaged because the result was to bound it on three sides by three public streets. There were other special elements of damage alleged. After a review of the law it was held that the asserted damage, though actual, was damnum absque injuria. To the same effect is Austin v. Augusta T. Ry. Co., 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755. Chicago & Alton Ry. Co. v. Tranbarger, 238 U. S. 67, 35 Sup. Ct. 678, 59 L. Ed. 1204, presented this same question under a different state of facts. The case arose under a Missouri statute. In that state the rule of decision permits a proprietor to levee or make an embankment against surface waters. The railroad company had done this thing, with the result that the surface waters thus checked and impounded interfered with the use of Tranbarger's land. The state of Missouri passed a statute making it compulsory upon railroad companies to build suitable ditches, drains, and culverts through their embankments, and providing penalties for a failure to construct them. Tranbarger sued the railroad company to enforce such a penalty based upon the injury which his land had sustained. It was argued by the railroad company that at the time and after the construction of their embankment it was within their legal right to maintain it as it was maintained, without regard to the fact that it arrested the flow of surface water; that to force them to make cuts and culverts through their embankments without compensation was a taking and damaging of their property in violation of the Constitution. So far as the taking or damaging was concerned, it was clear and undeniable. It is declared by the Supreme Court of the United States to be a satisfactory answer to all these objections that:

> "The act under consideration is a legitimate exercise of the police power, and not in any proper sense a taking of the property of the plaintiff in error."

In the state of Washington, where the constitutional provision is the same as ours, it was held that the operation of a railroad gave no right of action to the owner of nearby property, though his property was injured thereby, such consequential injuries being damnum absque injuria. This was in answer to the contention rested upon the eminent domain provision. The authorities are reviewed and the conclusion is expressed that:

> "We are of the opinion that this eminent domain constitutional provision does not change or lessen the force of the doctrine of damnum absque injuria." Taylor v. Chicago, M. & St. P. Ry. Co. 85 Wash. 592, 148 Pac. 887, L. R. A. 1915E, 634.

In our own state the recent case of Ex parte Hadacheck, 165 Cal. 416, 132 Pac. 584, L. R. A. 1916B, 1248, held that restricting and forbidding the carrying on of a lawful operation within a prescribed territory was valid as an exercise of the police power whose exercise "is not limited by the fact that the value of investments made in the business prior to any legislative action will be greatly diminished," and this conclusion could have been reached only after the determination that this real damage was damnum absque injuria. Under writ of error the Supreme Court of the United States sustained this view, declaring (239 U. S. 410, 36 Sup. Ct. 145, 60 L. Ed. 348):

> "It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. Chicago & Alton R. R. v. Tranbarger, 238 U. S. 67, 68 [35 Sup. Ct. 678, 59 L. Ed. 1204]. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community."

Closely paralleling the present case in certain of its essential features is the Arkansas case of McCoy v. Plum Bayou, etc., Dist., 95 Ark. 345, 129 S. W. 1099, 29 L. R. A. (N. S.) 396. The case involved the reclamation of a flood basin of the Arkansas river. The reclamation levee was built across certain sloughs through which flood waters from the river found their way after escaping from its banks, and through which the waters returned to the river as it receded. The action was brought, after construction of the levee, to recover for the damages arising from the fact that the flood plane outside of the levee district was raised by the building of the levee, and it was established that the water rose higher afterward than it ever did before. The Supreme Court of Arkansas gave deep consideration to the question, with reference to numerous authorities, including our own case of Lamb v. Reclamation District, supra. After this review the court concluded that:

> "The defendant could rightfully construct the levee in the manner described without liability to plaintiff for damages. It is insisted, however, that a distinction should be made because of the provision of our Constitution that 'private property shall not be taken, appropriated, or damaged for public use without just compensation therefor.' Article 2, § 22, Const. 1874. In reaching the conclusion above announced, we are not unmindful of the constitutional provision, but where no right has been violated, there is no injury for which the liability affords compensation, and it is a case of an injury without damages."

The Supreme Court of Mississippi, under a constitutional provision like ours, where the acts complained of were the acts of its levee commissioners in controlling the waters of the river whose name the state bears, has held that the landowner is not entitled to compensation because the construction of the levee renders the land between it and the river worthless for agriculture and necessitates the removal of houses on the protected side of the levees. Richardson v. Levee Commissioners, 68 Miss. 539, 9 South. 351.

Nothing in any of our decisions in the slightest militates against this conclusion. Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317, 56 Am. Rep. 109, contains a discussion of the meaning of the word "damage" as newly placed in the Constitution. The holding was that it applied to special consequential damages which the owner of adjoining property received over and above the common injury to other abutters on the street or the general public, by reason of a street improvement. It based its conclusion largely upon the views of the Supreme Court of Georgia, reference to which has hereinbefore been made. No difficulty arises over this case, which by its very language is limited to special damage occasioned to particular property which is not a common damage to all abutting property. Upon the other hand, in De Baker v. Railway Co., 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237, this court in bank, referring to the contention that because of the modification of our Constitution, the doctrine of Green v. Swift, and Green v. State, and Lamb v. Reclamation District, supra, were no longer the law, passed it by with the statement merely that "it is possible this may be true." But here and now, therefore, for the first time is the question presented, and for the reasons above given, we hold that the doctrine of damnum absque injuria is applicable to the prospective temporary consequential damage which it may be found will be inflicted upon the plaintiffs' lands by the future raising of a flood plane, which floods are of temporary duration and character, which raising the plaintiffs may protect themselves against, and which floods, in the progress of the work, will be taken care of so that future injury will be avoided, all this under the state's plan of vast magnitude and importance to abate, on behalf of the whole state, as well as for the benefit of private landowners, including these plaintiffs, flood conditions, which, if unchecked, would inevitably lead to the destruction of the navigability of the river and to the greater impairment and damage of all the adjacent land. Further than this it is not necessary here to go.

The second branch of this case which is proper for review goes to the right of the defendant, as an organized irrigation district, to do this work for its own protection, without regard to its public character as part of the proposed work of the nation and the state. This necessitates a consideration of the attack made by appellant upon two of the vital findings of the court; the first being the finding that Sutter basin is a natural water course within the meaning and definition of the law, and that the defendant is illegally obstructing it; the second being that these obstructions result in an illegal forcing back on the lands of plaintiffs of surface waters which they are entitled to have flow on without impediment.

[14] Touching the first finding, the topographical and hydrographical conditions have been pointed out with sufficient exactness. All of the waters which Sutter basin contains are emptied into the river when flood conditions have ceased, so that one may drive along and across the whole basin. A depth of water of one foot along the line of greatest depression means an expanse of water a mile on either side, and every addition to the depth of the water proportionately extends its area. In times of high water it is but a geographical continuation of the upper Butte basin, the waters of which from Moulton break, from Butte creek and from minor sloughs and drainage ditches move down, covering a correspondingly vast area. Butte slough, as has been pointed out, has a defined channel only as it cuts through the high lands constituting the east bank of the Sacramento river. Sacramento slough at the lower end has a defined channel of identically the same character. The waters of Tisdale wier pour into this basin as into a lake. The waters of Feather river for seven or eight miles above its junction with the Sacramento likewise pour into this basin. Not inaptly the trial court in its opinion described it under these conditions as an "inland sea," and yet in its findings declared it to be a water course of the Sacramento river. In support of this finding respondents' principal reliance is placed upon the case of Miller & Lux v. Madera Canal Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A. (N. S.) 391. All that was decided in that case touching this matter was that when there are natural and accustomed limits to the channel of a river, though the channel for the dry season may be more limited and that for the wet season more extended, and when usually recurring floods flow in one continuous stream in the accustomed enlarged channel and are naturally confined thereto, such regularly recurring flood waters are deemed to be a part of the ordinary flow of the stream. It would seem superfluous to elaborate upon the distinctions between such a condition as this and that shown here to exist. There are sloughs, principally in the lower reaches of the river, which are properly channels and they are the more frequent near the low-lying lands in the delta regions at and about the confluence of the Sacramento and the San Joaquin. There are Steamboat slough, and Sixteen Mile slough, and Three Mile slough, and Montezuma slough and many others which are distinctively waterways. Such a slough is spoken of in Island Rec. Dist. v. Floribel A. S., 167 Cal. 467, 140 Pac. 4. But, on the other hand, Butte slough in this case is precisely of the character of Wilkins slough, discussed in Lamb v. Reclamation District, supra, the closing of which slough was there complained of. Touching Wilkins slough it was there said:

> "It is not a channel or fork continuously carrying a large part, or any part, of the waters of the Sacramento river. It carries no water at all except 'in times of flood'"

—and it was declared not to be a water course. Whether or not a water course exists is "to be determined as matter of law from the evidence in the case." Sanguinnetti v. Pock, 136 Cal. 466, 69 Pac. 98, 89 Am. St. Rep. 169. Under all of the accepted definitions of a water course, our own as well as those from other states, Sutter basin is not a water course but a catchment area, principally for the reception of the flood waters of the Sacramento river. "The whole space between the foothills and a river is not to be called the channel because it sometimes overflows." Kansas City Ry. Co. v. Smith, 72 Miss. 677, 17 South. 78, 27 L. R. A. 762, 48 Am. St. Rep. 579; Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241; Sanguinnetti v. Pock, supra; Lamb v. Reclamation District, supra; Los Angeles Cem. Ass'n v. City of Los Angeles, 103 Cal. 461, 37 Pac. 375.

[15, 16] Moreover, the reports of the California Débris Commission and of state engineers have been adopted by state statutes. This court takes judicial notice of them. Jackson v. U. S., 230 U. S. 1, 33 Sup. Ct. 1011, 57 L. Ed. 1363. In addition to this, the history of the state, its topographical and its general conditions, including notorious facts concerning its rivers, are all matters of judicial cognizance. People v. Truckee Lumber Co., 116 Cal. 401, 48 Pac. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183; Olive v. State of Alabama, 86 Ala. 88, 5 South. 653, 4 L. R. A. 39, and note; Chamberlayne, Evidence, § 74. This evidence, within our judicial knowledge, absolutely negatives the concept of a water course. The same contention was presented to the Supreme Court in the case of the Mississippi river, whose flood conditions have been recognized and declared to be similar to those of the Sacramento (Lamb v. Reclamation District, supra), and the Supreme Court of the United States declared the contention untenable upon its own judicial knowledge. Cubbins v. Mississippi River Commission, 241 U. S. 351, 36 Sup. Ct. 671, 60 L. Ed. 1041.

[17] Respondents' final argument in support of this finding, that by an inspection of the premises which the court made it received evidence which is not embodied in the transcript on appeal, and which must be considered as sufficient to support the finding, upon the authority of Hatton v. Gregg, 4 Cal. App. 537, 88 Pac. 592, is completely disposed of, without the necessity for considering any other matters, by the judge's own statement, as follows:

> "So far as receiving any evidence, I cannot say that I did. I simply received a brief impression of the country."

Such a view, taken for the purpose of gaining a better understanding of the evidence given, will not, of course, be held to be the taking of independent evidence from which such a finding as this may draw support.

Independently of the findings establishing a natural water course, the court further declared that defendants' levee work impeded the natural flow of surface waters, and would force them back on plaintiffs' lands. Herein it stated that there are "numerous creeks and water courses * * * which gather up, and from time immemorial have gathered up, the surface waters which flow upon the above-described lands of plaintiffs and other lands in the vicinity thereof in said county of Sutter, * * * and which creeks and water courses carry and deposit such waters naturally into said Sutter basin, * * * and at times of heavy rainfall in every year carry not less than 2,400 second feet of water"; further, that the by-pass or channel east of the levee of defendant will not be "sufficient to carry off or discharge all or any material portion of the surface waters that would otherwise flow to and upon the lands within said district." This is explained by an elaboration of the finding, which declares that the completion of defendants' levee work will result in a diversion of the waters of Sutter basin "and the diverted waters will at all seasons of high water be raised to such an extent as to form a 'Water Cushion,' which will effectually impede and obstruct the natural flow and prevent the natural discharge of all waters mentioned, all of which waters are surface waters, and will cause the same to overflow and leave their natural courses and to spread out over and inundate the lands of plaintiffs." And, finally, that the elevation of the flood plane will not be caused entirely by flood waters; "on the contrary it will be caused by the obstruction of said Sutter basin, which is a natural water course, and the waters so obstructed will be the combination of the natural flow of Butte creek, or surface waters from the watershed lying between Feather river and the Sutter basin and of flood waters."

[18] Surface waters, it is well understood, are those waters from rainfall, from melting snows, from springs, which seeping or percolating, or vagrantly wandering over the surface of the earth, finally, in obedience to natural law gather into well-defined channels, where their character as surface waters at once ceases and the waters themselves take on the new character of the body of a defined stream. Gould on Waters (2d Ed.) § 265; Farnham, Water & Water Rights, § 878; Schaefer v. Marthaler, 34 Minn. 487, 26 N. W. 727, 57 Am. Rep. 73; Rait v. Furrow, 74 Kan. 101, 85 Pac. 934, 6 L. R. A. (N. S.) 157, 10 Ann. Cas. 1044. We will not pause here to discuss appellants' contention that these findings from which we have quoted are self-destructive, in that they include in and define as surface waters those flowing in what the court declares to be natural, well-defined water courses. In fact it is established, and it is beyond question of doubt, that some of these are natural creeks within well-defined channels, which gather up the rainfall in so far as their capacities permit. In times of heavy rains their channels are wholly inadequate for this purpose and the waters spread out, precisely as they do in the case of the larger rivers. In some instances artificial drains have been constructed communicating with these natural channels, in others the natural channels themselves have been enlarged. But, passing on to the main question, the court does not mean to find that this small amount of 2,400 feet of water in comparison to the enormous flood flow, aggregating over 220,000 feet, is or could be so obstructed by the works of defendant that adequate drainage has not been left for the passage of the surface water alone. Its finding in this regard is explained by the language which we have already quoted, and which means that the curtailment of the flood basin creates out of these flood waters a "Water Cushion" which will arrest the flow of the surface water and cause it to back up and overflow parts of plaintiffs' lands.

[19] But the defendant's right to protect and levee against flood waters cannot be questioned. Nor is this right impaired by the fact that these surface waters, as they usually do, form some part of the whole volume of water. A landowner has performed his full duty under such circumstances if he make adequate provision for the escape of the surface waters alone. In this aspect the present case is precisely that of Sanguinnetti v. Pock, 136 Cal. 466, 69 Pac. 98, 89 Am. St. Rep. 169. There is no finding in this case that the channel which is left is insufficient to take care of the surface waters were it not for the flood waters, and Sanguinnetti v. Pock is full authority for the statement that if such an adequate channel is left, defendant's right to construct its levee against flood waters is not impaired by the consequences which may result from a commingling of the flood and the surface waters.

[20] Sanguinnetti v. Pock is determinative of the question, but there is another consideration which may with propriety be adverted to. Ogburn v. Connor, 46 Cal. 346, 13 Am. Rep. 213, declared for the civil law rule, forbidding a lower owner from interfering with the natural drainage of surface waters onto his land from the proprietor whose lands were higher. It was an adoption of the civil-law rule (Walker v. Southern Pac. R. R. Co., 165 U. S. 593, 17 Sup. Ct. 421, 41 L. Ed. 837; Cass v. Dicks, 14 Wash. 75, 44 Pac. 113, 53 Am. St. Rep. 859), notwithstanding the fact that the common-law rules are made the rules of decision in this state, where applicable (Stats. 1850, p. 219; Pol. Code, § 4468). And this is made quite apparent from the later case of McDaniel v. Cummings, 83 Cal. 515, 23 Pac. 795, 8 L. R. A. 575. But in the last-mentioned case it is added that a rule of property has grown out of the earlier decision and, on the principle of stare decisis, that decision will be adhered to. But it is a

rule which this court would have the power to abrogate by the adoption of the common-law rule if in its judgment this were the wiser policy to pursue. Jones v. Cal. Devel. Co., 160 Pac. 823. It is of course a rule which the Legislature itself could change. For a rule of property is not a vested right in property which may not be taken away without compensation. This case, then, though in different form, presents the features of the Tranbarger Case, 238 U. S. 68, 35 Sup. Ct. 678, 59 L. Ed. 1204. The Missouri constitutional provision, as has been pointed out, is the same as ours. The rule as to surface waters was the common-law rule authorizing the landowner to protect himself against them. It was as much a rule of property as the civil-law rule in this state is a rule of property. By statutory enactment the state of Missouri modified the rule as to the railroad company, and compelled it under penalties and at great personal expense to make provision for cuts, drains, and culverts to allow the escape of surface water from the land of Tranbarger upon which, before that law it had, so far as the conduct of the railroad company was concerned, legally stood. One of the contentions of the railroad company before the Supreme Court of the United States was that this rule of property gave it a vested right of which it was not only divested by the statute in question, but in the divestiture there was imposed upon it great expense and a taking of property without process of law. The Supreme Court of the United States made answer as follows:

> "The previous immunity from responsibility for such injury was nothing more than a general rule of law, which was not in terms or by necessary intendment imported into the contract. For just as no person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit (Munn v. Illinois, 94 U. S. 113, 134 [24 L. Ed. 77]; Hurtado v. California, 110 U. S. 516, 532 [4 Sup. Ct. 111, 292, 28 L. Ed. 232]; Buttfield v. Stranahan, 192 U. S. 470, 495 [24 Sup. Ct. 349, 48 L. Ed. 525]; Martin v. Pittsburg, etc., Co., 203 U. S. 284, 294 [27 Sup. Ct. 100, 51 L. Ed. 184, 8 Ann. Cas. 87]), so an immunity from a change of the general rules of law will not ordinarily be implied as an unexpressed term of an express contract. See Gross v. United States Mortgage Co., 108 U. S. 477, 488 [2 Sup. Ct. 940, 27 L. Ed. 795]; Pennsylvania R. R. v. Miller, 132 U. S. 75, 83 [10 Sup. Ct. 34, 33 L. Ed. 267]."

Certainly with this authority before us, an argument of no little weight could be advanced to the effect that the state of California, in making it the duty of this reclamation district to construct these levees in furtherance of its own work did, as did the state of Missouri; that is to say, it set aside the rule of law as to surface waters so far as that rule would operate to impede the great purpose which it had in view.

But we need not pursue this suggestion further, nor base our decision upon it, since what has been said and shown besides and beyond this argument, affords complete justification for the action of defendants. And herein we may conclude with the language of the Supreme Court in Jackson v. United States, 230 U. S. 1, 33 Sup. Ct. 1011, 57 L. Ed. 1363, where, to a complainant under like circumstances, it made answer that, even though his land, because of the proposed work, would be subject to occasional overflow, though never overflowed before, "there would be no right on the part of an individual to insist that primitive conditions be suffered to remain, and thus all progress and development to be rendered impossible," and that the untenable position of plaintiffs is "that they have the right to stereotype the conditions existing at the time they built their levees to the extent of preventing anyone from subsequently exerting his right to build a levee to protect his land."

It is manifest that this case, so far as evidentiary matters are concerned, was most thoroughly tried in the court below. This court, however, is unable to make findings of fact. If, on the going down of the remittitur it shall appear that no further material evidence is to be presented, the trial court will make its findings in accordance with the legal views here expressed and render its judgment accordingly.

The judgment is reversed, and the cause remanded.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.; LAWLOR, J.

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174 Cal. 816

PROPER v. RECLAMATION DIST. NO. 1500 et al. (Sac. 2556.)

(Supreme Court of California. March 14, 1917.)

In Bank. Appeal from Superior Court, Sutter County; Emmet Seawell, Judge.

Suit by Eunice J. Proper against Reclamation District No. 1500 and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

A. C. & H. L. Huston, both of Woodland, and Devlin & Devlin, of Sacramento, for appellants. Sullivan & Sullivan and Theo J. Roche, of San Francisco, amici curiæ. A. H. Hewitt, of Yuba City, for respondent.

PER CURIAM. This case is in all its essentials identical with that of Gray et al. v. Reclamation District No. 1500 et al., Sac. No. 2555, 163 Pac. 1024, this day decided. Upon the authority of that case the judgment herein appealed from is reversed, and the cause remanded.

32 Cal. App. 677

DEAN v. HAWES. (Civ. 1971.)

(District Court of Appeal, First District, California. Feb. 2, 1917. Rehearing Denied by Supreme Court April 2, 1917.)

1. Appeal and Error 🔑1237—Liability of Surety—Statute.

Under the direct provisions of Code Civ. Proc. § 942, where a judgment was modified and affirmed on appeal, and the remittitur issued thereon, and appellant did not pay the judgment within 30 days after the filing of the remittitur from the Supreme Court in the court from which the appeal was taken, judgment was properly entered against the sureties on the undertaking to stay execution for the amount of the modified judgment and interest and costs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4778–4784.]

2. Appeal and Error 🔑1233—Bonds—Action Against Sureties.

In determining the amount of the judgment to be entered against sureties on an undertaking to stay execution, the trial court had no jurisdiction to consider costs which had been awarded the appellant on two earlier appeals, for which he had then instituted proceedings to collect, which were still pending and are involved in another appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4758–4760.]

Appeal from District Court, Santa Cruz County; B. K. Knight, Judge.

Action by Henrietta S. Dean, judgment creditor, against George W. Hawes, judgment debtor, and Geo. W. Wood and another, sureties on undertaking to stay execution. Judgment for plaintiff against the sureties, and Hawes appeals. Affirmed.

George W. Hawes, in pro. per. Chas. B. Younger, of Santa Cruz, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff taken against W. E. Vandervort and George W. Wood for the sum of $614 in this action, in which the above persons were the sureties of the appellant herein upon an undertaking to stay execution upon a former appeal. The judgment upon such former appeal having been modified in some respects, but otherwise affirmed, and the remittitur having issued thereon, and the appellant not having paid the amount of said judgment, the judgment creditor caused a judgment to be entered against the said sureties upon the undertaking on appeal in accordance with the terms of section 942 of the Code of Civil Procedure. The sureties have not appealed from said judgment, but the defendant, their principal, prosecutes this appeal therefrom.

It is contended by the respondent that the appeal should be dismissed for the reason that the defendant has no right of appeal from a judgment taken under said section of the Code against his sureties on a former appeal. We do not deem it necessary, however, to decide this question, for the reason that we find from the record before us that there is no merit otherwise in this appeal.

[1] The status of this case is quite fully set forth in the decision of this court upon the former appeal. Dean v. Hawes, 29 Cal. App. 689, 157 Pac. 558. The judgment affirmed upon that appeal after the modification noted therein was for the sum of $460. This judgment, of course, carried interest upon said sum from the date of its original rendition, and also carried the costs awarded to plaintiff upon the trial of the case. These two accretions to it made up the sum of $614, for which judgment was properly entered against the sureties of appellant under section 942 of the Code of Civil Procedure. The appellant, however, insists that, since he had been awarded his costs against the plaintiff upon said former appeal, and also upon a still earlier appeal, these two amounts, which he asserts aggregate the sum of $214.56, should have been deducted by the trial court from the amount for which this judgment against the sureties was taken. The record discloses, however, that the defendant and appellant herein had already and prior to the taking of this judgment against his sureties instituted proceedings against the plaintiff for the collection of his two former awards of costs, and that those matters are involved in another appeal yet to come before this court.

[2] Under such conditions the trial court had no jurisdiction to deal with those matters in determining the amount of the judgment to be entered against the defendant's sureties and from which the present appeal was taken. There is no merit, therefore, in the appellant's contention upon the present appeal.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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32 Cal. App. 640

SMITH v. SEMON. (Civ. 1906.)

(District Court of Appeal, First District, California. Feb. 1, 1917. Rehearing Denied March 2, 1917. Denied by Supreme Court April 2, 1917.)

1. Assignments 🔑57—Notice—Statute.

Where the written notice of the assignment of a contract for the purchase of an automobile was blank as to the name of any assignee when defendant admitted the receipt of a copy thereof when the contract was executed, and where the contract was not actually assigned to plaintiff until nearly a month after its execution, the notice did not of itself satisfy the provision of Code Civ. Proc. § 368, that in case of an assignment of a chose in action the action by the assignee is without prejudice to any set-off or defense existing at the time of or before notice of the assignment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 116–120.]

2. Assignments 🔑137—Notice—Evidence.

In an action by the assignee of a contract for the purchase of an automobile, defended on the ground of a settlement with the assignor before notice of such assignment, evidence *held* to sustain a judgment for plaintiff.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 234.]

3. SALES ⚷13—CONDITIONAL SALE—OWNERSHIP.

In the case of a contract for a future and conditional sale, the ownership of the thing to be sold and transferred need not be in the seller at the time of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 23.]

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by E. N. Smith against Samuel Semon. Judgment for plaintiff, and defendant appeals. Affirmed.

Harry Gottesfeld and Edward Lande, both of San Francisco, for appellant. Byrne & Lamson, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor in an action brought to recover the balance claimed to be due upon a contract for the purchase of an automobile from the assignor of the plaintiff.

The chief and only meritorious defense urged by the defendant in his pleadings and upon the trial of the cause consisted in his averments and proffered proofs, that he had made a certain settlement with the seller of the automobile and assignor of plaintiff, by the terms of which his contract had been canceled and his obligation to make further payments thereon terminated, in good faith and without notice of the prior transfer of the contract to the plaintiff. Upon this particular issue the evidence before the trial court showed the following state of facts: On March 10, 1915, the defendant made and entered into a contract for a conditional sale to him of an automobile by one D. J. Alberger, doing business under the name and style of D. J. Alberger Auto Sales Company, by the terms of which contract the said Alberger agreed to sell said automobile to the defendant for the sum of $775, of which the sum of $200 was to be paid on the date of said contract, and of which the balance was to be paid in stipulated monthly installments, the title of the machine to remain in the seller until these payments had been fully made. Attached to said contract was a printed form of notice, to the effect that D. J. Alberger had upon the date thereof sold, assigned, and transferred said contract, together with his right, title, and interest in the automobile covered thereby; and that his sole connection with said contract thereafter would be that of an agent of the assignee thereof for the sole purpose of collecting the payments to become due thereon; and that all other dealings in relation to said contract must be had with the assignee thereof. The spaces in said form of notice which should contain the name of the assignee of the contract were blank at the time of the execution of said contract and notice and at the time of the written acknowledgment of the receipt of a copy of such notice by the defendant, and which was signed by him at the same time that the contract itself was executed, viz. on the 10th day of March, 1915. The evidence further showed that the plaintiff became the purchaser and assignee of said contract on or about April 7, 1915, and that the blanks in said notice had been filled in with his name, as assignee of said contract, when the same was delivered to him. There was no evidence before the court that the transfer of said contract had not been made in good faith and for value. The plaintiff did not give to the defendant any other formal notice of the transfer of the contract to him, but there was some evidence before the court to the effect that upon one occasion after the date of the transfer of the contract to the plaintiff the defendant, coming to the place of business of Alberger, had there met and been introduced to the plaintiff by said Alberger in these words, as testified to by the plaintiff:

> "Mr. Semon, this is Mr. Smith. You know who he is. You hold some of his papers."

Testifying as to this meeting the plaintiff continued:

> "There was no special conversation, except that I wished him success in the dealings we had together."

The defendant admits a casual meeting with the plaintiff at the time and place stated, but denies that there was any such conversation. Several weeks later the automobile was very seriously damaged in a collision, and was by the defendant taken or sent to the place of Alberger for repairs; whereupon Alberger and the defendant entered into an agreement by the terms of which the defendant was to pay to Alberger the sum of $200, and relinquish the automobile, in full acquittance of the contract and of his obligations thereunder. This was done; and the defendant apparently supposed that the contract and his obligations thereunder were at an end. A few weeks thereafter the plaintiff appeared at the defendant's place of business with the contract and demanded the balance of the payments due thereon, which the defendant refusing to make, he instituted this action to recover. From the judgment in his favor, the defendant appeals.

[1] The verdict of the jury upon the trial of the cause was against the defendant's contention, based upon the foregoing state of the evidence, that his settlement with Alberger had been made without due notice of the prior assignment of the contract to the plaintiff; and in that regard the contention of the appellant herein is that the verdict is unsupported by the evidence in the case. It is true, as the appellant contends, that the written notice of the assignment of the contract in question was in blank in so far as the insertion of the name of any assignee thereof was concerned, at the time of the defendant's admission of the receipt of a copy thereof made on the day of the execution of

the contract itself; and that the same did not therefore convey to him sufficient notice of the transfer of his contract to any particular assignee. It is also true, as the undisputed evidence in the case discloses, that the contract was not in fact assigned and transferred to the plaintiff until nearly a month after the date of the execution thereof and of said notice. It would seem to follow that this notice in the condition in which it was at the time the defendant acknowledged the receipt of a copy of it, and in the absence of any actual assignment of said contract, could not of itself suffice to satisfy the requirements of section 368 of the Code of Civil Procedure with respect to notice of the assignment of choses in action.

[2] But while this much may be conceded it must also be noted that this notice, while thus insufficient to constitute in itself a notice of assignment of the contract to any particular person, was some sort of notification to the defendant of an existing purpose and intent on the part of the other party to the contract to make a present or prospective transfer thereof; and in this very connection the defendant himself testifies that at the time he wrote his acknowledgment of the receipt of a copy of such notice Alberger informed him that he intended making a present transfer of the contract. It is also to be noted that said notice contained matter which rendered it much more than a notice of assignment, for by its terms the defendant was expressly informed that the only authority retained by the seller of the automobile was to receive the deferred payments thereon, and that all other dealings in respect of the same must be had with the transferee of said contract whoever he might be. These facts are to be taken in connection with another piece of evidence in the case, viz. that the above-quoted testimony of the plaintiff with respect to his introduction to the defendant in the place of business of Alberger and to the terms of that introduction. The statement there made by Alberger to Smith in the presence and hearing of Semon that "you have some of his papers," and the statement of Smith to Semon that "I wished him success in the dealings we had together," while in themselves but slight, and, we think, insufficient proof of notice to the defendant of the assignment of his contract to the plaintiff, was still some evidence thereof; and if this evidence, was believed by the jury to be true, and if it was considered by them in connection with the terms and scope of the written notice, of which the defendant had acknowledged receiving a copy, to be sufficient to put the defendant upon inquiry as to the state and whereabouts of his contract at the time he undertook to make his settlement with Alberger, we are unable to say that these facts and proofs when thus considered by the jury were not sufficient to put the defendant upon such notice that any subsequent settlement with Alberger would be made at his peril, and would thus be the equivalent in legal contemplation of actual notice of the plaintiff's intervening rights in the premises; and hence we cannot hold upon this appeal that the verdict of the jury was not supported by the evidence.

[3] The appellant herein makes the further contention that the trial court committed an error in striking out of his answer his first pleaded defense, the substance of which was that the assignor of the plaintiff was not the owner of the automobile at the time of the sale thereof by him to the defendant; but this action of the court, even if error in the then state of the case, would be error unattended with injury to the defendant, for the reason that the contract when introduced in evidence proved not to amount to a present sale of the automobile, but only to be a contract for a future and conditional sale thereof. In the case of such contracts it is well settled that the ownership of the thing to be sold and transferred in futuro need not be in the person making the agreement of sale at the time of such agreement.

The appellant also urges that the court erred in refusing to give certain instructions requested by him, and in giving certain instructions at the plaintiff's request. These instructions related to the matters of law and fact above under discussion, and undertook to set forth in the form of instructions the respective views of the parties as to the law of the case; and, as we have seen, defendant's theory of the case has not been adopted, and hence his offered instructions were not improperly refused.

We find no error in the record. Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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32 Cal. App. 668

LILLIS v. SILVER CREEK & PANOCHE LAND & WATER CO. et al. (Civ. 1617.)

(District Court of Appeal, Third District, California. Feb. 1, 1917. Rehearing Denied by Supreme Court April 2, 1917.)

1. REFORMATION OF INSTRUMENTS ⚷45(2)—CONTRACT FOR USE OF WATER—EVIDENCE.

In an action for the reformation of a contract entitling plaintiff's predecessor to the use of water for irrigating purposes when the quantity of water in his canal did not exceed 75 cubic inches flowing per second, evidence *held* to show that the quantity had been so fixed by mutual mistake of the parties thereto.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 158, 184–188, 190.]

2. WATERS AND WATER COURSES ⚷143—IRRIGATION—"MINER'S INCH OF WATER."

The standard miner's inch of water, as fixed by St. 1901, p. 660, is the equivalent or equal to 1½ cubic feet of water per minute measured through any aperture or orifice, making it equivalent to one-fortieth of a second foot.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 152.]

3. WATERS AND WATER COURSES 🔑152(11)—IRRIGATION — DECREE—"SEVENTY-FIVE CUBIC INCHES OF WATER MEASURED UNDER A FOUR-INCH PRESSURE."

In an action for the reformation of a contract with a water company for the use of 75 cubic inches flowing per second, a decree that the amount had been so designated by mutual mistake when the parties intended a use of 75 cubic inches measured under a 4-inch pressure left the exact quantity of water to which plaintiff was entitled unascertained; as the expression "75 cubic inches measured under a 4-inch pressure" has no meaning whatever as applied to the measurement of a flowing stream.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 156.]

4. CORPORATIONS 🔑428(7) — OFFICERS—CONSTRUCTIVE NOTICE—STATUTE.

In an action to reform a contract for the use of water for irrigation purposes, a showing that defendant's president prior to defendant's purchase of the canal had actual notice of circumstances sufficient to put a prudent man upon inquiry as to the extent of plaintiff's right to the waters carried in the canal was equivalent under Civ. Code, § 19, to constructive notice of the fact which he could have learned had he prosecuted the inquiry.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1754.]

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by S. C. Lillis against the Silver Creek & Panoche Land & Water Company and others. Judgment for plaintiff, and defendant Belmore Land & Water Company appeals. Reversed, and cause remanded, with instructions.

See, also, 21 Cal. App. 234, 131 Pac. 344.

Bennett, Turnbull & Thompson, of Los Angeles, for appellant. Short & Sutherland, of Fresno, for respondent.

HART, J. This appeal is by the Belmore Land & Water Company from the judgment in favor of the plaintiff upon a transcript of the testimony prepared by the phonographic reporter under section 953a of the Code of Civil Procedure.

The action is for the reformation of a certain contract, made on the 3d day of March, 1904, and duly entered and filed of record in the office of the county recorder of Fresno county on the 2d day of November, 1905, by and between the defendant Silver Creek & Panoche Land & Water Company and one W. J. Hayes, predecessor in interest of the plaintiff, and whereby it was stipulated and agreed that said Hayes was entitled to the use of and to divert upon his lands from the irrigating canal of the Panoche Company a certain quantity of water, such diversion to be made by means of a lateral connected with the main canal.

The controversy here arises over a dispute between the parties as to the quantity of water to which the parties intended, by their agreement, to stipulate and agree that said Hayes should be entitled. The contract is set out in hæc verba in the complaint, and in the respect as to which the dispute here has arisen reads as follows:

> "* * * It is hereby understood and agreed that said second party is entitled to use upon any portion of his said land the water flowing in first party's canal from said Panoche creek at all times when the quantity of water flowing therein does not exceed 75 cubic inches flowing per second when the same reaches the land of said second party."

In a number of other places in the said contract the quantity of water to which it is agreed that the second party should be entitled is designated as above given.

The contention of the plaintiff was, however, that the parties to the contract intended to say and that the contract was intended to read and mean that the second party should be entitled to a flow of "75 miner's inches" instead of a flow of "75 cubic inches," as the agreement was made to read. Accordingly the complaint, by appropriate and sufficient averments, sets forth that it was the true intention of the parties to the said contract to write in and express therein, in lieu of the words "75 cubic inches flowing per second," wherever said words appear in said agreement, the words "75 miner's inches," and that the words, "75 cubic inches flowing per second," as so used to define the quantity of water which the said second party (Hayes) should be entitled to divert under said agreement, were written therein by and through the mutual mistake of the parties thereto; that, in conformity with the real intention of the parties to said agreement, and ever since the execution thereof, and down to the 2d day of January, 1910, the plaintiff and his predecessors in title have taken water from said main water ditch or canal for the irrigation of the land of the plaintiff described in the complaint; that during all of said period said water has been diverted from said main canal through and by means of a lateral ditch sufficient in size to carry 75 miner's inches of water; and that said quantity of water has been so diverted by the plaintiff and his predecessors in title during the irrigating season in each year since the execution of said contract "and whenever said water has been needed for the irrigation of the land now owned by the plaintiff as aforesaid."

It is shown by the complaint that on the land of the plaintiff irrigated by means of the canal and lateral in question "there is growing about 30 acres of alfalfa, and that there is now, and will continue to be, needed on said land water for the purpose of irrigating said alfalfa and other crops."

It is alleged that the defendant and appellant, Belmore Land & Water Company, has or claims to have succeeded to the right and interest of the defendant Panoche Company in and to the ditch or canal "above described"; that "on or about the 2d day of January, 1910, the defendant Belmore Land & Water Company, without any right, and against the will of the plaintiff, erected an obstruction in said lateral ditch, at the point where the same diverts water from said main water ditch or canal, by reason of which water was and now is prevented from passing from the said water ditch or canal to the land of the plaintiff above described; and that by reason of such obstruction to the flow of water plaintiff has been deprived of all water necessary to irrigate said alfalfa." It is alleged that "the facts constituting said mistake were not discovered by the plaintiff, nor by any predecessors in title of the plaintiff, more than three years prior to the commencement of this action; that said facts and said mistake were discovered by the plaintiff on or about the 2d day of January, 1910, and said facts and said mistake were unknown to the plaintiff and to his predecessors in title prior to said date."

Besides seeking a reformation of the contract in the particular mentioned and a decree adjudging him to be entitled to divert and use upon his land from the appellant's canal the quantity of water designated in said contract as so revised, the plaintiff asks for an injunction pendente lite restraining the defendants from interfering with the plaintiff in removing the obstruction which prevents water from flowing "into said lateral ditch as it has been accustomed heretofore to flow, and interfering with plaintiff's use of said ditch and his taking water from said main canal to irrigate his said land," etc.

A demurrer, upon both general and special grounds, was interposed by the appellant, and the same by the court sustained. Judgment was thereupon entered in favor of the appellant, and an appeal therefrom was taken by the respondent here. The cause came to this court by transfer from the Supreme Court, and the judgment was by this court reversed, with directions to the court below to overrule the demurrer, and a petition to have the case heard by the Supreme Court after judgment by this court was denied. Lillis v. Silver Creek & Panoche Land & Water Co. et al., 21 Cal. App. 234, 131 Pac. 344.

The defendants by their several and respective answers deny all the material averments of the complaint, and allege that the contract as executed by the parties thereto and filed for record expressed the real intention of said parties as to the quantity of water which the plaintiff's predecessor in title and the plaintiff were entitled to have diverted from the appellant's canal to the lands of the former for the purpose of irrigating the same.

The court found that at and prior to the time at which the agreement in question was made and executed the immediate parties thereto intended that said contract should mean, and that the legal consequences thereof should be, that said Hayes (second party and predecessor in title of the plaintiff) should be entitled to take from the appellant's canal for use upon his (now plaintiff's) land at all times water to the amount and quantity of 75 cubic inches measured under a 4-inch pressure; that, through a mutual mistake of the original parties to the contract, the said contract, as to the provision defining the quantity of water to be so taken and used, was made to read "75 cubic inches," etc., in lieu of "75 cubic inches measured under a 4-inch pressure," as the parties intended the agreement to read.

It will be observed that, notwithstanding that the complaint alleges that the contract should have been made to read, according to the real intention of the parties, "75 miner's inches" instead of "75 cubic inches flowing per second," the court found that the contract should be so revised as to give to the plaintiff the right to divert from the canal "75 cubic inches of water, measured under a 4-inch pressure." This finding corresponds strictly with the testimony presented, aside from the agreement itself, upon the question of the intention of the parties as to the quantity of water which the plaintiff and his predecessor in title were to be entitled to divert from the canal for the purpose stated in the complaint.

[1] It is very clear from the evidence that the provision in the written agreement purporting to fix the amount of water which Hayes should be entitled to take from the canal does not state or specify the quantity which it was the real intention of the parties that he should be entitled so to divert, and that the amount so fixed was the result of the mutual mistake of the parties to the agreement; for, as was said by this court in this case when it was before us on the former appeal, above referred to:

> "The quantity [of water] mentioned in the contract would hardly be sufficient to find its way through a ditch during the irrigating season."

In fact, the term "cubic inch per second," as used in the contract, is one that has never to our knowledge heretofore been used in California in connection with the measurement of water to be used for any purpose and one that would, if generally used, almost invariably lead to absurd consequences. Particularly would this be so in the case where, as here, the measurement is for the purpose of apportioning water for the purposes of irrigation, since, as we think will be found to be true upon an arithmetical analysis of the phrase, 75 cubic inches per second are the equivalent only of 0.32 of one gallon per second. Obviously such a quantity of water would be absolutely valueless or without utility for practical purposes of irrigation. This proposition alone or of itself would seem to be sufficient to sustain the conclusion that the parties to the agreement in question had mutually fallen into an error in attempting to define the quantity of water which was by said agreement to be awarded to one of them for the irrigation of his land for agricultural purposes. No sane person would purposely limit his right to the use of water for irrigating his land to a quantity which could not be of any possible benefit to him, or, indeed, which could not be utilized at all.

That the Panoche Company conceded that Hayes was entitled to divert a quantity of the waters running into its canal from Panoche creek sufficient to irrigate his land for agricultural purposes is incontestably shown by the fact itself of the making of the contract. The dispute between them, which was of long standing, was merely as to the quantity of water which Hayes should be entitled to divert from the canal. The evidence shows that, after negotiations between the two parties extending over a long period of time, during which, with a view to avoiding litigation, a correspondence relating to the dispute was carried on between the attorneys of the respective disputants, an agreement was finally reached and reduced to writing whereby the amount of water Hayes was to be entitled to divert from said canal and use upon his land was supposed to be specifically apportioned and definitely specified. The letters passing between the attorneys of the parties and a draft of a written contract which was not used, because it provided for "100 cubic inches of water measured under a 4-inch pressure" (25 such inches more than the Panoche Company was willing to concede to Hayes), unquestionably show that the understanding arrived at between Hayes and the Panoche Company was that the former should at all times when necessary to his purposes be entitled to divert from the canal and thence to his land a quantity of water equal in amount to "75 cubic inches of water measured under a 4-inch pressure." Whatever the quantity so defined amounts to, if, indeed, the phrase means anything at all as a unit in water measurement for any purpose, it is clear that the attorneys conducting the negotiations leading to the execution of the agreement, as well as the trial court in this case, were of the opinion and believed that a quantity of water equal in amount to "75 cubic inches measured under a 4-inch pressure," would be amply sufficient to subserve the purposes of Hayes.

[2, 3] But the serious question now confronts us: What does the expression "75 cubic inches of water measured under a 4-inch pressure" mean? In other words, what is the precise quantity of water which the court has thus found that the plaintiff is entitled to divert from the appellant's canal? Did the court intend so to revise the agreement as to make it provide that the plaintiff should be entitled to use, as the complaint alleges was the real intention of the parties, "75 miner's inches of water," and conceived that "75 cubic inches of water measured under a 4-inch pressure" were the equivalent of 75 miner's inches?

The miner's inch of water, as fixed by statute in California, is defined as follows:

> "The standard miner's inch of water shall be equivalent or equal to one and one half cubic feet of water per minute, measured through any aperture or orifice." Stats. 1901, p. 660.

This makes the miner's inch equivalent to one-fortieth of a second foot. Prior to the adoption of the above statute an inch or miner's inch in this state was defined as the quantity of water passing through an orifice one inch square under a 4-inch pressure, which would make the inch equivalent to one-fiftieth of a cubic foot per second. Under the statutory definition or standard, above given, 75 inches or miner's inches would amount to 90 cubic feet per minute, or 673.2 gallons per minute, or 11.2 gallons per second. These figures, confirmed by the opinion of the state engineering department, are based upon definite, well-defined, and well-understood standards or units of water measurement. The expression "a cubic inch measured under a 4-inch pressure" conveys to our minds no meaning whatever. Indeed, we are advised by the authority above referred to that:

> "The expression, '75 cubic inches measured under a 4-inch pressure' has no meaning whatever as applied to the measurement of a flowing stream."

Thus the decree leaves the whole matter of quantity "up in the air." No one can say how much water the plaintiff may, under the decree, divert from the appellant's canal. The rights of the parties are not defined with sufficient definiteness to enable either to know when the other is going beyond his rights. If the plaintiff, conceiving that, under the terms of the decree, he was entitled to divert more than 75 miner's inches, and should do so to the detriment of the appellant, how may it be told from the decree that he (the plaintiff) is not justified in diverting such quantity of water, or, on the other hand, if the appellant should so obstruct appellant's gate or weir as to prevent the passage into his lateral of a sufficient flow for his purposes, who can say, from the decree, that the appellant would not be within its just rights in so doing? But counsel for the respondent declare that the phrase adopted by the court in specifying the quantity of water to which the plaintiff is entitled is well understood in hydraulics, and conveys a definite meaning as to the quantity it expresses. They refer to Kinney on Irrigation and Water Rights (2d Ed.) § 890, as in confirmation of their statement, and assert that:

> "None of the writers of 'books on water rights' would have had the least difficulty in determining the meaning of the language used by the trial court in its decree."

But neither Kinney nor counsel tell us how much water is comprehended within or expressed by the language of the decree.

They do not say or, so far as their briefs go, claim that a cubic inch of water measured under a 4-inch pressure is equal to a miner's inch. If it is not, is it less or is it more than a miner's inch, according to their conception of its description? The fact is, as stated, that the phrase "cubic inch measured under a 4-inch pressure" is unknown in hydraulics as a unit of measurement, and, as the state engineer has declared, has no meaning whatever as applied to the measurement of a flowing stream.

It necessarily follows from the foregoing that the trial court wholly failed to ascertain and find the exact quantity of water to which the plaintiff is entitled under the agreement, and that the decree is likewise deficient and does not define or adjudicate definitely or at all the respective rights of the parties to the agreement. Obviously the parties are entitled to know exactly what their respective rights are judicially determined to be.

[4] In all other respects than the above the findings are supported and the decree is definite and sufficient. The only question which we have thus far not considered is whether the appellant purchased the water rights and canal in question in ignorance of the rights of the plaintiff. As to this proposition, it should be said that the evidence shows that the appellant's president, Farnham, visited and inspected the canal prior to the purchase and while his company was negotiating for the purchase of the ditch; that he saw the plaintiff's lateral and gate, and was informed that the latter had and was exercising certain rights in the waters of Panoche creek as the same were carried through said canal; that Farnham made no special effort at any time before the purchase to ascertain precisely to what extent the plaintiff was entitled to use the water from the canal; that the gate and lateral of the plaintiff as the same were then and had been for a number of years used by him had been so constructed and were being so maintained as that he was thus enabled to divert from the canal and thence to his land an infinitely greater quantity of water than the agreement provided for. But, without further reference to the evidence in this particular, it is sufficient to say that, on the whole, the proofs disclose that Farnham and the appellant through him, prior to the purchase by the latter of the canal, had "actual notice of circumstances sufficient to put a prudent man upon inquiry" as to the extent of the plaintiff's rights in the waters carried by the canal, and hence had constructive notice of fact itself, and could have learned the fact had he prosecuted the inquiry. Civ. Code, § 19; 2 Pom. Eq. Juris. § 11.

It follows from the foregoing that the question as to the precise quantity of water which the plaintiff is entitled to divert from the canal to and upon his land is the only one left for retrial.

The judgment is reversed, and the cause remanded, with instructions to the trial court to hear and consider only such further evidence as may be produced before it upon the question of the quantity of water which the parties to the agreement in question intended that the plaintiff should be entitled to divert from the appellant's ditch or canal and thence to his land.

We concur: CHIPMAN, P. J.; BURNETT, J.

32 Cal. App. 748

SPITZER v. CITY OF OAKLAND.

(Civ. 1917.)

(District Court of Appeal, First District, California. Feb. 8, 1917. Rehearing Denied by Supreme Court April 4, 1917.)

1. Money Received 🔑4—Title of Plaintiff.

Although an action for the recovery of money claimed to have been received for the use and benefit of plaintiff is in the nature of an equitable proceeding, wherein the plaintiff must prove that he has a better title than the defendant to the money received, where plaintiff, upon attempting to procure the arrest of "bunco men" who had swindled him, unwillingly placed in the hands of the police department for use as evidence in case arrests were made money received by him from a "bunco sharp," he has a sufficiently superior title to recover the money from the city, who claims no title, but merely seeks to retain the money upon the plea that plaintiff originally came into possession of it through some unlawful transaction, and inquiry as to the source of plaintiff's title was rightly limited to whether plaintiff was apparently in the sole and peaceable possession of the money at the time he unwillingly and for a single purpose delivered it to the police department.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 7–13.]

2. Money Received 🔑19(4)—Right to Interest.

Under the direct provisions of Civ. Code, § 1917, in an action against a city for money received to the use of plaintiff and detained from him after demand, plaintiff was properly allowed interest on such money upon judgment for its recovery.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 73, 74, 79.]

Appeal from Superior Court, Alameda County; J. W. Harris, Judge.

Action by James G. Spitzer against the City of Oakland. Judgment for plaintiff, and defendant appeals. Affirmed.

Paul C. Morf, City Atty., G. E. Jackson, Asst. City Atty., and John J. Earle, Deputy City Atty., all of Oakland, for appellant. John W. Gwilt and James P. Montgomery, both of Oakland, for respondent.

RICHARDS, J. This action was instituted by the plaintiff to recover from the defendant the sum of $1,000 alleged to have been received by it for the use and benefit of the plaintiff and to have been unpaid to him upon demand. The answer consists in a denial that the defendant received the said sum or any part thereof for the use of the plaintiff.

Upon the trial of the cause the following facts appeared: The plaintiff, who resided in the East, had come out to California about a year before the episode occurred out of which this action arose, and while here had fallen afoul of some "bunco men" who "buncoed" him out of the sum of about $2,800. He went home, but about a year later returned with the resolution and intent of trying to recover his lost money. He presently fell in with another "bunco" sharp, who, under the pretense of co-operating with him in betting on a horse race, handed him $1,000 in bills. Instead of betting on the horse race the plaintiff went to the police department in Oakland with a view to procuring the arrest of the bunco men. The officer in charge demanded that he leave the money in the hands of the police department for use as evidence in case arrests were made. The plaintiff testified that he did this, though unwilling, and that, no arrests having been made, he later returned and demanded the money, which demand the police department refused to accede to, but instead turned the money into the treasury of the city of Oakland, which also through its proper officials has refused to deliver the same or any part thereof to the plaintiff upon his demand. Thereupon this action was brought.

The only defense which was attempted to be urged at the trial was that the plaintiff had not shown sufficient title in himself to the money in question, although it was conceded the defendant made no claim of title to it. The trial court held in the light of the foregoing facts that the plaintiff's possession of the money at the time of its delivery to the police department upon its demand therefor for the single purpose for which it was unwillingly handed over to its officers was a sufficiently superior title to enable the plaintiff to recover the money from the defendant, its depositary, claiming no title thereto.

[1] We think the view taken by the trial court upon this question was correct. It is conceded on both sides that the action for the recovery of money claimed to have been received for the use and benefit of another is in the nature of an equitable proceeding, wherein the plaintiff must prove that he has a better title to the money received than the defendant has to it; but the adoption of this principle does not lead to its application to the case of a defendant who has and claims no title to the money except that derived from its receipt from the plaintiff, but who nevertheless seeks to retain it upon the plea that the plaintiff originally came into possession of the money through some unlawful transaction. To make such application of the doctrine would be to open the door to every depositary of money having no right to retain the same save that arising out of the fact of the deposit, to put in question the sources from which a depositor himself derived the money. Our attention has not been called to any line of authority which supports such a contention. On the other hand, the following cases uphold the contrary view: Willson v. Owen, 30 Mich. 474; Woodworth v. Bennett, 43 N. Y. 273, 3 Am. Rep. 706; McDonald v. Lund, 13 Wash. 412, 43 Pac. 348. As between the plaintiff and the defendant no equities were either pleaded or asserted which called for the application of the principle; and, this being so, the trial court rightly limited the inquiry as to the source of the plaintiff's acquisition of the money in question to the fact as to whether or not the plaintiff was apparently in the sole and peaceable possession of it at the time he unwillingly and for a single purpose which has passed to the point of accomplishment delivered it into the keeping of the police department. We think the trial court properly decided that the plaintiff was entitled to recover this money.

[2] We are also of the opinion that under section 1917 of the Civil Code the plaintiff was properly allowed interest in the sum found and adjudged by the court.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

32 Cal. App. 648

McCALEB v. McCALEB. (Civ. 2209.)

(District Court of Appeal, Second District, California. Feb. 1, 1917. Rehearing Denied March 1, 1917. Denied by Supreme Court April 2, 1917.)

DIVORCE ⚷151—NEW TRIAL—RIGHT—EFFECT OF ACCEPTING BENEFIT OF JUDGMENT.

In a suit by a wife for divorce, she was denied a divorce, but awarded alimony. She accepted payments of the alimony awarded, and then moved for a new trial. *Held* that, having accepted satisfaction of that portion of the judgment favorable to her, she could not have a new trial as to her right to divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 509–513.]

Appeal from Superior Court, Santa Barbara County; Leslie R. Hewitt, Judge.

Suit for divorce by Effie G. McCaleb against William H. McCaleb, who cross-complained. There was a judgment that neither party was entitled to a divorce and awarding alimony to plaintiff. From an order denying defendant's motion to dismiss plaintiff's motion for new trial, defendant appeals. Reversed.

B. F. Thomas, of Santa Barbara, for appellant. H. P. Starbuck, Canfield & Starbuck, and E. W. Squier, all of Santa Barbara, for respondent.

JAMES, J. In this action for divorce there are a complaint and cross-complaint and answers made to each. The case advanced to trial and evidence was introduced; whereupon the court made its findings of fact and judgment decreeing that neither party was entitled to a divorce.

Included in the decree was a provision giving to the wife alimony in the following terms:

> "That while the plaintiff and defendant continue to live separate and apart that the defendant shall pay to the plaintiff the sum of $10 per month from and after the entry of this decree; that the payment of said allowance may be secured by a valid lien on any of the community or separate property of the defendant as the plaintiff and defendant may agree upon, and in case they cannot agree upon such security and lien, then this court shall determine what property the defendant shall convey in trust to a trustee selected by this court, sufficient of said separate or community property as security for the payment of said allowance until the further order of this court."

The plaintiff, following the entry of judgment, proceeded to give notice of her intention to move for a new trial. Thereafter, on October 28, 1913, the defendant gave notice of his motion to have an order made denying and dismissing the plaintiff's motion for a new trial on the ground that plaintiff had accepted the payments of $10 per month for four months next preceding the date of the notice. This motion was supported by the uncontradicted affidavit of the defendant showing the payments to have been made and received as stated. Defendant's motion to dismiss plaintiff's proceeding for a new trial was denied, and this appeal was taken from that order.

The point urged by the appellant is that the plaintiff, having accepted the benefit of the judgment in so far as it was in her favor, was therefore estopped to have the judgment reviewed on appeal, and that she thereby waived her right to an appeal. Primarily this contention rests upon the well-established rule that, where a party accepts satisfaction of a judgment, the judgment then passes beyond review at the instance of the party accepting satisfaction. People v. Burns, 78 Cal. 645, 21 Pac. 540; Estate of Baby, 87 Cal. 200, 25 Pac. 405, 22 Am. St. Rep. 239; Estate of Shaver, 131 Cal. 219, 63 Pac. 340. In the cases cited satisfaction of the whole judgment appears to have been made. In this case the plaintiff proposed to have reviewed the judgment denying her a divorce. If she was successful in such proceeding upon appeal, the reversal of the judgment would set aside not only the determination of the trial judge as made against the plaintiff on her asserted grounds for divorce, but would also set aside the judgment for the payment of alimony. The rule seems to be that, where the different provisions of a judgment are so connected that a part cannot be reversed without a reversal of the whole, a party is not permitted to enforce the portions of the judgment in his or her favor and appeal from the adverse portions thereof. First National Bank v. Wakefield, 138 Cal. 561, 72 Pac. 151. The particular case which has been urged as complete authority sustaining appellant's position is that of Storke v. Storke, 132 Cal. 349, 64 Pac. 578. That also was an action for divorce, and a divorce was granted to the husband and an award made in the judgment of $250 alimony and $200 attorney's fees to the defendant. The defendant accepted payment of the money and at the same time proceeded to prosecute a motion for a new trial. A motion was made by the plaintiff there to dismiss the appeal on the same ground as urged in this case and was denied by the trial court, which order was reversed upon appeal, the court saying:

> "Another reason exists why the motion for a new trial should be dismissed. Defendant accepted the part of the judgment that was beneficial to her. It was a final judgment, and by its terms gave her $450. This sum was based upon the findings, and was the result of the litigation. Defendant took the $450, and now seeks to attack the judgment through which she received it. This she cannot do. Having taken the benefit, she must bear the burden. The amount of this judgment was not large, but the principle is the same. It may have been as great a hardship to plaintiff to have paid the $450 as it would be to a wealthy man to pay $450,000. If the defendant should procure a new trial, she would still have the $450, and plaintiff would not have his divorce. If she has used it, or is otherwise unable to pay it back, the plaintiff cannot be placed in the same condition in which he was before the trial. The principle is well settled that a party accepting and receiving the portion of the judgment beneficial to him cannot appeal from it"—citing cases.

This decision seems decisive of the question presented upon this appeal. While we are unable fully to reconcile the holding with the argument of the decision in First National Bank v. Wakefield, supra, we feel bound by the precedent established by the Supreme Court where the facts and conditions affecting the judgment were so nearly similar as those presented by this record.

The order denying the motion of the defendant to dismiss plaintiff's motion for a new trial is reversed.

We concur: CONREY, P. J.; SHAW, J.

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32 Cal. App. 694

PEOPLE v. McDONNELL. (Cr. 365.)

(District Court of Appeal, Third District, California. Feb. 5, 1917. Rehearing Denied by Supreme Court April 4, 1917.)

1. HOMICIDE ⟹250—MANSLAUGHTER—SUFFICIENCY OF EVIDENCE.

In a prosecution for murder, evidence *held* to support verdict of guilty of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517.]

2. CRIMINAL LAW ⟹829(5)—INSTRUCTIONS—SELF-DEFENSE.

In a prosecution for homicide, where the court gave several instructions, such as one that when one without fault is placed under circumstances sufficient to excite the fears of a reasonable person that another designs to commit a felony or some great bodily injury upon him, and to afford grounds for reasonable belief that there is imminent danger, he may, acting under such fears alone, slay his assailant, and be justified, etc., the court properly refused defendant's proposed instruction that if the circumstances surrounding defendant at the time of and immediately preceding the killing were sufficient to arouse the fears of a reasonable man that deceased was about to inflict upon defendant great bodily injury or death, it was not essential that deceased should have had or attempted to use a weapon in order to entitle defendant to defend himself.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

3. HOMICIDE 🔑300(7)—INSTRUCTIONS—SELF-DEFENSE—APPLICATION TO EVIDENCE.

The instruction was properly refused where defendant claimed that he was in danger from the use of some sort of weapon in the hands of deceased, and not merely from his fists; the charge thus not being applicable to any theory of the case based on the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 622.]

4. HOMICIDE 🔑300(5)—INSTRUCTIONS—SELF-DEFENSE.

In a prosecution for homicide, where the law of self-defense was adequately covered in other instructions, an instruction, given at the people's request, that although the right to take life or use a deadly weapon in self-defense is unquestionable, one on whom another has made a mere assault with his fist, not with the intent to kill or do great bodily harm, and who is not deceived as to its character, is not justified in taking life or in using a deadly weapon in self-defense, was not improper as misleading the jury, though it was not entirely clear or accurate.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 619.]

5. CRIMINAL LAW 🔑1172(2)—APPEAL—ABSTRACT ERROR.

Where the theory of self-defense was based on an attack with a deadly weapon, the instruction involved simply abstract error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3155.]

6. CRIMINAL LAW 🔑789(8)—INSTRUCTION.

In a prosecution for homicide, the trial court properly refused the instruction that the words "moral certainty," as used in relation to the jury's conviction of guilt, is a state of impression produced by facts in which a reasonable mind feels a sort of coercion or necessity or necessity to act in accordance with it, that degree of certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it, as the charge would have been no benefit to the average juror in relation to when a verdict of guilty should be returned.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849, 1913, 1960, 1967.]

7. HOMICIDE 🔑297—INSTRUCTION.

Ordinarily, an instruction, taken from the statute, as to what constitutes justifiable homicide, should not be condemned.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 611.]

8. HOMICIDE 🔑109—SELF-DEFENSE—DEPRIVATION BY LEGISLATURE.

Under Const. art. 1, § 1, guaranteeing the right to defend life, the Legislature cannot deprive a person, who is not a wrongdoer, of the right of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 138, 139.]

9. HOMICIDE 🔑118(3)—SELF-DEFENSE—DUTY TO RETREAT.

Where defendant was violently and inexcusably beaten in his own home by deceased, a man of quarrelsome disposition, and ordered deceased to leave the house, and told him he would kill him if he returned, whereupon deceased apparently seized a deadly weapon, and turned with manner and language plainly indicating his intention to kill or seriously injure defendant, defendant was not required to retreat, even though it would not have increased his peril, but had a right to stand his ground and slay his adversary if he believed himself in imminent peril.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 170.]

10. HOMICIDE 🔑340(1)—INSTRUCTION—JUSTIFIABLE HOMICIDE.

In a prosecution for murder, it appeared that defendant had been violently and inexcusably beaten in his own home by deceased, a man of quarrelsome disposition, had ordered deceased to leave, and told him that he would kill him if he attempted to return. Deceased apparently seized a deadly weapon, and turned with manner and language plainly indicating his intention to kill or seriously injure defendant, who shot him. The court instructed that homicide is justified when committed by any person in the lawful defense of himself when there is reasonable ground to apprehend a design on the part of the other to take his life or to do him some great bodily injury and imminent danger of such design being accomplished, but a person claiming such justification, if he were the assailant, or "engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed." *Held*, that the giving of such instruction was prejudicial error in view of the peculiar facts of the case.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 715.]

11. CRIMINAL LAW 🔑823(1) — APPEAL — HARMLESS ERROR.

A correct instruction on a subject does not cure the error of an incorrect one, but merely produces an irreconcilable conflict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1994, 3158.]

Appeal from Superior Court, Plumas County; Stanley A. Smith, Judge.

Daniel Joseph McDonnell was convicted of manslaughter, and from the judgment and an order denying his motion for new trial, he appeals. Reversed.

C. E. McLaughlin, of Sacramento, and J. D. McLaughlin, of Quincy, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was charged with the murder of Charles Cosker, and convicted of manslaughter, and he appeals from the judgment and the order denying his motion for a new trial.

In pointing his contention that we should hold as a matter of law that the conviction was unwarranted by the showing made, appellant presents a fairly comprehensive and accurate epitome of the evidence which we may substantially reproduce:

It is admitted that defendant at his home killed deceased, February 16, 1916. Deceased went to the home of defendant, about 7 o'clock in the evening, and together they went to the house of one McKenzie, a short distance away. About 8 o'clock the two left McKenzie's, Cosker announcing that he was going to the Chinese store with a present of pie and bread for the owner. While at the store each had two drinks of liquor. They returned to the home of McKenzie about 9 o'clock, and, at their joint invitation, he accompanied them to defendant's home. There they all drank liquor furnished by defendant, and Cosker occupied most of the time in lauding and reciting extracts from speeches of President Wilson. Several times he invited his two auditors to come to his house and read the speeches which he had cut out of the Sacramento Bee. Both declined the invitation, saying it was too late. McKenzie left defendant's house between 10 and 11 o'clock. But before he went away, according to the testimony of appellant, deceased had remarked that if he sold his mine he intended to go around electioneering for President Wilson, whereupon defendant laughed and deceased "got a little sore" and said: "You and Rorey don't want to read these speeches; you are turncoats like Tom and Will" (referring to his brothers). Both answered "No," and Cosker continued with the speeches. The only testimony as to the circumstances immediately preceding and attending the tragedy was furnished by the defendant himself. He testified that, after McKenzie's departure, deceased continued to praise Wilson and his speeches until about 11:30 p. m., when he announced that he was going home. Defendant lit a candle, and they left the kitchen, where they had been since their arrival at the house, and went into the back room. When they reached the center of said room deceased repeated his invitation to defendant to come to his house and read the speeches. Defendant responded that it was too late, and that he did not want to awaken the wife of deceased. Deceased then caught defendant by the shoulder and started to pull him, scratching his neck in doing so. Then he "swung" on defendant, saying, "You and Rorey are G—— d—— s—— of b——, and I don't believe you want to read those papers," at the same time with his fist striking defendant in the face. The candle fell to the floor, and while defendant was picking it up deceased hit him again and knocked him down. A muzzle-loading shotgun was in a corner near where defendant fell, and he got it and ordered deceased to leave the house. As Cosker reached the back door he picked up something from where a lot of tools, including a blacksmith hammer, were kept. Defendant could not see what it was—his "eyes were dazed"—and deceased stepped out on the porch and stood for a moment muttering, with his back to defendant, who said, "Charlie, you get out of here and go home; if you come back in here I will kill you;" whereupon deceased said, "You s—— of a b——, I'll learn you whether you can draw a gun on me; it ain't loaded anyway," and swung around toward defendant with his right arm upraised, and defendant shot. Defendant could not see whether deceased had anything in his hand or not.

The blacksmith hammer was found in the snow about three feet from the right arm of deceased where the body was lying full length with his right arm outstretched, his feet close to the edge of the porch. Defendant's face was bruised, his eye blackened, and his face bloody. The hammer, according to defendant's story, was placed near the door by some boys a day or two before who had been using it in breaking ice.

The wound which caused the death of Cosker was on the left side of the neck, right over the collar bone, nearer the front than the back of the neck. That was the only wound except one on the back of the right hand, about five-eighths of an inch long, crescent shaped, which looked as if he had struck his hand against something and broken the skin.

The undertaker testified that from placing cotton in the wound to stop the blood he formed the opinion that its course was slightly downward toward the inside of the right shoulder. The body had been moved from its position in the snow to the home of deceased before this was done. Dr. Eckhardt testified that under these circumstances the course or direction of the wound could not be determined with any accuracy without a probe, and that no person by pushing cotton in with his fingers could determine with any degree of accuracy the direction of the wound.

Defendant and deceased were on friendly terms prior to the homicide, so much so that defendant had an appointment to cut deceased's hair on the following morning. Deceased was a larger and stronger man than appellant.

Thomas and William Cosker, brothers of deceased, and James M. Hayes were the first to reach the scene of the homicide. They testified that they did not see the hammer in the snow on that occasion, but Hayes and Thomas Cosker did observe it when they returned the second time. They were there the first time three or four minutes. The hammer was from 2½ to 3 feet to the left or westerly from the body. The witnesses admitted that they were more or less excited, which, of course, seems quite natural. Thomas Cosker testified that his brother's snowshoes were about 50 feet from the house, separated a little, and that the slope from the house to the point where they were found was downward. The snowshoes were left outside of the house when McKenzie, deceased, and defendant reached the house.

The reputation of deceased for peace and quiet was bad.

Thomas Cosker testified that defendant

came to his house about 11 o'clock on February 17th, and knocked at the door, and when it was opened "he told me that he had killed Charlie, and I said, 'What! You killed Charlie?' and he says, 'Yes, I shot him,' and then my wife says, 'What did you shoot him for?' and he said, 'Accident,' and I says, 'Accident be damned,' and my wife then made the remark, 'Oh, my God; what did you shoot him for?' and he said, 'I don't know, that damned gun,' and during that time he went away; that when he reached the place he saw his brother's body lying face downward, McDonnell standing stride of him holding his head up, saying, 'I shot him, I shot him.' James Hayes asked him why he shot him, and he said, 'Self-defense; if I had not shot him he would have shot me,' and I said, 'Get out, Dan; Charlie ain't got no gun and never owned one in his life.' Then he said, 'He was coming after me with a club,' and I made a motion with my hand, like this, and said, 'Show me his club; there is no club here,' and he never said another word, but I told him to get out of there and he put Charlie's head down and went into the house." He testified further that defendant, on the occasion of his second visit to the scene, said: "I shot him. Probably I will go to San Quentin for a few years, but that is all right."

William Cosker also testified that he heard defendant say: "I have killed him, I have killed him, and I don't give a damn if I go to San Quentin for a few years. It makes no difference." Other relatives of deceased gave similar testimony, but it is not necessary to repeat it. Some other witnesses, we may state, declared that defendant said, "If I had not got him he would have got me," and that he directed them to look around for the club or hammer used by deceased.

Appellant presents a critical analysis and comparison of the testimony of the various witnesses and he argues, with force and persuasive eloquence, that the only rational conclusion is that defendant was entirely justified in the homicide. No doubt, a similar argument was made to the jury, but they were not convinced by it, as the verdict shows. As is manifest from the foregoing, much can be said in favor of appellant's theory, and has been well said by his counsel. We need not set out the reasons which he advances for his contention, although they have received our careful consideration. We deem it, however, proper to say that, in our opinion, for us to reverse the cause on this ground would be to usurp the exclusive function of the jury to pass upon questions of fact where there exists room for rational difference of opinion.

[1] We cannot say there is no substantial support for the verdict, and that only one reasonable conclusion from the evidence could be drawn by sensible men. There was evidence—how credible it was for the jury to determine—which tended to discredit the testimony of appellant, and his manner when upon the witness stand, of which we can obviously obtain no accurate or complete portrayal in the record, may have constituted a circumstance of great significance in the determination of his guilt or innocence. And it may be said that the recital of the facts by him while upon the witness stand leaves some room for doubt whether at the time he fired the fatal shot he actually believed he was in imminent danger of receiving great bodily harm or of losing his life, or whether he may not have been somewhat moved by resentment in consequence of the brutal treatment he had received at the hands of deceased. We deem it unnecessary to notice any more specifically in this connection the record presented, but we are satisfied that this point should be resolved against appellant.

In People v. Wright, 4 Cal. App. 706, 89 Pac. 365, this court said:

> "It is true deceased had a few seconds previously fired at defendant apparently with the purpose of killing him, and defendant might, under the circumstances, have had reason to believe that deceased would continue the assault, and that his only safety was to kill or disable deceased before the latter could again fire. There is evidence which would have sustained the jury in so finding. But these were matters for the jury to determine, and with their conclusion this court cannot interfere."

In People v. Rongo, 169 Cal. 75, 145 Pac. 1019, it is said:

> "Undoubtedly the defendant's own story exculpates him, but it was for the jury to say whether or not that story should be believed. The evidence was therefore sufficient to justify the verdict."

It is entirely clear that at least with equal propriety the same rule may be applied here. In a large proportion of such cases the defendant is the only surviving witness of the homicide, and beyond the mere fact of the homicide little additional evidence to the testimony of the accused can be secured. It is important, therefore, that there be no unwarranted interference with the prerogative of the jury to determine the weight of the evidence and the credibility of the witnesses, including the testimony of the defendant as well as that of any other witness. As to this, of course, the appellate courts are not authorized to substitute their judgment for that of the jury and of the trial court.

[2] Appellant complains of the action of the court in refusing his proposed instruction as follows:

> "You are instructed that if the circumstances surrounding defendant at the time of and immediately preceding the killing were sufficient to arouse the fears of a reasonable man that deceased was about to inflict upon defendant great bodily injury or death, it is not essential that deceased should have had or attempted to use a weapon. Under such circumstances defendant was as much entitled to defend himself from great bodily injury from the hands of Charles Cosker as he was to defend himself from the use of a weapon or weapons in the hands of Charles Cosker."

Although somewhat hazardous to predict what courts may or may not hereafter declare, it may be, as appellant claims, that no court has ever declared or will declare "that a man has no right to defend himself against great bodily injury unless it is inflicted with weapons or instruments." Men undoubtedly have been permanently disabled and even killed by blows from the fists of powerful assailants, and the law justifies homicide under such attack or threatened attack, provided there be reasonable ground for apprehending death or great bodily injury. The court, however, so fully instructed the jury upon the subject that there could have been no misunderstanding as to the rule. The language, it is true, was somewhat general, but, without a strained construction, it could not be said to limit the right of defense as apprehended by appellant. Several instructions of similar import were given, but it is sufficient to call attention to this:

> "Where one without fault is placed under circumstances sufficient to excite the fears of a reasonable person that another designs to commit a felony or some great bodily injury upon him and to afford grounds for reasonable belief that there is imminent danger of the accomplishment of this design, he may, acting under these fears alone, slay his assailant and be justified by the appearances. And, as where the attack is sudden and the danger imminent he may increase his peril by retreat, so situated he may stand his ground, that becoming his 'wall' and slay his aggressor even if it be proved that he might more easily have gained his safety by flight."

[3] Another conclusive answer to the proposition is that appellant's claim was that he was in danger from the use of some sort of weapon in the hands of deceased, and not merely from his fists. In other words, the instruction was not applicable to any theory of the case based upon the evidence. It is true that defendant did not testify that he believed that deceased was about to assault him with a weapon—or at all, indeed—but that is the inference which he sought to create by the following statement:

> "When I stooped down to pick up the candle, he hit me again, and as he knocked me down, I grabbed the shotgun and I said, 'Get out of here as quick as you can.' As he grabbed me he started to the door, and he picked something up. I could not tell what it was—my eyes were dazed—and he stepped out on the porch with his back to me, and I said, 'Charlie, you get out of here and go home; if you come back in here I will kill you,' and with that he said, 'You s—— of a b——, I'll learn you whether you can draw a gun on me; it ain't loaded anyway.' Then I shot, and he fell off the porch."

In his cross-examination he said deceased "swung around with his right arm" before the shot was fired. At any rate, it is quite apparent that appellant's theory was that he was in danger from the use of a deadly weapon.

[4] At the request of the people the court gave this instruction:

> "Although the right to take life or use a deadly weapon in self-defense is unquestionable, yet, one on whom another has made a mere assault with the fist not with intent to kill or do great bodily harm, and who is not deceived as to its character, is not justified in taking life or in using a deadly weapon in self-defense."

It is said by appellant that:

> "This instruction while taken from People v. Romero, 143 Cal. 459, 77 Pac. 163, does not state the law correctly for the reason that the right of self-defense depends in no degree upon the intent or will of the person slain."

[5] In the Romero Case the only objection to the instruction was that there was no evidence upon which to base it, and this was held to be untenable. The instruction is not entirely clear or accurate, and it probably would be better if it had not been given, but we do not think it could have misled the jury. It might be possible for a person to believe, and have reason to believe, that he was in danger of receiving great bodily harm from his assailant, although the latter had no such intention and the former was aware of it. However, in view of other instructions upon the subject of self-defense against apparent danger, the jury must have understood the law in relation to that particular feature. Besides, if erroneous, the instruction involved simply abstract error for the reason already suggested, that the theory of self-defense was based upon a threatened attack with a deadly weapon, and the instruction was not pertinent to the evidence.

Defendant's proposed instruction No. 13, as to the burden of proving justification, was undoubtedly covered by instructions which were given.

[6] It is questionable whether the jury would have received much enlightenment from this proposed instruction:

> "The jury is instructed that the words 'moral certainty' as used in these instructions is a state of impression produced by facts in which a reasonable mind feels a sort of coercion or necessity or necessity to act in accordance with it. It is that degree of certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it."

It might be quite interesting and illuminating to a philologist, but it is believed that it would be of no benefit to the average juror. Indeed, the instruction as a whole seems to us somewhat uncertain and obscure, and while it would probably have done no harm, if it had been given, it is fair to say that it would have done no good. It is even doubtful whether Chief Justice Shaw's celebrated description of "reasonable doubt" is of any particular assistance in most criminal cases, but it is probably as good as any that could be suggested. After all, the intelligent juror reaches the conclusion that under the law it is his duty to convict if he is thoroughly convinced and entirely satisfied of the defendant's guilt, and if not, it is his duty to acquit, and we would save trouble and confusion if we would refrain from much of our learning and refinement about these terms and confine ourselves to such simple and comprehensible statements of the duty of the jury as just indicated.

The proposed instruction of appellant as to the burden of proof of the prosecution and the right of the defendant to act upon appearances and his privilege to stand his ground were amply covered, we think, by other instructions given by the court.

Probably the most serious question arises out of the action of the court in giving this instruction:

> "Homicide is justifiable when committed by any person in the lawful defense of himself, when there is reasonable ground to apprehend a design on the part of another to take his life, or to do him some great bodily injury, and imminent danger of such design being accomplished, but a person claiming such justification if he were the assailant or *engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed.*"

The objection is directed to the portion we have italicized, and appellant argues:

> "This instruction is erroneous because it states that not only the assailant, but one who is engaged in mortal combat must decline further struggle before the homicide is justifiable. This, of course, is not the law. The instruction was harmful in this case because of the attitude and argument of the prosecution."

Then he quotes from the transcript certain questions addressed to appellant as to why he did not close the door and go into the kitchen and his answers thereto, and the assertion is made that the prosecution argued before the jury that it was the duty of McDonnell to retreat to the kitchen and close the door or to attempt to close the outer door.

The Attorney General answers that the instruction is in the language of the statute (subdivision 3, § 197, Penal Code), and that it was held to be a correct statement of the law in People v. Herbert, 61 Cal. 546. Therein the history of said subdivision is given, and it is declared that it is no new statement of a legal principle for the first time stated in the Codes, but that it follows the crimes and punishment act of 1850, and has been the law ever since. As far as the said opinion is concerned, though, it is apparent that the point before us was not made. The attention of the court was occupied in considering the question whether the instruction required the existence of absolute necessity to justify or excuse the homicide, or whether it was consistent with the doctrine that the slayer could act upon appearances, provided they were such as to create a reasonable apprehension that there was design to take his life or to inflict upon him great bodily harm. This is made manifest by the quotation therein from the case of Shorter v. People, 2 N. Y. (2 Const.) 193, 51 Am. Dec. 286, wherein the Court of Appeals of New York, through Bronson, J., learnedly discusses the question of self-defense.

It might be said, also, although the point was not considered, that since the evidence was not before the Supreme Court the instruction, if erroneous, could not be held on the record to be prejudicial.

[7, 8] Manifestly, there is force in the contention that an instruction taken from the statute should not be condemned. Ordinarily that is true, and within certain limits the Legislature may prescribe the conditions under which homicide may be excusable or justifiable. It cannot, however, deprive a person—at least a person who is not a wrongdoer—of the right of self-defense. The right to defend life is one of the inalienable rights guaranteed by the Constitution of the state. Article 1, § 1. It is plain that if a person without fault is assailed by another and a mortal combat is precipitated, to require the former to attempt to withdraw before killing his adversary is to require the very thing that may prevent him from defending himself at all. The instruction is quite capable of the interpretation that although the defendant was without fault and the deceased was the aggressor, yet, if they were engaged in a mortal combat, it was the duty of the defendant to endeavor to withdraw before killing his adversary, although he had reason to believe and did believe his life was in imminent danger, and that to attempt to decline further struggle would increase his peril and probably enable his adversary to kill him. Such, of course, was not the intention of the learned trial judge in giving the instruction, nor, probably, of the Legislature in enacting the law; but it is capable of such interpretation, and may nave been so interpreted by the jury.

[9] To appreciate the probable prejudicial effect of the instruction we must, of course, view the evidence from appellant's standpoint. We must, in other words, assume that the jury believed his story, since there is nothing inherently improbable about it. We then have this situation: Appellant had been violently and inexcusably beaten in his own home by a man of quarrelsome disposition. He had ordered his antagonist to leave the house, and had told him he would kill him if he attempted to return. Deceased apparently seized a deadly weapon and turned with manner and language plainly indicating his intention to kill or seriously injure defendant. Under those circumstances said instruction would demand the conclusion that it was still the duty of defendant to withdraw or retreat before firing the fatal shot. But if such condition existed defendant, under any proper view of the law, was not required to retreat, even though it would not have increased his peril. He had a right to stand his ground and to slay his adversary if he believed he was in imminent peril.

In People v. Lewis, 117 Cal. 186, 48 Pac. 1088, 59 Am. St. Rep. 167, it was held that:

> "The tendency of the American mind is against the enforcement of any rule which requires a person to flee when wrongfully assailed, to avoid chastisement, or even to save human life; and it seems that a true man, who is without fault, is not obliged to flee from an assailant who, by violence or surprise, maliciously seeks to take his life or to do him enormous bodily harm."

And, furthermore:

> "A person assailed in his own house, or upon his own premises, has the right to stand his ground, and is not bound to retreat or escape to avoid the assailant, but may kill him if reasonably necessary for his protection from great bodily danger in the position rightfully occupied by him on his own premises, even though he might avoid the assault by fleeing or withdrawing therefrom."

In that case it was held prejudicially erroneous to instruct the jury in reference to the defendant that "if he could have withdrawn from the danger it was his duty to retreat," and that "between his duty to flee and his right to kill, he must fly, or, as the books have it, 'he must retreat to the wall.'" There are other decisions to the same effect, but they need not be cited. As to whether appellant was engaged in a mortal combat, according to his story, and in view of the tragical ending of the affray, there can be no doubt.

[10] We think, under the peculiar facts of this case, the giving of this instruction should be held to be prejudicially erroneous, and that the evidence of defendant's guilt is not so strong and convincing as to justify us in saying there was no miscarriage of justice. What the Legislature probably intended to provide is that where one as the assailant is engaged in a mortal combat he must endeavor, etc., but the language chosen is not apt for that purpose.

[11] It is true that the jury was also correctly instructed upon the subject, but that simply produced an irreconcilable conflict, and we cannot say which instruction was followed.

The judgment and order are reversed.

We concur: CHIPMAN, P. J.; HART, J.

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32 Cal. App. 651

KUNS v. DIAS et al. (Civ. 1629.)

(District Court of Appeal, Third District, California. Feb. 1, 1917. Rehearing Denied by Supreme Court April 2, 1917.)

1. Action 🔑57(1)—Consolidation—Foreclosure.

Where one of the parties who claimed to be a tenant in common of land had filed a suit for partition and a lis pendens, such suit may be consolidated by consent of all the parties with the suit by one holding a mortgage on all of the land for foreclosure, it being agreed that the right of partiton should be subordinated to the mortgagee's right of foreclosure.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 632–661.]

2. Partition 🔑17(2)—Actions—Jurisdiction.

In a suit to partition land, where the claims of the parties were adverse, the court has jurisdiction to determine title.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 54–59.]

3. Appeal and Error 🔑934(2)—Presumption—Conveyances.

In a suit where husband contended that a purchaser from his wife, who was named as grantee in a deed, conveying the land to the husband, and wife took no title, it will be presumed in support of the judgment, findings having been waived, that the court held that the presumption in favor of the wife's title declared by Civ. Code, § 164, was not rebutted, and that the purchaser from the wife was one in good faith for a valuable consideration, so that his title was not subject to attack.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3777.]

4. Partition 🔑62—Actions—Evidence.

Where a purchaser of the alleged interest of a wife in land conveyed to a husband, and wife sought partition, and the husband introduced the wife's declaration of homestead, the purchaser may, though the declaration was not mentioned in the pleading, show its invalidity, for such declaration if valid would defeat the purchaser's title, the husband not having joined in the conveyance.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 178–181.]

5. Vendor and Purchaser 🔑244—Bona Fide Purchaser—Evidence—Sufficiency.

Where land was conveyed to a husband and wife as grantees, and the wife conveyed her interest, *held*, the husband having attacked the bona fides of the purchaser from the wife, that the evidence warranted a finding that such purchaser was one in good faith for value.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 609–611.]

6. Appeal and Error 🔑1058(1)—Review—Harmless Error.

The exclusion of evidence subsequently admitted was not error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200.]

7. Vendor and Purchaser 🔑243—Bona Fide Purchaser—Evidence.

Where respondent claimed to be a bona fide purchaser from appellant's wife for value without notice of any defect in her title, questions whether respondent knew that the wife was contemplating a divorce at the time of executing the conveyance were properly excluded as immaterial.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 606–608.]

8. Appeal and Error 🔑760(2)—Review—Briefs.

An exception to the admission of testimony referred to in the brief without comment need not be considered by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3095.]

9. Vendor and Purchaser 🔑243—Bona Fide Purchaser—Evidence.

Respondent purchased from appellant's wife her interest in land, which had been granted to appellant and his wife. Appellant contended that the deed by mistake had named his wife as a grantee, and asserted that respondent was not a bona fide purchaser for value without notice. *Held*, that respondent was entitled to testify as to what appellant's wife told him about the transaction, and how she came to sign a purchase-money mortgage.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 606–608.]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Henry L. Kuns against George M. Dias, Emma F. Dias, and Joe G. Coelha, who filed a cross-complaint. There was a judgment for plaintiff, and from a judgment on the cross-complaint directing partition, and an order denying new trial, George M. Dias appeals. Affirmed.

Rose & Silverstein, of Oakland, for appellant. Griffin & Carlson and J. W. Hawkins, all of Modesto, for defendants respondents. E. J. Fleming, of Los Angeles, for plaintiff respondent.

CHIPMAN, P. J. The complaint in the action was for the foreclosure of a mortgage executed December 20, 1909, by George M. and Emma F. Dias to secure the payment of a certain promissory note, of the above date, made and delivered to plaintiff. The note was made payable six years after date, but the word "years" was omitted by clerical error. In the description of the real property mortgaged, section 31 was by like error made to read 30. The complaint seeks to have these mistakes corrected. Defendant Joe G. Coelha is alleged "to have some right, title, or interest or lien in or to said premises described in said mortgage or some part thereof, which interest and claim were subsequent to and subject to the lien of said mortgage."

Defendant Emma F. Dias in her answer alleged that at the time the mortgage was executed she was the owner of an undivided one-half interest in the mortgaged premises, but since said date she granted and sold said interest to defendant Coelha, who is now the owner thereof.

Defendant Coelha, in his answer, alleges that he is the owner of an undivided one-half interest in the mortgaged premises, and that defendant Emma F. Dias conveyed to him said interest on January 11, 1913; that he is a purchaser in good faith and for value of said interest in said premises. By way of cross-complaint, alleges that he and defendant George M. Dias are tenants in common of the said premises, each owning an undivided one-half interest therein; that plaintiff claims to be the owner and holder of a mortgage on said land given to secure the payment of a promissory note for $8,816, "which he claims to be a valid and subsisting lien against said land"; that "ever since this defendant became an owner of an undivided one-half interest in said land, defendant George M. Dias has collected the rents, issues, and profits from said land, and has failed and refused to account therefor to this defendant"; that "there are no liens or incumbrances on said land and premises appearing of record other than those hereinbefore mentioned, and that no person other than this defendant and the said defendant George M. Dias are interested in the said premises as owner or otherwise, except as hereinbefore alleged; that this defendant has been compelled to employ Messrs. Griffin & Carlton and J. W. Hawkins as his attorneys to defend this action and to prosecute the action set forth in this cross-complaint, and $500 is a reasonable attorney's fee for such attorneys."

The prayer of the cross-complaint is "for a partition of said real property according to the respective rights of the parties hereto"; or, if a partition cannot be had, for a sale of the premises and a division of the proceeds; for the allowance of attorney's fees; that if it be adjudged and decreed that the plaintiff, Henry L. Kuns, is the owner and holder of a promissory note and mortgage upon said premises, that the amount thereof be ascertained and determined, and that the same be paid from the proceeds of the sale of said property, and that the residue received from the sale of said property after payment of all costs and expenses incurred in said action be partitioned between this defendant and defendant George M. Dias; and that said Dias be compelled to account for all rents, issues, and profits from said land since January 11, 1913, and such further order as shall be just and equitable.

Defendant George M. Dias, answering the cross-complaint of defendant Coelha, denied that Coelha or any other person is the owner as tenant in common or otherwise with this defendant in said land, or is the owner of any interest therein "except as hereinafter set forth"; denied that this defendant, since January 1, 1913, has collected any rent, issue, or profit from said land, or has refused to account to said Coelha, and alleged that said Coelha is not and never was entitled to any of the rents, issues, or profits of said land; denied that said Coelha had been compelled to employ attorneys, as by him alleged, or at all; alleged that the whole of said tract of land "is the community property of the defendant George M. Dias and the defendant Emma F. Dias"; that said land was acquired by this defendant after his marriage with said Emma, by contract of purchase with plaintiff, and that thereafter, about December 20, 1909, "said Kuns, on the request of the defendant George M. Dias, and on the payment to said Kuns of a large part of the purchase price of said land by the said George M. Dias to said Kuns, made and executed a deed of grant, bargain, and sale of said land and delivered the same to said George M. Dias; that said deed so executed and delivered conveyed said land, on its face, to said George M. Dias and to said Emma F. Dias, his wife"; that this defendant, when said deed was delivered and for many months thereafter, believed that he was the sole grantee therein named; that said Emma took no part in any of the agreements in relation to the transfer of said land, with said Kuns, except to sign and execute a mortgage and note for the unpaid purchase price of said land, and that the name of said Emma was inserted in said deed "without the knowledge, request, or consent of the defendant George M. Dias"; that this defendant is "a foreigner and not educated in the English language, and did not read or otherwise acquaint himself with the contents of the said deed, at or before its delivery, and relied solely on the good faith of said Kuns and in the confidence existing between himself and said Kuns, as to the proper wording and execution of said deed, according to their agreements theretofore made"; that this defendant had not, prior to the execution of said deed, promised or agreed with his said wife that he would convey or cause to be conveyed to her an undivided interest in said land, nor has he since so promised; that his said wife did not have any knowledge that she was named as grantee in said deed or claim any ownership in said land, except as the wife of this defendant, until on or about the 7th day of January, 1913, on which date she sold an undivided one-half interest in said land to said Coelha and conveyed the same to him; that said deed was made without the knowledge or consent of this defendant, and "said Coelha still holds said deed against the will and without the consent of defendant George M. Dias"; on information and belief, alleges that said deed to said Coelha "was made and delivered by her without consideration, and to unlawfully and fraudulently deprive said defendant George M. Dias of his interest therein"; that said Coelha well knew at the time of the execution and delivery of said deed by said Emma to him of the interest of this defendant in said land "and said Coelha took said deed with such knowledge and conspired with said Emma F. Dias, then and there, to defraud said defendant George M. Dias of his interest and the interest of the community in and to said land, so conveyed to him, the said Coelha"; that unless a reconveyance of said interest in said land so conveyed to said Coelha can be had, this defendant has been and will be damaged in the sum of $10,000.

The prayer is that Coelha take nothing by his cross-complaint; that the deed from defendant Emma F. Dias to Coelha be canceled, and that a reconveyance of said property by said Emma be ordered; that this defendant recover damages against said Coelha in the sum of $10,000, and that this defendant have his costs and such further relief as may seem meet in equity.

Plaintiff, answering Coelha's cross-complaint, denied most of the averments thereof, generally on information and belief; alleged the material averments of the complaint and alleged that plaintiff's security "will be greatly impaired and lessened if partition be made of said mortgaged premises."

Findings were waived. It was adjudged that Coelha's interest in the premises was acquired subsequent to and subject to the lien of plaintiff's mortgage and with full knowledge thereof; the corrections prayed for in the note and mortgage were made, as also the usual provisions for the sale of the property and payment of the amount found to be due; also the usual provision for a deficiency judgment. Among the provisions of the decree are the following:

> "It is further ordered, adjudged and decreed that the defendant Joe Goncalves Coelha and defendant George M. Dias are the owners in common of that certain real property [the land in suit]. It further appearing to the court that all the parties to said action have consented that only one referee be appointed to partition the land and premises hereinbefore described between the defendant Joe Goncalves Coelha and the defendant George M. Dias, subject, however, to the foreclosure and sale thereunder of the mortgage hereinbefore mentioned, Wherefore, it is further ordered, adjudged and decreed that that certain declaration of homestead filed by Emma F. Dias upon the land and premises hereinbefore described and dated the 5th day of December, 1912, and recorded, * * * is null and void."

The decree appoints J. E. Russell referee to make partition, "and that the said referee be and he hereby is vested with all the powers necessary to perform all the duties required or created by this interlocutory decree so far as the same affects the partition of the lands and premises hereinbefore described." The decree proceeds to order partition, etc., "provided, however, that if the said J. E. Russell, referee in partition, finds and ascertains that said property cannot be so partitioned, quality and quantity relatively considered, then he shall thereupon report the same to the court, specifying the manner in which he shall have executed his trust."

It is further decreed that if the premises cannot be partitioned, "in that case and after the referee has so reported the premises be sold as required by law, subject to the payment of the mortgage aforesaid and subject to the judgment of foreclosure and order of sale herein, and sale thereunder, and that the proceeds from such sale, after payment of all costs of partition and attorney's fees be divided and one-half thereof paid to the said Joe Goncalves Coelha and one-half thereof to said George M. Dias."

Defendant George M. Dias appeals from the portions of the judgment decreeing that defendant Coelha and defendant George M. Dias are owners in common of the premises; that the homestead declared by defendant Emma Dias is void; that a referee in partition be appointed and from other portions of the judgment relating to the partition of said premises. Said defendant also appeals from the order denying his motion for a new trial. In his brief appellant states that his appeal "is urged only to that portion of the judgment based upon the cross-complaint of Coelha, viz. the partition of the property decreeing that Coelha is the owner of an undivided one-half interest therein. We make no objection to the decree and judgment of foreclosure of mortgage."

The points discussed in appellant's brief are: (1) That the court had no jurisdiction in foreclosure proceedings to try title to property or to partition the property to be foreclosed. (2) That the court had no authority or jurisdiction to determine the homestead to be null and void. (3) That it appears from the record that the property was the community property of appellant, and that Coelha purchased with knowledge sufficient to put him upon inquiry as to the true status of the property, and had knowledge of the homestead declared by Mrs. Dias in which she claimed the property to be community property.

[1] When the cause was called for trial it appeared that an action had been commenced by Coelha against George M. Dias, H. L. Kuns, and John Doe, No. 2916, prior to the foreclosure action, for partition of the premises. Some discussion arose as to whether the question of partition should be tried on Coelha's cross-complaint or on the pleadings in the action No. 2916. It was finally stipulated and the court made an order that the present case, No. 2923, and No. 2916, be consolidated and tried together. There was no objection by any of the parties to the trial of the issues for partition. We must presume that upon the consolidation of the cases the pleadings in No. 2916 were before the court, although they do not appear in the record, and we must presume further that these pleadings were sufficient to present the issues neccessary in an action for partition. No objection was made by appellant to the testimony on such issues. A lis pendens filed in action No. 2916 was introduced without objection, and its recitals show that the purpose of the action "is for the partition of the real estate hereinafter described (the premises here involved), and to have it ordered, adjudged and decreed that if partition of said real estate cannot be had, that the said real estate be sold and the proceeds distributed in partition among the parties to this action in accordance with their respective interests therein." It is perhaps unusual for partition to be sought in a foreclosure proceeding, and, probably, had there been objection the court would not have made the order. But as all parties agreed that whatever was done in the matter of partition should be subordinated to plaintiff's right first to foreclose and sell the land under the foreclosure proceeding, we can see no legal objection to the course taken at the trial. In Towle Bros. Co. v. Quinn, 141 Cal. 382, 385, 74 Pac. 1046, cited by appellant, the action was foreclosure of mortgage. Over defendant Hanlon's objection, the complaint was amended by setting up the proceedings in an action in partition, previously commenced, and praying for an order that in effect took over the action in partition and carrying out its object in the foreclosure action. The sale under the partition proceeding had not yet taken place. On the appeal of Hanlon in the foreclosure action the court said:

> "The plaintiff in the partition suit was not called upon to make the respondent (Towle Bros. Co.) herein a party defendant, for he had no lien of record when that suit was commenced. See Code Civ. Proc. §§ 752-801. Indeed, when the suit was commenced respondent had no mortgage at all; and the one which was afterwards executed to it was not recorded until after the interlocutory decree, but respondent undoubtedly had the right and it was its duty to intervene in that suit and set up its mortgage lien, and have it adjudicated in the partition decree as provided by the Code. At least it could not afterwards, in its separate action to foreclose the mortgage, rightfully ask the court to cross over and take charge of the partition suit. This is not a bill to vacate a judgment on the ground of fraud," etc.

In the present case Coelha's interest in the land was acquired after the execution and recordation of the mortgage, and he was properly made a party to the foreclosure action in order to have his interest adjudged to be subsequent and subordinate to the mortgage. Had he objected to the consolidation of the partition suit with the foreclosure action, his position would have been that of Hanlon in the Towle Bros. Case. But he and all other of the parties, plaintiff and defendants, stipulated that the partition and foreclosure cases should be heard and determined in the foreclosure case, and as both were of equitable cognizance, the power of the court so to proceed cannot now be questioned.

[2] That the court had the right to try questions of title we think well settled. In Adams v. Hopkins, 144 Cal. 19, 29, 77 Pac. 712, 716, objection was made that the rights of defendants, as adverse occupants, could not be determined in that case. The court said:

> "It is settled in this state that the rights of adverse occupants of land sought to be partitioned 'may be put in issue, tried, and determined in such action' "—citing De Uprey v. De Uprey, 27 Cal. 335 [87 Am. Dec. 81]; Gates v. Salmon, 35 Cal. 577 [95 Am. Dec. 139]; Martin v. Walker, 58 Cal. 597; Jameson v. Hayward, 106 Cal. 689 [39 Pac. 1078, 46 Am. St. Rep. 268].

In Morenhout v. Higuera, 32 Cal. 290, 295, the court said:

> "The interest of each, or all, may be put in issue by the others; and if so, such issues are to be first tried and determined, and no partition can be made until the respective interests of all the parties have been ascertained and settled by a trial."

See Freeman on Cotenancy and Partition, § 531.

It is contended that the averments in the pleadings are insufficient in partition, and that the decree of partition is not supported by any testimony, the point being, as we understand appellant, that no title was shown in Coelha. It was alleged in the cross-complaint of Coelha that he is the owner of an undivided one-half interest in the property, and defendant George M. Dias is the owner of the remaining one-half, and that there were no liens or incumbrances on the land appearing of record other than those mentioned, "and that no persons other than this defendant and the said defendant George M. Dias are interested in the said premises, as owner or otherwise." What allegations upon this question were in the pleadings on the partition suit does not appear. All the pleadings seem to proceed upon the assumption that the interests involved were only those of Coelha and appellant. Dias in his answer denied that Coelha, "one of the defendants herein, or any other person is the owner, as tenant in common or otherwise, with the said defendant George M. Dias in the tract of land described in said cross-complaint of said Coelha, or any tract of land described herein or at all, except as hereinafter alleged." And the pleading then alleges that the land is the community property of Dias, and that his wife Emma had no interest in it. In its decree the court declared that the property belonged to Coelha and Dias as cotenants in equal shares, and thus disposed of all the property and all of the interests therein of all persons known or unknown.

Coelha's title was based upon a grant deed of the premises in question, dated January 11, 1913, by Emma F. Dias, granting to Joe Goncalves Coelha, grantee, which said deed recited that it was "made subject to a mortgage upon said premises," plaintiff's mortgage, and purported to convey "all that certain lot, piece or parcel of land, situate," etc., describing the mortgaged premises. Coelha also introduced and there was admitted in evidence without objection a grant, bargain and sale deed, of date December 20, 1909, reading:

> "Henry L. Kuns and Mary E. Kuns, husband and wife, of Lordsburg, California, in consideration of ten dollars, and other good and valuable considerations, to them in hand paid, the receipt of which is hereby acknowledged, do hereby grant to George M. Dias and Emma F. Dias, husband and wife, of the county of Merced, state of California, all that real property," etc.

—particularly described by metes and bounds and being the mortgaged premises here involved.

[3] Section 164 of the Civil Code provides as follows:

> "All other property acquired after marriage by either husband or wife, or both, is community property; but whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance be to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument, and the presumption in this section mentioned is conclusive in favor of a purchaser or encumbrancer in good faith and for a valuable consideration. * * *"

Under this section two presumptions arise from the terms of the Kuns' deed: First, a disputable presumption that title to an undivided one-half interest, as tenant in common, in the property described in the deed vested in Mrs. Dias "as her separate property"; second, this presumption is conclusive in favor of Coelha if he was a purchaser in good faith and for a valuable consideration. We are authorized to assume, in support of the judgment, findings having been waived, that the court held that the presumption in favor of Mrs. Dias' title was not overcome by evidence and, whether overcome or not, that Coelha was a purchaser in good faith and for a valuable consideration.

The Supreme Court said, in Alferitz v. Arrivillaga, 143 Cal. 646, 649, 77 Pac. 657, 658:

> "The law will not allow idle presumptions to be indulged in against a deed delivered and recorded. Facts must be proven from which it is clearly made to appear that the property, in such case, is community property, or the deed will be given effect according to its terms."

Appellant sought to establish his right to the property as against Coelha's right by introducing a declaration of homestead by his wife recorded prior to her deed to Coelha; also by appellant's testimony, by the testimony of Kuns, grantor of the deed to appellant, and by the testimony of Coelha, both of whom were introduced as appellant's witnesses.

[4, 5] The homestead interest of Emma F. Dias was not mentioned in any of the pleadings. The declaration of homestead was introduced by appellant apparently to support his claim that the property was community property because she so stated in her declaration. Furthermore, appellant would have been advantaged, had the homestead proven to be valid, for it would have annulled the deed made subsequently to Coelha by Mrs. Dias for the reason that her husband did not join in its execution. The declaration of homestead having been introduced by appellant, it was competent for Coelha to show its invalidity, which he did by undisputed evidence that Mrs. Dias was not living on the property at the time the homestead was declared. Mrs. Dias testified:

> "Q. Had you lived on that ranch for one year before that time? A. No. Q. And you have not lived on the ranch since? A. No, sir. Q. You never filed any other homestead on the premises except that one? A. No, sir; I never did."

She had in fact been living apart from her husband. He testified that she left him in October, 1911, as we understand the evidence, and never came back to the ranch. The homestead was recorded December 5, 1912. Appellant testified, "She never did live on this part of the ranch in controversy either before or after she left me or at all." All that is now claimed by appellant is, as stated in appellant's brief, that "the portion of the decree which declared the homestead null and void 'is superfluous and nugatory.'" It is urged, however, that Coelha had knowledge of this homestead or of facts putting him on inquiry that it existed, and that he is charged with knowledge of the statement in the declaration "that the land and premises hereinafter described is the community property of myself and my said husband, George M. Dias." Coelha testified that he knew Mrs. Dias had declared a homestead on the premises, but he was advised by his attorney that it was invalid for the reason that the statement made therein that she was at the time residing on the property was not true; that he purchased the property in good faith, paying her $1,500 for her interest and assumed the payment of the mortgage; that he made the payment by a check on a Modesto bank where he kept his account and "she cashed the check." On his redirect examination by appellant's attorney Coelha testified:

"Mr. Whitby: Q. From what Mrs. Dias told you, did you know that she was contemplating another action for divorce at that time? A. She came over to me and she said that she was getting no support for the children, and she came there to see Mr. Griffin, and Mr. Griffin was not there, and Mrs. Dias told me that Crow from the west side advised her to go to see Hawkins, so I took her over to Mr. Hawkins; she told all of her troubles to Mr. Hawkins, that George Dias offered her $500 if she signed all the rights back to George Dias to the property. She said to Hawkins that George Dias offered her $500 if she would turn all the property back to George Dias and signed away the rights, and Mr. Hawkins asked her if she could sell it that way, and she said she would like to get more, and Mr. Hawkins asked her if it was separate property, and she said that it was because she signed the deed and mortgage, so at that time Mr. Hawkins asked me why I did not want to buy the property, and I told him if she would give me a good title, I would buy it, and he said, 'I will write to the county clerk and find out.' In the meantime, I went to see the property, and when I came back Hawkins got a letter from the county clerk of Merced, and he told me that she could give me a good title, and I told her I would give her $1,500, and I would pay the mortgage, that is it. She told me that Dias had offered to give her $500 if she would sign her rights back to him; she showed the letter to Hawkins, and I think the letter was $500. Q. Before you bought that property, did you know that she had put a homestead on it? A. Well, she told me it was a homestead, but she could release the homestead, just a tract which she told me the homestead was on. Q. She did not release it, did she? A. Mr. Hawkins told me it is not valid; he said that homestead did not amount to anything, and they found out she did not live on the place, what my lawyer told me. * * * I did not know, prior to the purchase of this land from Mrs. Dias, that the title was in question; I know that my lawyer told me it was good; that she could give me a good title, and that's what I did. I bought it; she told me that her husband had offered her $500 to deed back the land to him; when George Dias wanted to give $500 and she to sign all her rights back to him, I thought she could give it to me as long as she could give it to George."

He was examined at considerable length by appellant's counsel in an effort to show that he was present in court when the divorce proceedings between appellant and his wife were in progress, and thus became aware that the title to this land was in dispute; but there was no evidence that the pleadings were read in his hearing, or that he knew of any dispute as to the title, or that the question was discussed in his presence or hearing. The pleadings were introduced, but are not made part of the bill of exceptions.

Assuming that Coelha was put upon inquiry as to the title, what were the sources of information to which he was called upon to resort? The deed from Kuns on its face showed that Mrs. Dias owned a half interest in the property which she could convey. The statement in the homestead declaration that the property was the community property of herself and husband was not conclusive, nor did it necessarily cast any doubt upon the language of the deed, and for the purposes of the homestead it was immaterial whether the property was community or separate. Besides, she claimed and so told Coelha that it was her separate property, and she exhibited a letter in which her husband had offered her $500 for her interest. Furthermore, Coelha had the advice of an attorney that Mrs. Dias could convey a good title. Coelha testified that Mrs. Dias made the following statement to him, at the time of the sale to him, in explanation of how she came to sign the note and mortgage, and why the property was conveyed to her and her husband:

"Mrs. Dias told me she is in a family way, and a few months before she had her baby she lived with her father, her mother and father; and Dias came home and said 'Mrs. Kuns is in town and wants you to go with me and sign that deed, the note and mortgage,' and Mrs. Dias told him, 'What is the matter? Can't you do that alone without I go?' and she said, 'I don't feel well,' and George Dias said, 'Well, it is better for you because suppose if you die and the child lives, the child would get one-half of the property,' and he said, 'If everything be in my name, I will get everything,' and he said, 'If you go and sign everything, one-half of the property belongs to you,' and she went with George Dias and signed the deed and note. Q. Did she tell you that Mr. Dias has told her that he had the deed made in her name? A. The property belonged to the two of them, and in case of death if she died and if the child was born alive, she would get one-half of it. Q. She told you that? A. She told me that George Dias told her that. * * *

"Mr. Carlson: Q. What was said at that time about the homestead? A. I think Mr. Hawkins told her that the homestead is not valid because she don't live on the place, and that she could give me a deed. He said the homestead is not valid; she said the homestead had been filed just so that George could not sell, something like protection and for the support of the children; I considered that the property, I mean that half interest, is mine absolutely; I paid $1,500 for it; this is not the first piece of land that I have bought; I have bought over $40,000 worth of property in a little less than three years; I have bought and sold and I have sold over $30,000 worth of property."

Mr. Kuns testified that so far as he knew Mrs. Dias did not "have anything to do with buying that land," and that personally she did not pay any money. He testified:

"I made an agreement to sell this land to Mr. Dias; I don't remember the exact force of that agreement; I cannot recollect it to mind; I afterwards made a deed to this land; in that deed, the parties or grantees were named as George M. Dias and Emma F. Dias; I certainly did receive directions from Mr. Dias as to who should be made parties and grantees in the deed or I would not have made them grantees; I mean he wanted the deed made to himself and wife, or I should not have put her name in; it is possible that that may have occurred in relation to the mortgage, but I don't think so; I think it was with relation to the transfers. Q. Did he ask and request you to put his wife's name in the deed as well as in the mortgage? A. That is my recollection, but of course I would not undertake to say that is exactly true, because it is awful hard to recollect these things, but I always act on these things according to instructions, because I have no authority whatever to put her name in the deed without its having been at his request; no authority whatever. Q. Well, you did want Mrs. Dias' name in the mortgage? A. Certainly, if her name was in the deed. Q. Whether her name was in the deed or not, you would want her name in the mortgage? A. Well, as a general rule, I think that is customary. Q. Well, you have not any independent recollection, though, that Mr. Dias asked you to do that? A. Not from memory, no, sir; not exactly from memory. I cannot state because I am getting old, and I cannot remember those things as I used to, but I certainly had instructions, or I would not have done what I did do."

Appellant testified that he paid for the property with his own money, and bought it for himself; that he never told his wife that he bought the land for her or that he wanted to make her a gift of one-half of the property. He testified:

> "I never knew she signed any deed, only Mr. Kuns told her to sign on the mortgage, and that is all I know; I never knew her name was on the deed until she left; another thing, she never had been in the family way at the time I made that sale."

It appeared that appellant and Mrs. Dias were married April 24, 1909; their first child was born June 15, 1910.

> "The Court: It was born in June, 1910, and the deed was made in December, 1909. Was she in the family way at that time? A. She never knew it because the baby was born just about 11 months after we get married."

It thus appears that the child was born a little less than 6 months after the deed was made. The period of gestation for the human animal is given at 40 weeks. It is therefore quite probable that Mrs. Dias knew she was in an "interesting situation" on December 20, 1909.

We have given the evidence somewhat at length rather than a statement of what we deemed to be its import, because it is but fair to the trial judge that it be made to appear upon what evidence the court based its conclusions and whether or not its conclusions were well founded.

Appellant cites In re Carlin, 19 Cal. App. 168, 124 Pac. 868, claiming that "the facts disclosed by the opinion are almost identical with the facts of the case at issue." The opinion is by Mr. Justice Shaw of the second appellate district, and the Supreme Court denied a hearing of the case in that court. The principles of law governing this class of cases are succinctly, clearly, and, we think, in the case cited, correctly stated. It will be seen upon an examination of the opinion that the evidence was meager, and, such as it was, all one way. "Moreover," said the learned justice, "as in the case of Fanning v. Green, 156 Cal. 279 [104 Pac. 308], he [the husband] testified positively that in having the property deeded to his wife it was *not his intention to give it to her.* (Italics the court's.) In the absence of evidence of the existence of any circumstances inconsistent with his testimony, received without objection and conceded to be competent, we are constrained to hold the conclusion of the trial court should not be disturbed."

It is true that in the present case the husband testified that in purchasing the property he did not intend to make a gift to his wife of an interest in the property or that she should share in the title at all. But the trial court evidently did not nor was it bound to accept the testimony of the husband as true, for it was controverted by many and cogent facts and circumstances inconsistent with its verity. Furthermore, there is a feature of this case not present in the Carlin Case, namely, the transfer of the wife's interest to a purchaser in good faith for a valuable consideration, which manifestly the trial court found was supported by the evidence. Whether or not the deed to Mrs. Dias was intended as a gift, and whether or not Coelha was a purchaser in good faith for a valuable consideration, were questions of fact, as was said in the Carlin Case, "to be determined by the trial court upon the evidence adduced at the trial, and its conclusion, unless manifestly without sufficient support, should not be disturbed by an appellate court." We cannot say that the conclusions of the learned trial court were without support.

Some alleged erroneous rulings will be briefly noticed.

[6] When appellant was called as a witness, questions were propounded to him as to how he became possessed of the land in question—how he first became so possessed. (Exceptions numbered 1 and 2.) The objection to the questions was that it was immaterial how he became possessed of the land, and that it was not the best evidence, and that the issues related to the present title. The court ruled that, "if it is in writing, it seems to me they would have the right to make the objection, but if it was not in writing, then he can testify. It is the present title." Counsel for appellant stated that it was his right "to show title from the beginning of the transaction down to the present time." Later the witness was permitted to testify how he came to buy the land, as we have shown by his testimony. His grantor also testified to the circumstances attending the purchase. We cannot see that appellant was prejudiced by the ruling.

[7] The court sustained an objection to a question put to Coelha whether or not Mrs. Dias was considering commencing a second action for divorce at the time the witness was negotiating for the purchase of the property. The question seems to have called for the conclusion of the witness. He stated, "I could explain the way it was, and you could

understand it better." An answer yes or no was demanded, and the court sustained the objection. We cannot discover that the witness' knowledge of Mrs. Dias' intentions had any relevancy to the case.

[8, 9] The witness was asked to tell the court what Mrs. Dias told him about this transaction, how she came to sign the note and mortgage. The question was objected to as hearsay, and the objection overruled, and counsel moved to strike out the testimony after it was given on the same ground, which motion was denied. The matter is referred to in appellant's brief as "Exception No. 6, page 101, fol. 302-3," without comment. We would be justified in treating it likewise. The matter was part of the conversation brought out by appellant and occurred at the time Coelha was seeking information about the title and was deciding whether or not to make the purchase. We discover no error in the ruling. It is to be remembered Coelha claimed to be a purchaser in good faith and for a valuable consideration, which appellant denied. As tending to show good faith the testimony was admissible.

Appellant concludes his brief by the following statement:

> "The appeal, however, is urged only to that portion of the judgment based upon the cross-complaint of Coelha, viz. the partition of the property decreeing that Coelha is the owner of an undivided one-half interest therein."

We think the evidence was sufficient to support such findings as were necessary to support the judgment. The decree simply means that the property shall first be sold to satisfy the mortgage, and if a surplus remains such surplus shall be dealt with upon the assumption that Coelha and Dias are tenants in common owning equal shares thereof.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

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164 PACIFIC REPORTER

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174 Cal. 684

In re JEPSON'S ESTATE. (L. A. 5055, 5056.)

(Supreme Court of California. March 22, 1917.)

DESCENT AND DISTRIBUTION 🔑34—PERSONS ENTITLED—NEPHEWS AND NIECES.

Under Civ. Code, § 1386, subd. 2, providing that the issue of deceased brothers and sisters take by descent in certain cases, and subdivision 4, giving the entire estate to the surviving spouse if decedent does not leave certain enumerated relatives including, as now amended, the issue of deceased brothers and sisters, such issue now take by descent, although it was otherwise before the amendment of subdivision 4.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 97–101.]

Lorigan, J., dissenting.

In Bank. Appeals from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Frederick E. Jepson, deceased. From orders setting apart a homestead to the widow and dismissing contests, deceased's nephews and nieces appeal. Motions to dismiss denied.

Fred N. Arnoldy and Stewart & Stewart, all of Los Angeles, for appellants. Frank Stewart and J. W. Howell, both of Los Angeles, for respondents.

HENSHAW, J. Frederick E. Jepson, upon his death, intestate, left surviving him a widow, but neither issue, nor father, nor mother, nor brother, nor sister. He did, however, leave nephews and nieces, children of deceased brothers and sisters. The widow made application to the court in probate to have set apart to her a homestead. These nephews and nieces filed a contest. Their contest was dismissed by the court in probate, upon the ground that they were not parties in interest. The court made its order setting aside a homestead to the widow. The nephews and nieces have appealed from both of these orders, and their appeals are met with this motion to dismiss upon the ground indicated, namely, that they are not parties in interest.

The question then is this: If these nephews and nieces under our law of succession have no inheritable interest in the estate of the deceased, they are not interested in the widow's application for a homestead, and these appeals should be dismissed. The argument that they have no inheritable interest and are, therefore, not parties in interest, is founded upon the construction which this court gave to subdivisions 5 and 2 of section 1386 of the Civil Code as those subdivisions read before their amendment in 1905, the further contention being advanced that the amendments of 1905 have not changed the law so as to give such nephews and nieces an inheritable interest which before the amendments was not theirs. The cases referred to are Estate of Ingram, 78 Cal. 586, 21 Pac. 435, 12 Am. St. Rep. 80, Estate of Carmody, 88 Cal. 616, 26 Pac. 373, and Estate of Nigro, 149 Cal. 702, 87 Pac. 384. In each of those cases this court was construing, as it was compelled to do, subdivision 2 of section 1386, under the limitations upon that subdivision imposed by the language of subdivision 5 of the same section. By the amendments of 1905 subdivision 5 has become subdivision 4, and for convenience in exposition we will here deal with subdivision 4, it always to be borne in mind that in the cases above cited it was, and was called, subdivision 5.

What, then, were these cases? The first of them, the Estate of Ingram, is the only one calling for analysis, since the other two simply follow the construction placed on the law in the Estate of Ingram. The Estate of Ingram presented precisely the situation that exists in the present case. There was no surviving father or mother; there was no surviving brother or sister, but there were surviving children of a deceased sister. At that time subdivision 4 (then subdivision 5) declared in effect that the whole estate of a spouse dying intestate went to the surviving spouse, unless the deceased spouse left either issue, or a father or a mother, or a brother or a sister. It stopped there. Therefore by this unequivocal language, if no one of these persons was in being, the right of the surviving spouse to take all of the estate was absolutely fixed. To determine the disposition which the law made of an estate under these circumstances when there were not such survivors, the judge in probate primarily, and this court in review, turned to the language of subdivision 2. Subdivision 1 made provision for the case where a deceased spouse left issue as well as a surviving spouse. Subdivision 2 treated of the disposition of the estate in the other contingencies contemplated by subdivision 4, and it declared that if the deceased spouse left father and mother or father or mother, one-half of the estate should go to them or the survivor of them. If there was neither father, nor mother, then the one-half of the estate, which otherwise would have gone to them, went to the living brothers and sisters "and to the children of any deceased brother or sister by right of representation." What, then, was the inevitable and necessary construction of these laws forced upon this court? It was simply this: Subdivision 4 had placed no limitation upon the right of the surviving spouse to take all of the estate merely because there might have been living children of a deceased brother or sister, but, to the contrary, had said that unless there were living brothers or sisters, the whole estate should go to the widow. Turning, then, to subdivision 2, which contemplates that in the event that there is a living brother or sister and children of a deceased brother or sister, the children of such deceased brother or sister shall take the parent's share, the construction was inevitable that such children of a deceased brother or sister could take only upon contingency, and that contingency was the existence of a living brother or sister. This construction, we have said, was forced upon this court. We mean forced in the sense that it was an inevitable and unescapable conclusion. The unreasonableness of it—even the injustice of it—was apparent and was recognized. No sound reason could be or ever was attempted to be adduced to support a law which said, as then did ours, that children of a deceased brother or sister could share in the estate if there was another living brother or sister, but could not share if there were none. All that this court could say was: Ita scripta lex. In time the anomaly of the situation came to be recognized by the Legislature and it amended subdivision 4 in a most important particular. It also amended subdivision 2, that it might read harmoniously with the amended subdivision 4. That amendment for the first time added to the classes, the existence of which would forbid the surviving spouse from taking all of the estate "the children or grandchildren of a deceased brother or sister." Or, to make our meaning plain, paraphrasing the language of subdivision 4, while still maintaining its meaning, originally it declared that all of the estate shall go to the surviving spouse unless the deceased spouse left issue, husband, wife, father, mother, brother, or sister, in which event the estate should go as provided in the previous subdivisions 1 and 2; or, again paraphrasing its meaning, the subdivision declared that the surviving spouse should not take all of the estate if any of these enumerated relations of the deceased spouse survive. By the amendment to subdivision 4 it declared that the surviving spouse should not take all of the estate if, as well as those first enumerated, children or grandchildren of a deceased brother or sister survived. As a limitation upon the right of the wife to take all of the estate, these children and grandchildren of a deceased brother or sister were placed in the same list and category as a surviving parent or a surviving brother or sister. We now have the law reading as it never read before. We have the law declaring that the surviving spouse shall not take all if the deceased spouse left a surviving father, or mother, or, failing these, left a surviving brother or sister, or, failing these, left children or grandchildren of a deceased brother or sister. It still becomes necessary to turn to subdivision 2 to learn what disposition the law makes of the estate when any of the contingencies or limitations contemplated by section 4 upon the surviving spouse's right to take all of the estate have arisen, and we do this now with the fixed declaration of the law that the surviving spouse shall not take all of the estate if there be surviving children or grandchildren of a deceased brother or sister of the deceased spouse. When we turn to the consideration of subdivision 2, with this new light and law before us, we now find a law rationally and justly framed to enable children of a deceased brother or sister to inherit, whether or not there be a surviving brother or sister. If there be a surviving brother or sister, then the children of each deceased brother or sister take collectively their parent's share "by right of representation." If there be no surviving brother or sister, and there be children of more than one deceased brother or sister, each group of such children takes the parent's share by right of representation. Such is the manifest meaning of the amended law; such is the meaning that would have been given to this law from the first—a meaning which this court was unable to give it because of the original limitation in subdivision 4, so often referred to.

And, finally, let it be said, if the amendment to subdivision 4, aptly phrased to accomplish this thing, does not mean this it means nothing, and the Legislature was but beating the air.

The precise question here under consideration has never been directly presented to this court under these amendments to section 1386 of the Civil Code. But upon the other hand there is no decision of the court given since those amendments which follows the views of the Estate of Ingram—the law of which case happily fell to the ground with the existence of the amendments. To the contrary, while the question was not directly presented in them, the opinions in such cases as Estate of Claiborne, 158 Cal. 646, 112 Pac. 278, could only have been written under the recognized concession of the litigants that the law had been changed as indicated—a concession which the court accepted. Estate of Nigro, 172 Cal. 474, 156 Pac. 1019, contains nothing in opposition to what has been here said. In the Estate of Nigro this court simply laid down the unimpeachable proposition that children and grandchildren of a deceased brother or sister were not grouped in the law as forming together one class but as forming two distinct classes, so that grandchildren were entitled to the inheritance only in the event that there were no living children.

The motions to dismiss are therefore denied.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; SHAW, J.; MELVIN, J.; LAWLOR, J.

LORIGAN, J. I dissent. As subdivisions 2 and 4 of section 1386 of the Civil Code now stand they provide—subdivision 2—that:

> "If the decedent leaves no issue, the estate goes one half to the surviving husband or wife, and the other half to the decedent's father and mother in equal shares, and if either is dead the whole of said half goes to the other. If there is no father or mother, then one-half goes in equal shares to the brothers and sisters of decedent *and to the children or grandchildren of any deceased brother or sister by right of representation.*"

I have italicized that portion of the section more particularly involved in the consideration of this matter. Subdivision 4 provides that:

> "If the decedent leaves a surviving husband or wife, and neither issue, father, mother, brother, sister, nor the children or grandchildren of a deceased brother or sister, the whole estate goes to the surviving husband or wife."

These are the only subdivisions of the section requiring attention. Appellants base their claim as heirs to a portion of the estate of decedent under subdivision 2 of the section.

When the Ingram Case, referred to in the prevailing opinion, was decided in 1889, subdivision 2 of section 1386 read just as it does now except that in 1905—many years after it was decided—it was amended so as to add the words "or grandchildren" after the word "children." The other subdivision quoted above—subdivision 4—is the same now as it was when the Ingram Case was decided, except that it was then marked subdivision 5, and except, further, that it also was amended in 1905 to add "nor the children or grandchildren of a deceased brother or sister" after the word "sister." These amendments do not affect the situation here as far as grandchildren are concerned because there are none.

Now, as to the Ingram Case, 78 Cal. 586, 21 Pac. 435, 12 Am. St. Rep. 80. It appears therefrom that Mrs. Ingram, deceased, left a surviving husband, but no issue and no surviving father, mother, brother, or sister. There were, however, left by her certain children and grandchildren of a deceased sister, who, on distribution of the estate, claimed that they were entitled to one-half of it. The trial court having ignored their claim entirely and having distributed all the estate to the assignee of the surviving husband, the said children and grandchildren of the said deceased sister appealed. They asserted, as do the appellants here, that they were entitled to one-half of the estate under said subdivision 2 of section 1386. This court, however, held to the contrary, and in construing both subdivisions 2 and 5 (now 4 as amended) said:

> "It is entirely beyond doubt that the whole of the estate should have been distributed to the surviving husband. Paragraph 5 of section 1386 of the Civil Code is too clear to present any difficulty of construction whatever. It is as follows: 'If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate goes to the surviving husband or wife.' Paragraph 2 of said section refers to the case where *there is* a surviving brother or sister, and provides that in such case, if there be *also* children of the deceased brother or sister, they shall take their parents' share by right of representation. It is vain to argue against the injustice of the rule, or to contend that in a case like the one at bar the children of a deceased sister *ought* to have a share in the estate when there is not any surviving brother or sister, as well as when there *is*. Succession to estates is purely a matter of statutory regulation, which cannot be changed by courts."

While this was a department decision, the construction put on these subdivisions was subsequently affirmed in bank in Re Carmody, 88 Cal. 616, 26 Pac. 373, and Estate of Fabricio Nigro, 149 Cal. 702, 87 Pac. 384, in which latter case it was declared, while not questioning the construction of the subdivisions as made in the Ingram Case, that such interpretation of the law had theretofore become a rule of property which should be and is adhered to. These two decisions were made under the subdivisions as they stood prior to the said amendments of 1905, and they are confirmatory of the construction in the Ingram Case of the subdivisions as they then stood, and such construction should be adhered to not only as a proper one, but as having become a long-established rule of property, unless the amendment of 1905 to subdivision 4 compels a different construction. The prevailing opinion decides that it does. I am unable to agree with it. Certainly, the amendment of 1905 of subdivision 2 itself worked no change in the construction as given in the Ingram Case. That amendment amounted only to the insertion of the word "grandchildren" therein which obviously operated solely as an enlargement of the class who might take if the class of "children or grandchildren" could take at all. No one claims that this subdivision alone, as amended, called for any different construction than it received in the Ingram Case. And appellants do not. So it must be taken that as far as subdivision 2 is concerned it means, taken by itself, just what it has always meant and as the Ingram Case declared it meant, namely, that the issue of a brother or sister of a deceased spouse could not inherit unless there were also a brother or sister left surviving the decedent. It is claimed, however, that a change in subdivision 2 was wrought through the amendment of subdivision 4 in 1905. If this is not so, then it has not been wrought at all. If the amendment did have this effect, where is the language in it which declares it? The insertion in subdivision 4 of the words "nor the children or grandchildren" is not language potent or positive of itself to give them the right to inherit at all. These words were simply inserted in subdivision 4 to have it conform to subdivision 2 and make it consistent and harmonious with it. What the amendment to both these subdivisions amounted to is as to subdivision 2—that grandchildren and children of a deceased sister or brother may with a surviving brother or sister of a decedent inherit one-half the estate of a decedent with the surviving spouse, but only where there is a surviving brother or sister of the decedent who is entitled to do so. As to subdivision 4—that the surviving spouse shall inherit the whole estate when the decedent leaves "neither * * * brother, sister, nor the children or grandchildren of a deceased brother or sister." In other words, when the decedent spouse leaves none of those who, as enumerated therein, would be entitled to inherit one-half of it under subdivision 2, then the whole estate goes to the surviving spouse. It will be observed also that the only subdivision which gives brothers or sisters, children or grandchildren of a deceased brother or sister, in plain and direct language any right to inherit with a surviving spouse at all is this subdivision 2. Subdivision 4 does not pretend to confer any right of inheritance on any one save the surviving spouse, and then gives the whole estate to such survivor when none of the parties exist who under subdivision 2, re-enumerated in subdivision 4, would be entitled to take. It is necessarily understood when subdivision 4 declares that on the nonexistence of any of the different classes enumerated therein, the surviving spouse takes the whole estate, that what is meant is that none of the classes exist who, if left, would be capable of inheriting under subdivision 2. Anderson v. Potter, 5 Cal. 63. If the Legislature did not agree with the interpretation in the Ingram Case it took it many years—some 17—to enact something different with the result that instead of a clear and positive enactment as to inheritable rights, if that was the intended subject, we are still left to indulge in more construction and interpretation as to what was meant. Certainly, if it was intended to change the Ingram rule and establish a different rule of succession, it was not difficult for the Legislature to do so and do it in plain certain language in the proper place. If children and grandchildren were to inherit one-half with the surviving spouse, though no brothers or sisters survived the decedent, it could have easily and clearly said so in subdivision 2, where the inheritable rights of said persons are declared, and not left it to be construed through the use of negative, indirect, and obscure language inserted in subdivision 4, and which does not refer to succession or inheritance at all, and particularly where the only inheriting language used in said section is that conferring a positive inheritable right on the surviving spouse. I am satisfied that the enumeration in subdivision 4 of any of those who might not be entitled to take with the surviving spouse the one-half of the estate under subdivision 2 was made simply as a reason for granting or vesting the whole estate in such surviving spouse and as not affecting the change in the rules of succession declared in subdivision 2 and as construed in the Ingram Case.

The Estate of Claiborne, 158 Cal. 646, 112 Pac. 278, is not to be taken as authority questioning the rule of the Ingram Case. That case is not mentioned or discussed there, nor was the construction of subdivisions 2 and 4, or either of them, involved in that appeal. It could not be, as the question there was not one of succession on intestacy, but the construction of peculiar terms in a will. As far as the Estate of Ellen Nigro, 172 Cal. 474, 156 Pac. 1019, is concerned, while it did not involve the same question as here—the construction of subdivisions 2 and 4—it did involve the construction of subdivisions 2 and 3. In that construction the reasoning in the Ingram Case was applied and approved, and I do not perceive that the two cases present any radical difference between them in the language used as to inheritable rights.

I think the trial court was correct in holding that the appellants had no interest in the estate which entitled them to appear therein or to be heard on appeal to this court, and that the motions to dismiss their appeals should be granted.

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174 Cal. 672

REALTY DOCK & IMPROVEMENT CORP. v. ANDERSON et al. (S. F. 6833.)

(Supreme Court of California. March 20, 1917.)

1. Fixtures 🔑27(2) — Trade Fixtures — Rights of Lessor — Removal of Improvements—Statute.

Where a lease provided that all alterations, additions, and improvements to the premises by the lessee should become the property of the lessor, it is not material in determining the rights of the parties to a safety deposit vault constructed in the basement whether such vault was a trade fixture within Civ. Code, § 1019, giving the tenant the right to remove a trade fixture at any time before the termination of his lease if the removal could be effected without injury to the premises, unless the thing had by the manner in which it was affixed became an integral part of the premises, or whether the removal could be effected in the manner prescribed in that section, but the rights of the parties are to be governed solely by the provisions of the lease.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 5, 22, 44, 45, 54.]

2. LANDLORD AND TENANT 🔑157(2, 3) — LEASE—CONSTRUCTION—"IMPROVEMENT."

Within the provisions of a lease that no alterations, repairs, or changes should be made by the tenant except with consent of the lessor, and that all alterations, additions, and improvements made by the tenant should be the property of the lessor, a safety deposit vault built in accordance with the terms of the lease by the lessee, a bank, which consisted of a large room erected on the basement floor having substantial brick walls and a steel and concrete roof, all lined on both sides with steel plates, and having a steel door, became the property of the lessor, whether or not it was a trade fixture, since the term "improvement" is much more comprehensive than "fixture," and the bank commissioner was therefore liable to the lessor for removing the steel lining and the door from the vault.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 574, 575.

For other definitions, see Words and Phrases, First and Second Series, Improvement.]

Shaw, J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Realty Dock & Improvement Corporation against Alden Anderson and another. Judgment for defendants, and plaintiff appeals. Reversed.

Edgar C. Chapman, of San Francisco, for appellant. F. R. Sweasey, F. A. Cutler, and Gillett & Cutler, all of San Francisco, for respondents.

LORIGAN, J. In June, 1908, the Union State Bank, a banking corporation, leased and went into the occupancy of a portion of the Monadnock Building in San Francisco, under a ten-year lease from Herbert C. Law, its owner. In October, 1908, Law sold the property and assigned his interest in the lease given to him by the Union State Bank to the plaintiff. In July, 1909, the defendant Alden Anderson, as superintendent of banks of this state, declared the Union State Bank to be insolvent, took charge of its property, business, and banking premises, and with the assistance of his codefendant, S. P. Young, his deputy, removed all the personal property of the bank from the building as expeditiously as possible, at that time, among other things, removing, over the protest of the plaintiff, a steel door and the exterior and interior steel plate linings of a large safe deposit vault which, under the terms of its lease, the bank had constructed in the basement of the leased banking premises.

Plaintiff brought this action to recover damages from the defendants for the removal of said steel door and said exterior and interior steel lining of said vault, which it alleged were wrongfully removed. The court made findings and entered a judgment in favor of defendants, from which, and a denial of its motion for a new trial, plaintiff appeals.

The court found that by the terms of the lease made between the plaintiff and the Union State Bank the bank was leased a certain amount of space on the ground floor of the Monadnock Building for ordinary banking business, and also a large room in the basement immediately below the ground floor space; said basement room to be used for safe deposit vaults to be constructed in said basement for the customers of the bank; that the premises leased should not be used "for any other purposes than that of banking and safe deposit business without the written consent of the lessor." The lease further provided:

> "That said premises should not be altered, repaired, or changed without the written consent of the lessor, and that unless otherwise provided by written agreement all alterations, improvements, and changes should be done either by or under the direction of the lessor, but at the cost of the said lessee; that all alterations, additions, and improvements made in and to said premises should, unless otherwise provided by a written agreement, be the property of the lessor and should remain upon and be surrendered with the premises."

As to the construction of the brick vault: The court found that the bank upon entering into possession of the premises constructed a safe deposit vault in said basement; that said vault rested on the floor of said basement and was not connected with the walls of the basement or with the ceiling, and was approximately 20 feet wide by 30 feet long and between 8 and 9 feet high; the walls of said vault were 2 feet thick, made of brick, and lined inside and out with sheets of steel; the vault was provided with a steel door and steel paneling surrounding the door; within this vault the said Union State Bank placed safe deposit boxes for the use of its customers; that neither said vault, door, or paneling in it was imbedded or affixed to said building owned by plaintiff, nor attached or affixed to its walls or connected therewith, and formed no integral part of said building, and was not placed in the basement of said building or in said building as an "alteration, addition, or improvement" thereto, but was placed there for the purpose of trade as aforesaid, and not otherwise, and the same could be removed from said building and from said basement without causing any injury or damage thereto.

These matters are taken from the findings. But in addition to said findings, and showing more in detail all about the construction of said vault and the removal thereof, the following undisputed facts taken from the

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

record are referred to: The safe deposit vault was constructed by the bank under the provisions of the lease and as an essential aid to the proper conduct of its banking business, and was of such substantial character and strength and permanency of construction as to render safe and secure protection for the valuables of the depositors and of sufficient size to be convenient and commodious for them. This vault was built in a corner of the basement room, and one side and one end were set against said basement walls. These were not connected by cement or mortar with such basement walls, but were built up against and parallel therewith. The vault room was built up from the floor of said basement to the width, breadth and height as found by the court. The walls were 2 feet thick, built of brick; they were constructed from the cement floor of the basement, the brick being laid on the basement floor and affixed thereto by means of mortar mixed with cement. The roof of the vault did not reach the ceiling of the basement, but was constructed of 9-inch steel I beams, 18 feet long, laid close together across the vault walls and filled in with brick and cement. The reasonable cost of the construction of the vault brickwork was $800. The vault was lined inside and out with burnished steel casing; the outer steel casing being placed there solely for ornamental purposes. The steel of the ceiling of the vault was secured to the steel beams entering into its construction, and the inner and outside steel linings were screwed to the brick walls of the vault. The steel door and vestibule (one piece) was set in mortar and secured by flanges to the vault walls to hold it in place. This door and the inner and outer linings of the vault were of the reasonable value of $2,550. The defendants in dismantling the vault unscrewed the steel linings, inner and outer, from the walls of the ceiling, and broke away the plaster from around the steel door and vestibule and took them out. The taking out of the door left the brick walls about the door somewhat jagged and ragged on one side, but otherwise the brickwork of the walls was not injured. No attempt was made to remove any of the walls or ceilings of the vault save as we have indicated. In fact, the only portions taken were the door and vestibule and the inner and exterior steel linings. Otherwise the vault room was left intact. As to the vault room itself, as originally constructed and equipped and used by the bank, it was provided with safe deposit boxes on three sides, and with chairs, tables, and other accommodations for the patrons of the safe deposit department. When these defendants dismantled the vault in the manner described and took away the property in question they did so by breaking the sidewalk in front of the building and taking it out through the opening so made. This was the only way in which the articles could be removed.

It is insisted by the appellant that the finding of the trial court that neither the vault, nor door, nor panelings, when constructed, were affixed to the building owned by plaintiff and formed no integral part of the building leased, and were not placed in the basement of said building, or in said building, as an "alteration, addition, or improvement" thereto, is not sustained by the evidence. While this finding, as a whole, embraces several particular findings, we do not think it necessary to consider the attack of appellant upon all of them, because we are satisfied that its contention is correct as to the particular finding that this vault was not placed in said building as an "alteration, addition, or improvement" thereto, and it is upon the fact as to whether the construction of the vault did or did not constitute an "alteration, addition, or improvement" to the building that the rights of the parties in this action are to be determined.

[1] The theory of the respondents appears to be, and was doubtless that adopted by the trial court, that the construction of this vault in the manner and style described in the evidence constituted it simply a trade fixture which, under section 1019 of the Civil Code, the tenant had a right to remove at any time before the termination of his lease if the removal could be effected without injury to the premises unless the thing had by the manner in which it was affixed become an integral part of the premises. We do not think, however, as we have just said, that the finding of the court in as far as it determines that the vault is a trade fixture, and that it could be removed from the building without causing any injury thereto, is of any consequence. Nor do we think it of any moment in the consideration of this appeal whether the vault was imbedded in or affixed to the main building and had become an integral part thereof, except in so far as these matters may bear on what we consider the determinative question in the case, namely, whether its construction constituted an "alteration, addition, or improvement" in the premises which under the terms of the lease inured to the lessor. It is not a matter of controlling importance whether the vault as constructed was a permanent or a movable fixture. We are not here considering the rights arising by operation of law only between landlord and tenant as to the articles placed upon the leased premises by the latter. On the contrary, these rights are to be determined from the terms of the lease under which the parties undertook to fix them. The lease provided that no "alterations, repairs, or changes" should be made by the tenant except with the consent of the lessor, and that, as to them, provided that all "alterations, additions, and improvements"

should be the property of the lessor. This vault was built under the terms of the lease and with the consent of the lessor. Hence, the only question is, Did this construction of the vault result in an "alteration, addition, or improvement" to the premises leased? If it did not, the defendants, as representing the lessee, had a right to remove it as they did. If it did, then it belonged to the plaintiff and the defendants had no right to interfere with it.

[2] It appears to us as assuming rather an idle task if we were to discuss at length the question whether the character of this vault built by the bank did or did not constitute "an alteration, addition, and improvement" in the premises. It is, of course, quite apparent that the term "improvement" is comprehensive enough to embrace all additions or alterations which may be made by a tenant for the convenience of his business upon the premises. It is much more comprehensive than the word "fixture," and, while including these, includes also many things that may not be classed as fixtures. In fact, if force is to be given to a provision in a lease which provides that all "improvements" made in premises shall inure to the lessor, it is difficult to conceive of any subsequent addition, alteration, or repair to the premises during the tenancy which would not be embraced within the term "improvement." That the construction of this vault was intended to and did amount to all of these—an addition, alteration, and improvement—and was embraced within the terms of the lease, we think is evident. Certainly, a room covering a floor space of 20 feet wide by 30 feet long, with walls 8 feet high, made of solid brick 2 feet thick set in cement and mortar, and having a steel beam roof, sheathing inside and out with steel sheeting screwed in place, having a steel door and vestibule and the whole erected and adapted as a safety vault at an expense of over $3,000, is in the nature of things an alteration in the premises on which it is built, and in its solidity, permanency, and utility is certainly an addition and improvement to the premises. It certainly altered the basement of the premises to build it there, and was an addition and improvement in aid of the use of the premises for banking purposes for which they were rented and in aid of which use the building of the vault was contemplated and accomplished. This safety vault was not like an ordinary movable safe or a machine which might be temporarily housed in or which is constructed or fixed together in parts readily separable so as to permit of removal and reassembling at some other place. This vault as constructed had no removable identity. It lost its character as a safety vault as soon as it was taken apart. With the removal of the steel casings and the door the structure remained but brick and mortar, which, as one of the defendants testified, was of no use or value to the lessee, and in its then condition it could not be of particular value to the lessor. That as constructed in the manner and form described in the evidence it did constitute an "alteration, addition, and improvement" which passed to the owner of the leased premises when it was made is sustained by the authorities. French v. Mayor, etc., of the City of New York, 29 Barb. (N. Y.) 363; Parker v. Wulstein, 48 N. J. Eq. 94, 21 Atl. 623; Merritt v. Judd, 14 Cal. 59; Harris v. Kelly (Pa.) 13 Atl. 523; Wright v. La May, 155 Mich. 119, 118 N. W. 964; In re Rahls Ice Cream & Baking Co. (D. C.) 195 Fed. 986; Levin v. Improved Property Holding Co., 141 App. Div. 106, 125 N. Y. Supp. 963. In the French Case, supra, the court said:

> "The question in this case is not, what are fixtures which a tenant is at liberty to remove on the expiration of his lease, but, what did the lessees covenant with the lessors they would surrender and suffer to remain on the demised premises on the termination of the lease? The covenants of the lease are that on the last day of the term the lessees will surrender the demised premises, 'and all the improvements that may have been placed thereon by the said parties of the second part [the lessees], and which improvements are to belong to said parties of the first part [the lessors], and all of which are to be surrendered up in as good a state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.' * * *
>
> "The covenant is to surrender all the improvements that may have been placed thereon. Improvements clearly," in the lease here used, "embrace every addition, alteration, erection, or annexation made by the lessees during the demised term, to render the premises more available and profitable, or useful and convenient to them. It is a more comprehensive word than 'fixtures,' and necessarily includes it, and such additions as the law might not regard as fixtures. It would be difficult to select a more comprehensive word; and where the parties say all which may be placed upon the premises shall belong to the lessors, it is difficult to say what, if anything, would be excluded."

While the other authorities cited are to the same effect, attention is specially directed to Parker v. Wulstein, supra, for a more particular discussion of the subject.

The judgment and order appealed from are reversed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; HENSHAW, J.; SLOSS, J.; LAWLOR, J.

SHAW, J. (dissenting). I dissent. Under the terms of the lease and upon the facts as stated by Justice LORIGAN I am of the opinion that the safe deposit vaults, having been put in the basement solely to facilitate the banking business carried on by the tenant in the leased premises, and not forming any part of the premises leased, should not be deemed to be a part of the premises, or an "improvement" thereto within the meaning of the clause that all "improvements made in and to said premises" should go to the lessor. That clause should be held to refer to improvements to the premises as leased, not to a trade structure in no way affixed, except that it was set upon the floor of the basement. Neither the fact that it was not all removed nor the fact that it was a massive structure alters its character in law.

174 Cal. 679

In re MATHEWS.

ROUSE v. MATHEWS.

(S. F. 7673.)

(Supreme Court of California. March 22, 1917.)

GUARDIAN AND WARD 🔑10—RIGHT OF PARENT—"COMPETENT"—STATUTES.

Code Civ. Proc. § 1751, declaring that the parent of a child under age of 14, if found competent to discharge the duties of guardianship, is entitled in preference to any other person to be appointed guardian, controls Civ. Code, § 246, subd. 1, providing that in appointing a guardian the court is to be guided by what appears to be for the child's best interest in respect to its temporal, mental, and moral welfare, and if it is of age to form an intelligent preference, the court may consider that preference; so that the parent being "competent," that is, having the mental and moral qualifications, though lacking means, so that she may be compelled to seek state aid in the child's maintenance, must be appointed, irrespective of the child's intelligent preference, unless the parent has by abandonment, or act or omission enumerated in subdivision 4 forfeited right of guardianship.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 23–33.

For other definitions, see Words and Phrases, First and Second Series, Competent.]

Department 2. Appeal from Superior Court, Alameda County; William S. Wells, Judge.

Application for appointment of a guardian of Gerald Mathews, a minor. From decree denying petition of Warren A. Rouse, and appointing the minor's mother, petitioner appeals. Affirmed.

W. B. Rinehart, of Oakland (Charles M. Shortridge, of Oakland, of counsel), for appellant. James L. Nagle and Louis H. Ward, both of San Francisco (P. B. Nagle, of San Francisco, of counsel), for respondent.

HENSHAW, J. This is a second appeal in the matter of the guardianship of Gerald Mathews, a minor. The decision on the former appeal will be found reported in 169 Cal. at page 26, 145 Pac. 503. Upon that appeal this court, with the evidence before it, was called upon to review a finding of the trial court that the mother "is an unfit, incompetent, and improper person to have the care, custody, or control of her minor child." The holding was that the evidence so presented did not support this finding. Upon this present appeal there are tendered for our consideration findings in many respects different from the single finding which was under review in the previous appeal. The appellant rests his case upon these new findings, and insists that under them his petition for guardianship should have been granted and that of the mother denied. It becomes necessary then to set forth these findings, and it will be done as succinctly as possible.

Warren A. Rouse, the petitioner, is married, and is and for many years has been living with his wife, Carrie E. Rouse. To them and into their custody was given the minor when he was but 8 months of age. This was in October, 1906. The child is therefore now about 11 years of age. The father is and for many years has been dead. Ever since its reception into the home of the Rouses it has been treated by them in all respects as their child. There was no agreement entered into between the Rouses and the mother of the child at the time the former received it nor thereafter going to either its care or support, to the mother's contribution thereto, or to the duty of the Rouses to restore the child to the mother upon demand. But to the contrary, the mother has neither supported nor maintained the child during all of these years, nor has she provided for its support and maintenance, and she never has been "and is not now able to support and maintain her child." The Rouses have great affection for the child, and are in all respects fit, proper, and competent persons to have its care, custody, and control, and "it is for the best interest of said minor child, with respect to its temporal, mental, and moral welfare that he remain" in their custody. Upon examination the court finds: That the child is of sufficient age to form an intelligent preference in the matter of his custody, and that his preference is to remain in the care, custody, and control of the Rouses. During the time that they have had the child the mother has made small voluntary contributions toward its support, not exceeding in the aggregate the sum of $150. The mother "is not the proper person, in the judgment of this court, to have the care, custody, or control of said minor Gerald Mathews, but she is not incompetent, but is competent, to discharge the duties of guardianship." "That while said Annie Mathews, respondent, is not incompetent to discharge the duties of guardianship, yet considering her condition, her surroundings, and ability to care for said minor child, the court finds that the best interests of said minor child in respect to its temporal, mental, and moral welfare is that said child remain in the custody of the petitioner; and the affections of said minor child and its relationship to the petitioner have become fixed to the extent that said minor child has come to regard the petitioner and said Carrie E. Rouse as his parents, and that said Annie Mathews, the respondent, to that extent is practically a stranger to him."

No controlling law of the case was declared upon the former appeal. All that the court was there called upon to do and did was to review the evidence addressed to the finding of the incompetency of the mother to discharge the duties of guardianship, and the holding of this court, after a review of the evidence, was that the finding was not sustained. Upon the second trial the court made its findings with elaboration, which findings covered numerous probative matters, and together present, as they are designed to present, a survey of the whole situation. Also it is quite apparent that notwithstanding the influence and effect which the findings thus made may have upon the determination of the ultimate question of the competency of the mother, the court felt constrained by virtue of our former decision to find in terms that she was competent, while also finding that she was not the proper person to be appointed guardian.

We are now called upon, in the light of all of these other findings, to determine whether the denial of guardianship letters to the Rouses was made compulsory upon the court (as the court unquestionably deemed that it was made compulsory) by the finding of competency of the parent, coupled with the force of section 1751 of the Code of Civil Procedure, which declares that the father or the mother of a minor child under the age of 14 years, if found by the court "competent to discharge the duties of guardianship," is entitled to be appointed a guardian in preference to any other person. Elsewhere (Civ. Code, § 246) the law declares that the primary consideration by which the court is to be guided in the appointment of a general guardian is "what appears to be for the best interests of the child in respect to its temporal and its mental and its moral welfare; and if the child is of sufficient age to form an intelligent preference, the court may consider that preference in determining the question" (Civ. Code, § 246, subd. 1). If the language just quoted from section 1751 of the Code of Civil Procedure were not upon our books, it would leave as the controlling consideration the language from section 246 of the Civil Code just quoted, and as the findings distinctly and repeatedly declare not only that the best interests of the child demand its continued control under the Rouses, but as the child itself has expressed that preference, as furthermore the court has found that the mother, while competent, is not the proper person, while the Rouses are in all respects not only competent but fit and proper persons, no difficulty would be presented over the determination.

The difficulty arises from the declaration of section 1751 of the Code of Civil Procedure touching the parent's right, which declaration of necessity must be read and construed with the language of section 246 of the Civil Code.

In its last analysis, then, our question is, what is the meaning of the phrase "competent to discharge the duties of guardianship" as that language is employed in section 1751? "Competency" is a word of broad and varied application. Within the legitimate scope of its meaning as employed in the law, it embraces many attributes. Wealth alone does not establish competency any more than poverty alone establishes incompetency. Wealth and mental capacity together do not always establish competency, though, upon the other hand, lack of means and lack of mental capacity would clearly render a petitioner for guardianship letters incompetent. Wealth and ability may be found in a dissolute and even in a criminal life, and no court would award guardianship over a minor to such a dissolute or criminal person, even if he were found to be abundantly possessed of mental ability and financial means. Poverty alone of itself no more establishes incompetency than wealth alone establishes competency. No one would say that the state would or should deprive the natural parent of the custody of its child because dire poverty, which may strike any of us, had stricken that parent. To the contrary, the state, in recognition that poverty shall not be a ground for the severance of the relation of parent and child, has made provision itself to aid in the support of the children of the poor, the parents being expected to contribute only in accordance with their limited means. It is only when a parent has abandoned the child, or has been found disqualified for other reasons than poverty alone, that under our law the parental rights of guardianship are terminated and destroyed. Civ. Code, § 246, subd. 4.

The finding of competency in this case is a full finding of competency in all mental and moral respects. No question is presented of the unfitness of the mother for dissoluteness, immorality, unwillingness to labor, or for any other reason, saving as that competency so found is affected by her poverty. But touching this, as we have said, poverty itself, unless accompanied by an abandonment, or some other disqualification as above suggested, no one of which is here found, is not sufficient to justify the denial by a court of the preferential parental right declared in section 1751. Being competent, the mother is still entitled to the legal custody of this child which she has not abandoned, and to whose support she has contributed as her limited means would permit. Upon taking such custody she may still be compelled to seek state aid in its maintenance. But this is only a part of the cruel lot which too frequently falls on the very poor.

It is argued with great force that the trend of modern decisions is to regard as of primary importance the welfare of the minor himself. This is most true. The decisions to this effect are made either under the permission of the law, which contains no such restriction as that found in our section 1751, or else are given under the command of the law which, in effect, declares that over and above all else the controlling consideration shall be the welfare of the child. If we were thus at liberty to act, it might well be that the custody of this child, under the findings of the court, would be given to the Rouses. This is the injunction declared in our own law by subdivision 1 of section 246 of the Civil Code. But, as we have pointed out, unless the parent has for some reason (and no such reason is here found) forfeited his preferential right to the guardianship of his offspring, all considerations of the welfare of the child must, under our law, be regarded as subordinate to that right.

The decree appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

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32 Cal. App. 767

COLQUHOUN v. FURSMAN et al.

(Civ. 1951.)

(District Court of Appeal, First District, California. Feb. 10, 1917.)

1. SALES 🔑52(6)—ACTION FOR PRICE—PERSONS LIABLE—EVIDENCE—SUFFICIENCY.

Evidence *held* insufficient to show that goods sold to one individual were sold upon the credit and authority of defendants, so as to charge them with the purchase price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 138.]

2. APPEAL AND ERROR 🔑1011(1)—SCOPE OF REVIEW—FACT FINDINGS.

The discretion of the trial court in resolving conflicting evidence will not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988.]

3. JUDGMENT 🔑951(2)—EVIDENCE—ADMISSIBILITY.

In action for purchase price of goods against several individuals, where defendants pleaded that plaintiff had a prior judgment against other persons for the same goods, but did not set up such judgment as a bar, it was proper to admit evidence of such judgment, and on sufficient evidence to find the existence of such judgment, where the court did not find that it was a bar to the action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1808, 1810.]

4. PRINCIPAL AND AGENT 🔑121—AUTHORITY—EVIDENCE—ADMISSIBILITY.

In action for purchase price of goods sold to one person who assumed to act for others, it was proper to exclude testimony of such person as to the extent of his authority for the others.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 413–415.]

5. JUDGMENT 🔑282—TRIAL 🔑395(8)—SUBSEQUENT PROCEEDINGS — SIGNING — DEATH OF PARTY.

Action of court in signing findings and judgment after the death of one defendant in whose favor judgment ran was not an irregularity prejudicial to plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 554–556; Trial, Cent. Dig. § 934.]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by W. W. Colquhoun against H. C. Fursman and others. Judgment for defendants, and order denying motion for new trial, and plaintiff appeals. Affirmed.

Walter Slack and Joseph K. Hutchinson, both of San Francisco, for appellant. Clayberg & Whitmore, of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants in an action, brought by the plaintiff as assignee of a certain firm, to recover the sum of $750 as the reasonable value of certain goods, wares, and merchandise alleged to have been sold and delivered by said firm to said defendants as a copartnership and individually, and for which they had refused to pay.

The four defendants who were served with process and appeared herein denied that they were copartners, or that as such or individually they or either of them had purchased any wares or merchandise from plaintiff's assignor; and they also averred affirmatively that plaintiff had already recovered judgment against certain other persons on account of the sale to them of such goods. Upon the issues thus framed the cause went to trial, at the conclusion of which the trial court gave judgment in favor of the defendants. The court also denied the plaintiff's motion for a new trial on the ground of newly discovered evidence, and from such judgment and order the plaintiff appeals.

[1, 2] We find no merit in the first contention of the appellant that the evidence was insufficient to support the findings and judgment in defendant's favor. The evidence educed at the trial showed the following state of facts: In the month of October, 1910, one Henry E. Lee caused to be located 175 placer mining claims at Searles Lake in San Bernardino county. In so doing he used the names of the defendants in this action without their knowledge or authority. Subsequently, according to the testimony of said Lee, he procured from these defendants a ratification of his acts in using their names in making said locations, but upon the condition and understanding that none of said defendants should assume or be charged with any personal liability because of such locations, but that said Lee should care for the property, perfect the title, sell or work the said locations, and provide all funds necessary for such purposes without any personal liability on the part of the defendants. Subsequently, when certain assessment work was required to be done upon these locations, said Lee, in co-operation with Thomas W. Pack and T. O. Toland, proceeded to employ men and incur expense in doing such work, and in so doing purchased the goods,

wares, and merchandise from the assignor of the plaintiff, for the value of which this suit was brought.

Upon the trial of the action Lee was called as a witness for the plaintiff, and testified circumstantially to the foregoing state of facts. The evidence further disclosed that the assignor of plaintiff had no direct connection or communication with any of these defendants in respect of such transaction; but, on the contrary, showed that the goods were purchased by said Thomas W. Pack and were charged to him on the sellers' books. This evidence, if believed by the trial court, was sufficient to overthrow whatever inference the plaintiff sought to have drawn from the acts and conduct of the defendants in ratifying the action of said Lee and the use of their names in the making of the locations, and also in continuing to recognize said Lee as their agent in the doing of later acts and things in respect to such lands. The utmost that may be said with regard to the testimony in the case and to the inferences to be drawn therefrom is that a substantial conflict exists, which the trial court was justified in resolving in defendants' favor. Its discretion in that regard will not be reviewed upon this appeal.

The appellant criticizes the conclusions of the trial court as based upon an alleged implied finding that Lee was not the agent of the defendants in procuring the assessment work to be done upon these locations in the course of which these goods were bought, and which implied finding the appellant claims to be contrary to the undisputed evidence in the case. But we see no room or need for any implied finding in the premises, since the court expressly finds that the goods in question were never sold and delivered to the defendants herein. For the same reason a finding as to the reasonable value of the goods was unnecessary.

[3] The appellant further contends that the trial court erred in directing the judgment in favor of the defendants upon their affirmative plea that the plaintiff had recovered a prior judgment against said Pack and Lee. But the record does not show that the judgment of the court was based upon this plea as a plea in bar, but only discloses that the court found the fact of such prior judgment in response to the issue as to its existence raised by the pleadings. It was not, however, pleaded as a plea in bar, and was not found or declared to be such by the trial court. It thus appears that the court properly admitted evidence in support of such issue, and that its finding was correct, and that its judgment in the defendants' favor was not predicated upon such finding as a bar to the present action.

[4, 5] As to the other alleged errors of the court upon the admission or rejection of evidence during the trial, we have examined the voluminous record in the case, and are of the opinion that there is no prejudicial error in any of these rulings; that the court did not err in excluding the evidence of Lee, a witness for plaintiff, as to the scope and details of his agency for the defendants some considerable time after the alleged purchases were made; nor in refusing to admit in evidence as a whole the record and papers in certain actions commenced by said Lee on behalf of the defendants long after the transaction in question, and which record and papers the defendants personally never saw, and of which much was irrelevant and immaterial matter; nor in its other rulings not deserving of special mention; nor do we think that the court erred in refusing to grant the continuance sought by the plaintiff in order to allow certain depositions to be taken, no abuse of its discretion in that regard having been shown; nor was the action of the court in signing its findings and judgment after the death of one of the defendants, said judgment being in his favor, an irregularity by which the plaintiff would be injured or of which he would have the right upon this appeal to complain. We are also of the opinion that there is no manifest abuse of the large discretion with which the trial court was invested in the granting or refusing a new trial on the ground of newly discovered evidence which is cumulative in its character and effect.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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33 Cal. App. 5

GIDEON v. HOWARD et al. (Civ. 2197.)

(District Court of Appeal, Second District, California. Feb. 13, 1917. Rehearing Denied by Supreme Court April 12, 1917.)

1. MASTER AND SERVANT 🔑286(4)—INJURY—DEFECTIVE APPARATUS—NEGLIGENCE—QUESTION.

Evidence in an action for injury *held* sufficient to go to the jury on the question of negligence of the employer in furnishing a defective apparatus, a worn rope, for pulling away a board mold from around hardened concrete.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1011.]

2. PLEADING 🔑126 — ANSWER — NEGATIVE PREGNANT.

That the employers furnished the rope by which the employé was injured is admitted by their answer, denying only that they negligently furnished it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 261–263.]

3. MASTER AND SERVANT 🔑129(1)—INJURY—PROXIMATE CAUSE.

The breaking of a rope furnished by the employer, precipitating against a stump an employé using it, and not the stump, was the proximate cause of his injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 257.]

Appeal from the Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by O. P. Gideon against P. A. Howard and another, partners as the Howard Bros. Construction Company. From an order denying motion for new trial, plaintiff appeals. Reversed.

Miller & Miller and E. B. Drake, all of Los Angeles, for appellant. Flint, Gray & Barker, Gray, Barker & Bowen, and Wheaton A. Gray, all of Los Angeles, for respondents.

SHAW, J. In this action plaintiff sought to recover damages for personal injuries alleged to have resulted from the negligence of defendants as copartners. At the close of the evidence, defendants offering none, the court, at their request, instructed the jury to render a verdict for defendants, which being done, judgment followed in accordance therewith. The appeal is from an order of court denying plaintiff's motion for a new trial. The question presented is one of law as to whether or not there was any substantial evidence as to facts determinative of the case upon which the jury could have properly found for plaintiff.

The evidence tends to establish the following facts: Plaintiff was an employé of defendants, who were contractors engaged in the erection of a bridge, in the construction of which wooden molds or forms were made, into which concrete was deposited, and after it set and hardened these molds or forms were detached therefrom. As such employé, plaintiff, with others, not only worked as a carpenter in making and installing these forms, but in detaching them from the hardened concrete walls by various means, among which was that of attaching thereto ropes provided by defendants and pulling them loose by hand. At the time in question, when plaintiff sustained the injuries of which he complains, two men had thus, for the purpose of removing one of the molds, attached a rope thereto, and, being unsuccessful in breaking it away, called upon plaintiff and another, who were at work on the bridge, to aid them in pulling it away. They responded, and their united strength applied in pulling upon the rope caused it to break, as a result of which plaintiff, with the others, all of whom were at the time on the ground, was precipitated backwards into a depression some 18 inches deep to a point 10 or 12 feet distant, where he fell upon a stump, the others falling upon him, and, in some way undisclosed by the record, was injured. The rope was five-eighths or three-fourths inch in size and about 45 feet in length. Some three or four days prior to the accident, plaintiff, while using this rope on a scaffold some 40 feet from the ground, discovered that it was badly worn, weakened and cut, for which reason he removed it from the swing he was working on, came down and informed Mr. Crump, the superintendent in charge of construction, of its condition, telling him that the rope was "not fit to work on," and threw it upon the ground under an abutment of the bridge, from which place his coemployé, when requiring a rope for use in detaching the mold, secured and used it for the purposes aforesaid, which fact, however, was unknown to plaintiff until after the accident.

[1-3] At the time in question a statute then in force (Stats. 1911, p. 796) provided that in actions by employés to recover for personal injuries based upon want of reasonable care of the employer, contributory negligence of the employé should not bar a recovery where such negligence was slight, and that of the employer, by comparison, gross; nor, as provided by the same statute, did the fact that the employé assumed the risk, or that the injury was due to the negligence of a coemployé, constitute a bar to his recovery. Since, therefore, negligence on the part of the plaintiff or that of a fellow servant is not involved, the sole question presented by the record is whether or not there was any substantial evidence introduced from which the jury might have found that defendants were guilty of negligence in furnishing a defective rope for plaintiff's use in pulling away the concrete mold. Not only did the evidence tend to show that the rope was supplied by defendants, but such fact is admitted by the answer, which denied only that they negligently furnished the same. The proximate cause of the injury was the breaking of the rope used by plaintiff, which use was within the scope of his employment. It was the duty of defendants to exercise reasonable care to provide their employés with safe appliances in the performance of the work required of them, and under the facts here presented the rope was an appliance which the evidence tends to show was, with defendants' knowledge, worn and weakened to an extent that rendered it unsafe for the purpose.

There is no merit in respondents' contention that the stump upon which plaintiff fell, and not the breaking of the rope, was the proximate cause of the injury. It is reasonably certain that but for the breaking of the rope plaintiff would not have fallen backward upon the stump, and his coemployés would not have fallen upon him. But it may be that falling upon the stump contributed nothing toward his injuries; the record is silent upon that point. It might with equal logic be claimed that where a defective cable, used in hoisting one to the top of a building, breaks, precipitating him upon a pile of stone underneath, the pile of stone, and not the breaking of the cable, was the proximate cause of his injury.

It is further claimed that the circumstances were such that the defendants could not reasonably have anticipated an injury resulting from the breaking of the rope. This and the question as to whether or not the injury sustained by plaintiff was due to causes which men in defendants' position could in the exercise of ordinary prudence reasonably have foreseen and guarded against, are matters which, in our opinion, should, upon the record presented, have been submitted to the jury.

The order denying plaintiff's motion for a new trial is reversed.

We concur: CONREY, P. J.; JAMES, J.

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32 Cal. App. 727

PEOPLE v. PRIETZ. (Cr. 656.)

(District Court of Appeal, First District, California. Feb. 7, 1917.)

1. Criminal Law 🔑1168(2)—Appeal and Error—Admission of Evidence—Harmless Error.

In prosecution for rape, where the prosecuting witness' story lay near the border line of incredibility, any error in admitting or rejecting material evidence will amount to prejudicial error, particularly where such evidence had a direct bearing upon the main issue and upon the degree of credit to be accorded to the prosecuting witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3124, 3124½, 3129–3136.]

2. Rape 🔑48(1)—Admission of Evidence—Complainant's Statement to Third Persons.

Permitting prosecuting witness, in a prosecution for rape, to testify to statements made by her to a third party as to treatment she had suffered was reversible error, where her story was close to the border line of incredibility, and where the prosecuting attorney had called the jury's attention to such statements in his opening.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 67.]

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Robert Prietz was convicted of rape, and appeals. Reversed.

A. F. St. Sure, of Alameda, and J. Leonard Rose, of Oakland, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LENNON, P. J. This is an appeal from a judgment of conviction of the defendant upon a charge of rape alleged to have been committed upon his daughter at the time of the age of 15 years.

The record is voluminous, and presents a state of facts which it would subserve no worthy or useful purpose to reproduce in their disgusting and sordid details here. The appellant's first contention is that the story of the prosecuting witness as recited upon the trial of the cause is so inherently improbable as to require a reversal of the verdict and judgment of conviction based upon it. While there is much force in this suggestion, and while there was also much in the prosecution of the case as disclosed by the record which does not commend itself to us, we are unable to say from a careful consideration of the entire record that the testimony educed on behalf of the people is on the whole insufficient to support the verdict by reason of its inherent improbability.

[1] While, however, this is our conclusion as to the facts of the case, we are of the opinion that this is one of those cases wherein any error of the trial court in the admission or rejection of material evidence would amount to prejudicial error, particularly where the evidence thus erroneously admitted or excluded had a direct bearing upon the main issue in the case and upon the degree of credit to be accorded to the prosecuting witness therein.

[2] This brings us to the appellant's second contention, which is that the trial court erred in its rulings upon the admission of certain statements made by the prosecuting witness to another of the principal witnesses for the prosecution respecting complaints which the prosecuting witness claimed to have made with regard to her father's treatment of her. While upon the witness stand the prosecuting witness was asked the following question:

> "Q. You stated to Miss Delmar that your father had committed many acts of sexual intercourse upon you, did you not?"

Aside from the leading and improper form of this question, to which the defendant did not urge this specific objection, his other proper objections to it were overruled by the court, and the witness was permitted to answer the question affirmatively. The question and answer thus permitted responded to the proffer of proof made by the prosecuting attorney in his opening statement to the jury, wherein he said, "She finally confessed to Mrs. Margaret Delmar what had been done to her all this time," and would thus be given an added impression and influence upon the jurors' minds. We are unable to distinguish the foregoing question and ruling from the question and ruling which led to the reversal of the case of People v. Wilmot, 139 Cal. 103–107, 72 Pac. 838, wherein the obnoxious question was in the following form:

> "Q. Did she say whether or not this defendant had had sexual intercourse with her?"

The trial court permitted this question to be answered, and the Supreme Court reversed the case upon that sole ground, holding that the testimony elicited was clearly incompetent, and that it must have substantially affected the defendant's case.

In a case lying as close to the border line of incredibility as does the present one we think the error of the trial court in permitting the foregoing question to be answered was prejudicial to a degree which requires a reversal of the case.

Judgment and order reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

33 Cal. App. 1

ELLSWORTH v. NATIONAL HOME & TOWN BUILDERS. (Civ. 2204.)

(District Court of Appeal, Second District, California. Feb. 13, 1917.)

1. Corporations 🔑99(2)—Sales of Stock—Consideration.

Corporation stock issued in return for valuable services rendered and labor performed on behalf of the corporation is not issued without consideration.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 445.]

2. Corporations 🔑193—Meeting of Stockholders—Place—Validity of Acts.

Though the by-laws provided that the stockholders' meetings should be held in Phœnix, Ariz., the acts of stockholders and of the directors elected by them at a meeting in Los Angeles, Cal., to which all the stockholders consented, and notice of which they waived, were valid; the officers serving under such election being de facto.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 733.]

3. Corporations 🔑130—Transfer of Stock on Books—Right to Transfer.

The mere fact that certain stock was named in a pooling agreement which was never consummated would not prevent its transfer on the books to the holder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 488, 489.]

4. Corporations 🔑133—Transfer of Stock—Refusal of Corporation to Make—Evidence—Admissibility.

In action by a purchaser of corporation stock for refusal to transfer it on the books, evidence of the consideration paid by her was inadmissible.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 513–520.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by Lucie E. Ellsworth against the National Home and Town Builders. Judgment for plaintiff and order denying motion for new trial, and defendant appeals. Affirmed.

Gray, Barker & Bowen and Flint, Gray & Barker, all of Los Angeles, for appellant. S. L. Carpenter, of Los Angeles, for respondent.

SHAW, J. This action to recover damages for conversion is based upon defendant's refusal to transfer to plaintiff certain shares of its capital stock, evidenced by a duly indorsed certificate, No. 167, which the latter had acquired from one J. F. Clark, to whom the defendant corporation had theretofore issued the stock. Judgment went for plaintiff, from which, and an order denying its motion for a new trial, defendant appeals.

[1] As grounds for reversal, appellant claims: (1) That the stock was issued without consideration; (2) that the issuance thereof was unauthorized by the corporation; (3) that at the time when plaintiff demanded the making of the transfer, another party, with defendant's knowledge, held an option from plaintiff's assignor for the purchase of the stock, which fact was also known to plaintiff; (4) that a transfer of the stock would be in violation of a pooling agreement to which appellant was a party, the existence of which was known to plaintiff; and (5) that plaintiff paid no consideration for the stock.

First. There is no merit in the first contention, since the uncontradicted record shows that the stock was issued by the corporation to Clark in consideration of valuable services rendered and labor performed by him for and on behalf of the corporation.

[2] Second. The contention that the issuance of the stock to Clark was illegal is based chiefly upon the fact that defendant was a corporation created under the laws of the state of Arizona; that the by-laws of the company provided that all meetings of stockholders, whether regular or special, should, upon notice as therein prescribed, be held in Phœnix, Ariz., whereas the board of directors which authorized the issuance of the stock to Clark was elected at a special meeting of the stockholders held, without notice given as provided in the by-laws, in the city of Los Angeles, Cal.—all of which facts appear to be true. But it is likewise true that the holders of all of the outstanding stock, in writing consented to the holding of such meeting in the city of Los Angeles, and waived notice thereof, and that at the meeting so convened pursuant to such written consent, all of the stock of said corporation then issued was represented at said meeting and participated in the election of members of the board, each and all of whom received the unanimous vote of all the stock so represented. The board of directors so elected organized by electing officers, and in transacting the business of the corporation, assumed to and did act as the duly constituted board of directors of the company. Appellant insists that, by reason of the stockholders' meeting being held outside of Arizona, contrary to the by-laws of the company, such meeting and all proceedings there had were without right or authority, and hence wholly void. We cannot assent to this contention. It may be conceded that in a proper proceeding the members of the board so elected might have been ousted from office (State v. Cronan, 23 Nev. 437, 49 Pac. 41) but they were nevertheless, so long as they continued to act as the duly constituted board, de facto officers (San Joaquin L. & W. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349; Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594), the validity of whose acts is not subject to attack in an action of the character of that here involved (San Jose Sav. Bank v. Sierra Lumber Co., 63 Cal. 179; 2 Cook on Corporations [6th Ed.] § 623). Meetings held in violation of charter provisions have been held void. Mr. Cook in his work on Corporations (6th Ed.) § 589, in discussing such authorities, says:

"It is the sounder view to regard the votes and proceedings at such a meeting as voidable rather than void. The corporation itself cannot allege that such proceedings are void. It is estopped from so doing. So, also, are the stockholders who participated in the meeting."

To the same effect see Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; Heath v. Silverthorn Lead, etc., Co., 39 Wis. 146; Thompson on Corporations, § 814. The stockholders' meeting in question, so far as disclosed by the record, was not in violation of any provision of the charter, but contrary to the by-laws which had been adopted by the stockholders. Neither the corporation nor the stockholders all of whom, as stated, were present and united in the election of this board of directors by unanimous vote of all the outstanding stock, as against plaintiff, who acquired the certificate in usual course, are in any position to assert as void the act of the board in issuing the stock to her vendor.

Third. Appellant offered in evidence a document signed by J. F. Clark, E. E. Ragsdale and one Joseph P. Smith, whereby Clark and Ragsdale agreed that Smith should have an option for a period of 12 months from August 5, 1911, to purchase from said Clark and Ragsdale 200,000 shares of the capital stock of appellant corporation for the sum of $2,000, to the introduction of which plaintiff's objection was sustained. No error is predicated upon this ruling. Waiving such omission, we perceive no error in the ruling for the reasons: First, that the agreement appears to have been made without any consideration therefor; and, second, there is nothing in the agreement showing that it had reference to the stock evidenced by certificate No. 167, issued to Clark long after the making of said agreement. We cannot assume that the 50,000 shares of stock so purchased by plaintiff was in violation of this agreement made by Ragsdale and Clark, or if Smith exercised the option they would not deliver to him the stock as agreed. There was no error in the ruling of the court in excluding from evidence this document.

[3] Fourth. It is next claimed that the stock in question so owned by Clark was subject to a pooling agreement signed by Clark. It is true a document was offered in evidence to which the signature of Clark was attached, providing that the stock and the certificates evidencing the same, owned by the signers thereof, should be deposited with ———, as trustee. Such pooling agreement, however, was never consummated, and the evidence clearly shows that certificate No. 167 was at all times, up to the time when he delivered same to the plaintiff herein, in the control and custody of Clark. There is no evidence of any circumstance that justified or excused the corporation for refusing to transfer the stock on demand of the plaintiff, and hence the cases of Jennings v. Bank of California, 79 Cal. 323, 21 Pac. 852, 5 L. R. A. 233, 12 Am. St. Rep. 145, and Young v. New Standard, etc., Co., 148 Cal. 306, 83 Pac. 28, have no application to the facts here presented.

[4] Fifth. It must follow from what has been here said that whether or not plaintiff paid any consideration for the stock was no concern of appellant, and hence it was not error for the court to exclude any evidence as to the consideration paid therefor.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

32 Cal. App. 729

REDMOND v. McLEAN et al. (Civ. 2207.)

(District Court of Appeal, Second District, California. Feb. 7, 1917.)

1. Quieting Title 🔑44(3) — Evidence — Prima Facie Case.

In an action to quiet title, evidence, consisting of plaintiff's testimony that at the commencement of the action he was and for a long time prior thereto had been in possession of the lot described in the complaint as delineated upon a map under and by virtue of a deed referred to conveying the lot described in the complaint to him, was sufficient as a prima facie showing to establish plaintiff's right as against defendant to a decree quieting his title to the lot so described.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 91.]

2. Quieting Title 🔑44(5) — Evidence — Sufficiency.

Evidence *held* to justify a finding that plaintiff was at the time of the commencement of the trial in possession of the lot described in the complaint, and was the owner thereof and entitled to a decree quieting his title thereto.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 92.]

3. Quieting Title 🔑47(2)—Findings—Conformity to Issues.

As no issue as to the location of the boundary lines and dimensions of the lot was tendered by the complaint, and there was nothing in the answer enlarging the scope of the complaint, a finding of the court which purports to locate the lot upon the ground and fix the dimensions thereof should be disregarded as a finding of fact not in issue or presented by the pleadings, and, being so disregarded, that part of the decree based upon such finding should be stricken.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 97.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action to quiet title by John E. Redmond against Mrs. Della McLean and others. From a judgment for plaintiff, and an order denying a motion for a new trial, the named defendant appeals. Judgment modified, as modified affirmed, and order denying motion for new trial affirmed.

Olin Wellborn, Jr., and Alfred H. McAdoo, both of Los Angeles, for appellant. Edward Dietrich, Dietrich & Kidder, and Smith, Miller & Phelps, all of Los Angeles, for respondents.

SHAW, J. Action to quiet title, the complaint being in the usual form and alleging that plaintiff was the owner and in possession of lot 31, block 2, of the Golden Bay tract, as per map recorded in book 2, page 15, of maps, Los Angeles county, Cal.; that defendant, without right, claimed an estate or interest therein adverse to plaintiff. Defendant Della McLean, the appellant, answered, denying that the plaintiff was the owner or in possession of the lot described in the complaint; and, as a further defense, asserted that she was the owner in fee simple of the easterly 4 feet of said lot 31, but asked no affirmative relief. At the trial, judgment went for plaintiff, from which, and an order denying her motion for a new trial, defendant McLean appeals.

[1, 2] The sole question at issue upon the pleadings was whether plaintiff was at the time of commencing the action the owner and in possession of all or any part of the lot described in his complaint as lot 31, block 2, as delineated upon the map referred to. At the trial plaintiff, in support of his claim, testified that at the commencement of the action he was, and for a long time prior thereto had been, in possession of said lot 31, as delineated upon said map, under and by virtue of a deed whereby the grantors therein, describing the lot as in the complaint, conveyed the same to him. This evidence, uncontradicted, was sufficient as a prima facie showing to establish plaintiff's right as against defendant to a decree quieting his title to the lot so described. Davis v. Crump, 162 Cal. 513, 123 Pac. 294; De Noon v. Morrison, 83 Cal. 163, 23 Pac. 374. In opposition to the case so made by plaintiff, defendant conceded that plaintiff, under the deed, was in possession of all of said lot, except a strip of 4 feet on the easterly side thereof, which defendant claimed to be in possession of by virtue of an agreement fixing the boundary line between the lots. Aside from any conflict in the testimony touching the question of possession, the evidence offered by defendant was wholly insufficient to establish any agreement fixing the boundary line. While both parties had caused surveys to be made and the surveyors had agreed upon a line, there is no evidence that plaintiff ever acquiesced in the line so established by these surveyors. There is some meager evidence as to a fence, erected by somebody undisclosed by the record; but it is not made to appear that the fence was erected in accordance with any agreement between plaintiff and defendant, nor is it shown at what time the fence was erected; indeed, from aught that appears to the contrary, it may have been erected the day before the trial. Upon the state of the record here presented, the court was fully justified in finding that plaintiff was at the time of the commencement of the trial in possession of the lot described in the complaint, and was the owner thereof and entitled to a decree quieting his title thereto.

[3] Had the court contented itself with such finding and decreed in accordance therewith, no just cause for complaint would have existed. As stated, the action was one to quiet title. Notwithstanding this fact, the court, over objections of defendant that such question was not in issue, permitted evidence to be introduced under which it not only quieted plaintiff's title, but fixed the location of the boundary lines, and dimension of the lot. No issue was tendered by the complaint under which, had defendant suffered default or filed a disclaimer, the court would be justified in making a decree establishing the size and boundary lines of the lot; nor is there anything in the answer that enlarged the scope of the complaint. Nevertheless, by its judgment, the court found and decreed that said lot so described in the complaint as lot 31, block 2, of the Golden Bay tract, as delineated upon the map therein referred to, was located at a point—

> "beginning at a point 460 feet east from the center line of an alley known as the Speedway on the southerly line of Ozone street, continuing thence along said southerly line of Ozone street a distance of 30 feet east, continuing thence in a southerly direction to a point distant 490 feet from the center of said Speedway along the northerly line of an alley between Ozone and Rose streets, and continuing along said northerly line in a westerly direction a distance of 30 feet to a point distant 460 feet from the center line of aforesaid Speedway along the northerly line of said alley, thence in a northerly direction to a point in the southerly line of Ozone street 460 feet from the center line of Speedway, being the point and beginning."

Not only was the question of the dimensions and location of the lot not involved, but we are unable to find any evidence in the confused and jumbled record presented which sustains the finding of the court as to the location of the boundary lines of the lot.

That part of the finding which purports to locate the lot upon the ground and fix the dimensions thereof should be disregarded as a finding of fact not in issue or presented by the pleadings. Thus disregarded, that part of the decree herein quoted and following the language of said finding is without support, and hence should be stricken from the decree.

The judgment is therefore modified by striking therefrom that portion commencing with the words, "beginning at a point 460 feet," and ending with the words, "being the point of beginning." As thus modified, the judgment is affirmed, and hence no reason exists for granting appellant's motion for a new trial, and the order denying said motion is likewise affirmed; appellant to recover her costs on this appeal.

We concur: CONREY, P. J.; JAMES, J.

32 Cal. App. 706

EGAN v. DODD. (Civ. 1872.)

(District Court of Appeal, First District, California. Feb. 6, 1917.)

1. Landlord and Tenant ⟹152(4) — Repairs—Lessee's Duty.

A lease providing that the lessee will not call upon the lessor for repairs and will surrender premises in good order less reasonable use casts upon the lessee the burden of making repairs necessary to make the building safe.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 541–543.]

2. Landlord and Tenant ⟹101—Repairs—Statute.

Civ. Code, § 1932, providing that the hirer of a thing may terminate the hiring when the greater part of the thing hired perishes, etc., is inapplicable to a lease which requires the lessee to make the repairs.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 314, 315.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by J. H. Egan against Fred Dodd. Judgment for plaintiff, and defendant appeals. Reversed.

Geo. Cosgrave, of Fresno, for appellant. Short & Sutherland, of Fresno, for respondent.

KERRIGAN, J. The plaintiff commenced this suit to recover from the defendant a balance alleged to be due for laundry work. The defendant answered, and also set up a counterclaim, in which he alleged that the plaintiff was indebted to him for the rent of premises situate in the city of Fresno, and held by plaintiff under two leases from the defendant. The judgment of the court was in favor of the plaintiff and that the defendant take nothing by his counterclaim. Defendant appeals.

The question presented for determination is as to whether or not the plaintiff was entitled under the circumstances of the case to abandon the premises held under said leases, and thereby terminate them, and calls for a construction of the provisions of the leases relating to the obligation to keep the premises in repair.

Concerning the lessee's obligation to repair, the lease of what is called the main building provides:

> "The lessee also agrees that the lessor shall not be called upon to make any repairs or improvements whatever in said leased premises during the term of this lease, or any renewal thereof, and that he will at all times and at his own cost and expense keep said premises in good order, repair and condition, provided, however, that the lessor agrees to install" (here follows an enumeration of certain improvements agreed to be made by the lessor, and a provision imposing on the lessor the repair of the roof of the building, but which are not involved in the present controversy).

The other lease, covering a portion of the second floor of the building, contains the following covenant on the part of the lessee:

> "That he will not call upon the lessor for any repairs, alterations, or maintenance during said term."

Both leases contain the additional covenant on the part of the lessee to the effect that:

> "He will surrender and yield up possession to the lessor all in good order and repair as the same is received by him, reasonable use and wear thereof and damages by the elements alone excepted."

It appears that in December, 1913, two years before the plaintiff vacated the premises, the city engineer of the city of Fresno served a notice upon the defendant as owner of the leased premises, declaring the building to be dangerous in certain specified particulars, and requiring its demolition within 60 days thereafter. Following the receipt of this notice defendant, under the provisions of the city building ordinance, demanded an arbitration to determine whether or not the building could be repaired and rendered safe under the ordinance. The matter was submitted to arbitration in the manner provided in the ordinance; and in their report made to the city engineer the arbitrators agreed "that there is no necessity whatever for taking down any portion of the building," but reported that certain repairs were necessary and should be made. Upon receipt of a copy of the arbitrators' report defendant at once wrote plaintiff advising him of the requirements of the arbitrators as to repairing the building, and, referring to the covenants of the lease regarding the lessee's obligation to repair, notified him to make at once the repairs required. Those repairs were not made. Subsequently, and during the life of the lease, a portion of one of the walls of the building collapsed owing to an excavation made into the adjoining land in the course of building operations thereon; whereupon and almost immediately the defendant, although insisting that he was under no obligation to do so, commenced to repair the wall, saying that he felt under all of the circumstances of the case that perhaps it would be asking too much of the tenant to make this particular repair. Nevertheless the plaintiff, without notice to the defendant, abandoned the premises, and moved into a building which he had recently caused to be erected.

[1] The covenants to repair above set out bound the tenant, we think, under the general rule adopted in this state, to make the repairs, and he was not entitled because of the condition of the building to vacate the premises. The effect of such covenants is thus stated by Tiffany, in his work on Landlord and Tenant, at section 116 (d):

> "An express covenant by the tenant to repair or keep in repair binds him to repair, although the injury were accidental and in no way caused by his negligence. The express covenant to repair binds the covenanter to make good any injury which human power can remedy, even if

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

caused by storm, flood, fire, inevitable accident, or act of a stranger. * * * There are dicta and perhaps one decision to the effect that the tenant is not bound to rebuild in case of such destruction by the act of God or of destruction by the public enemy. Such a view can be supported only on the theory that the covenant to repair, in view of the circumstances under which it was made, is not in the particular case to be construed as extending to injuries so caused, and the authorities show that such a limited construction is not ordinarily placed upon the covenant. The tenant is liable, under the covenant to repair, in case the premises are injured by third persons, or even if the premises fall on account of defects existing therein at the time of the lease."

To the same effect is Taylor on Landlord and Tenant (9th Ed.) § 364.

Our own Supreme Court, stating the effect of a general covenant to repair in the case of Polack v. Pioche, 35 Cal. 416, 422, 95 Am. Dec. 115, used the following language:

> "If the tenant desires to relieve himself from [damages] resulting from any of the causes above enumerated, or from any other cause whatever, he must take care to except them from the operation of his covenant."

In a Texas case in many respects like the one at bar the lease contained the following covenant:

> "It is expressly agreed and understood that the said Martinez [the tenant] shall himself bear all the expenses of repairing or improving the premises hereby leased him during his occupancy of same."

There also the only exception to the lessee's obligation was a covenant on the part of the lessor to make needed repairs to the roof. The building had been condemned by the municipal authorities of Dallas and ordered demolished. Subsequently a resolution was passed by the city council ordering the building to be repaired under the direction of the city engineer. The tenant refused to make the repairs, and they were made at the expense of the landlord, who brought suit to recover the amount expended by him. The court, holding that the landlord was entitled to recover the cost of the repairs, used the following language:

> "The contract shows that defendant obligated himself to bear all expenses of repairing or improving the property during his occupancy. * * * This would obligate him to bear the expenses of everything falling within the meaning of repairs or improvements necessary during the term, except as by the other provisions of the contract he may have been released from such liability. * * * The work which Thompson caused to be done was for the purpose of restoring the house to a sound state or a safe condition, and this was the repairing, the expense of which the defendant promised to pay." Martinez v. Thompson, 80 Tex. 568, 16 S. W. 334.

To the same effect is Markham v. David Stevenson, etc., Co., 104 App. Div. 420, 93 N. Y. Supp. 684.

In the case in New York the obligation of the tenant was held to extend even to the repair of dilapidations caused by defects in the construction of the building. In that case the lessee covenanted "to make such improvements as he might require, also make all necessary repairs and to keep the same in tenantable order at his own cost." There, as here, the lessee abandoned the premises, claiming that the same had become untenantable because of the settling of the rear wall owing to the original defective construction of the foundation. The court, sustaining the right of the landlord to recover the money expended by him in making certain repairs, held that:

> "As the covenant was absolute to make all necessary repairs and keep the premises in tenantable order, and no fraud on the part of the landlord having been shown, defendant was bound to make the repairs irrespective of the cause of the defect, and defendant having abandoned the premises without making the repairs the landlord had a right to make them and recover the expenses." Lockrow v. Horgan, 58 N. Y. 635.

[2] Section 1932 of the Civil Code has no application to the facts of this case. That section provides:

> "The hirer of a thing may terminate the hiring before the end of the term agreed upon * * * when the greater part of the thing hired, or that part which was and which the latter had at the time of the hiring reason to believe was the material inducement to the hirer to enter into the contract, perishes from any other cause than the want of ordinary care of the hirer."

That section is not applicable to a case where the lease itself expressly provides who shall make the repairs; and even if it could be held that this section does apply, the evidence wholly fails to show that the greater part of the thing hired, or that part which was the material inducement to the hirer, was destroyed. We think, therefore, that from no aspect of the case was the tenant relieved from the obligation to pay the agreed rent.

The judgment is reversed.

We concur: LENNON, P. J.; RICHARDS, J.

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38 Cal. App. 23

PEOPLE v. GILBRETH. (Cr. 527.)

(District Court of Appeal, Second District, California. Feb. 14, 1917.)

CRIMINAL LAW ⟹913(1)—TIME FOR ENTRY OF JUDGMENT—RIGHT TO NEW TRIAL—STATUTE.

As the provisions of Pen. Code, § 1191, providing that after a verdict of guilty the court must appoint a time for judgment not more than 2 nor less than 5 days after verdict, and that the court may extend the time not more than 20 days, where the question of probation is concerned, are mandatory, in view of section 1202, requiring judgment to be pronounced on day appointed or to which it is continued under section 1191, and if not rendered within the time fixed the defendant shall be entitled to a new trial, in a prosecution for embezzlement where, after verdict of guilty, plaintiff made oral application for release on probation, and the time for hearing this application and for pronouncing judgment was extended several times, until the court finally denied the application for probation, and entered judgment 33 days after the date of conviction, defendant was entitled to a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2137–2139, 2141, 2142, 2145.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

George W. Gilbreth was convicted of embezzlement, and his motion for a new trial denied, and he appeals. Judgment and order reversed.

A. A. Sturges and Waldo, Root & Dysert, all of Los Angeles (G. E. Waldo, of Los Angeles, of counsel), for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. The defendant, by verdict of the jury returned on the 14th day of September, 1916, was found guilty of the crime of embezzlement, a felony. He made oral application for release on probation, and the court, without request or consent of the defendant, fixed the time for hearing of this application and for pronouncing judgment at September 28, 1916. On September 28th, at the request of defendant, time was extended to October 5th. Another extension was made from October 5th to October 10th, at the request of defendant. On October 10th, however, without the request of defendant, time was extended to October 17th, which was 33 days after the date of conviction. The court at the latter time denied the application for probation, and the defendant then made his motion for a new trial, the principal ground being that, under the provisions of sections 1191 and 1202 of the Penal Code, the court had no jurisdiction to pronounce judgment. Sentence being pronounced, this appeal was taken from the judgment and from the order denying the application for a new trial.

The requirement of the provisions of section 1191 of the Penal Code, which limit the time for the pronouncing of judgment after conviction, has been before this court and the District Court of Appeal for the First District heretofore. These provisions have been construed to be mandatory in effect and designed to produce speedy determination of criminal proceedings in the trial court. We refer to the cases of People v. Winner, 160 Pac. 689, and People v. Boling, 161 Pac. 1169. The views of this court as declared in the decision first mentioned are in harmony with those which find place in the opinion in the Boling Case, which was decided in the First District. In the Boling Case there was a petition for rehearing in the Supreme Court, which petition was denied, thereby giving the adjudication final approval. On the authority of the cases cited, defendant, the appellant here, is entitled to a new trial.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

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32 Cal. App. 732

ABALAS v. CONSOLIDATED CONST. CO.

(Civ. 2222.)

(District Court of Appeal, Second District, California. Feb. 7, 1917.)

1. Damages 🔑153—Servant's Injury—Complaint—Allegation of Damage.

Complaint, alleging in general terms injuries suffered by employé while digging a trench for the laying of sewer pipe, concluding with the prayer for a specific amount of damages, was not insufficient for failing to allege in the body of the complaint the specific damage suffered.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 422–425.]

2. Appeal and Error 🔑930(2)—Presumption that Jury Followed Instructions.

Where court instructed jury in action for servant's injury that expenses of care and nursing "are subjects of direct proof and are to be determined * * * on the evidence," it will be assumed that the jury followed such instructions, and included no sum for any matter not proved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3757.]

3. Damages 🔑160—Servant's Injury—Pleading and Proof—Recovery for Care.

Complaint alleging that plaintiff "expended much for medicines and treatment and employment of physicians," in the absence of demurrer, was sufficient to justify proof of exact amount expended for care and nursing.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 439, 445, 448.]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by M. P. Abalas against the Consolidated Construction Company. Defendant appeals from judgment for plaintiff, and from order denying new trial. Affirmed.

Jones & Weller, E. T. Sherer, and Emmet H. Wilson, all of Los Angeles, for appellant. Sam B. Dannis and Walter J. Horgan, both of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment in favor of the plaintiff and from an order denying to defendant a new trial.

[1] The plaintiff suffered personal injuries while at work for the defendant in digging a trench for the laying of sewer pipe. He alleged in his complaint that he was employed by the defendant and earning $2.25 per day as a common laborer at the time he suffered his injuries, and that he was at work in the performance of his duty at the bottom of the trench, which was about 55 feet deep, when defendant's foreman negligently caused brick to be placed near the opening and immediately above where the plaintiff was at work; that one of the brick being dislodged fell and struck the plaintiff on the head. This allegation followed:

> "That by reason of the negligence and carelessness of defendant as hereinbefore set out plaintiff was hurt in his health, strength and activity, and received a profound shock to his nervous system, and received a fracture of the skull, and plaintiff is informed and believes and upon such information and belief states that the

injury to his head is permanent, and that he will never regain his former health, strength, and activity, and that plaintiff has lost much time and expended much for medicines and treatment and employment of physicians."

The prayer attached to the complaint asked for judgment in the sum of $20,000. The judgment as entered upon the verdict of the jury was for the sum of $2,000. No demurrer was made to the complaint. But two points are presented as ground for the contention that the judgment and order should be reversed, to wit: (1) That the complaint did not state facts sufficient to constitute a cause of action. (2) That the court erred in instructing the jury on the matter of the amount of damages which might be assessed. It is contended that as the specific amount of damages suffered is not alleged in the body of the complaint, no cause of action was stated which would entitle plaintiff to any recovery. As already noted, the complaint did contain an allegation describing in general terms the injuries suffered (and there was no special demurrer interposed), and the complaint concluded with a prayer for a specific amount of damages. It has been held that a plaintiff in such a case need not allege particularly the amount of damage he has suffered, and that a complaint which contains a statement of such amount in the prayer only sufficiently states a cause of action. Riser v. Walton, 78 Cal. 490, 21 Pac. 362; Tucker v. Cooper, 158 Pac. 181.

[2, 3] The court instructed the jury as to the measure of damages, and stated that the elements entering into damage were, first, "such sum as will compensate him for the expenses he has paid or incurred in caring for and nursing him during the period that he was disabled by the injury, not exceeding the amount alleged in the complaint." After enumerating other elements, such as the value of time and impaired power to earn money in the future and for pain suffered, the court advised the jury as follows:

"The first two of these elements are the subjects of direct proof, and are to be determined by the jury on the evidence they have before them."

It is the contention of appellant that it was neither pleaded nor proved that there had been any expense paid or incurred for care and nursing. We must assume that the jury included in their computation no sum for any matter which had not been proved before them; the court expressly told them that the first two elements defined were the subjects of proof and to be determined upon the evidence before the jury. Had the defendant demurred specially to the complaint, plaintiff would have been required to particularize the amount expended for nursing; but in the absence of such a demurrer and under the authorities which are cited above, the complaint undoubtedly was sufficient to entitle the plaintiff to introduce evidence to prove the amount expended or incurred on the several accounts. However, assuming that there was no evidence sufficient to authorize any allowance on account of nursing or medical charges, still, as has been stated, it must be assumed that the jury gave heed to the instruction of the court and included no allowance on any account not fully established by the evidence.

No other errors are pointed to as supporting the case for appellant.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

32 Cal. App. 689

LYNCH v. PACIFIC ELECTRIC RY. CO.

(Civ. 2211.)

(District Court of Appeal, Second District, California. Feb. 5, 1917.)

1. MASTER AND SERVANT 🔑137(4)—INJURY TO RAILROAD EMPLOYÉ—NEGLIGENCE.

Defendant electric railway company's failure to furnish sufficient power to move a train, causing a car to back onto an employé, does not establish negligence, especially where employés knew the condition of the power supply.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 274, 277, 278.]

2. APPEAL AND ERROR 🔑973—DISCRETION OF LOWER COURT—WITHDRAWING CASE FROM JURY.

An order, directing a verdict for defendant after the entire case has been presented, will not be reversed, unless the court abused its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3846.]

3. NEGLIGENCE 🔑136(31)—INJURY TO RAILROAD EMPLOYÉ—DIRECTED VERDICT.

The trial court did not abuse its discretion in directing a verdict for defendant electric railway company, where an employé stepped between two cars of a train for some unknown reason and shortage of electricity caused one portion to back against him, although St. 1911, p. 796, allowed recovery where employé's negligence was slight and employer's gross.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Elizabeth Lynch, administratrix of William Edward Lynch, against the Pacific Electric Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

E. B. Drake, of Los Angeles, for appellant. Frank Karr, R. C. Gortner, and A. W. Ashburn, all of Los Angeles, for respondent.

CONREY, P. J. The plaintiff, as administratrix of the estate of her deceased husband, William Edward Lynch, prosecutes this action against the defendant to recover damages on account of the death of her husband, which she alleged was caused by negligence of the defendant employer of said Lynch. The charge is that, on the 29th day of April, 1913, "while the defendant was attempting to draw a gravel train of cars over its tracks on a steep upgrade, near Redondo Beach, Cal., the defendant negligently failed to furnish sufficient electricity, the motive power thereof, to pull said train, * * * so that while the said William Edward Lynch was in the act of passing between two cars of said train, the front part of said train slipped back against him and caught him between said two cars, crushing him so that he immediately died therefrom." The complaint also alleged negligent failure of the motorman to put on brakes as a proximate cause of the accident. After the evidence had been received as offered by the respective parties, the court, on motion of the defendant, instructed the jury to find for the defendant. This the jury did, and judgment was rendered accordingly. From that judgment the plaintiff has appealed.

At the commencement of the trial, counsel for plaintiff abandoned his claim of negligence on the part of the motorman, and admitted that at the time in question the motorman did throw on the power as quickly as he could, but that before he could put on the power the car slipped back and caught Mr. Lynch between the two cars, whereby he was killed. The case was tried upon the charge that the defendant negligently failed to furnish power to make it sufficiently safe for him to work. The circumstances were as follows: The defendant was operating a line of electric cars from Los Angeles to and through Redondo and to a place called Clifton, a short distance south of Redondo. Its passenger cars did not run beyond Clifton. At a point a half mile or more beyond Clifton defendant had a gravel pit to which it had extended a track on which a motor and cars were operated for the transportation of gravel. This track ran on an upgrade from the gravel pit toward Clifton. Power was obtained through a trolley wire running over the track down to the gravel pit, which trolley wire was continuous with the wire used by the passenger cars running to Clifton, and carried the same supply of power. The result was that sometimes, when cars were actually running on what was called the Clifton section, their consumption of power reduced the supply of power available for the gravel cars, and there was not always sufficient power to bring the gravel cars upgrade. A cluster of electric lights on the motor car of the gravel train was utilized by the operatives of the gravel train to show them whether at any given time there was or was not power available for their purposes. On the day of the accident Lynch was the foreman in charge of the gravel train, and had under his direction the motorman and two other employés. The cars were started upgrade toward Clifton in the form of a train the parts of which were in the following order: The motorcar was at the north end (toward Clifton); car No. 1 was attached to the motorcar, and car No. 2 was attached to car No. 1, and the train was being pulled upgrade toward Clifton. After they started from the gravel pit the train was stopped two or three times on account of lack of power. When it arrived at a point 100 feet, more or less, from the top of the grade, the train stopped again and Lynch decided that it would be better to detach car No. 2, deliver car No. 1 on a siding at the top of the grade, and go back later for car No. 2. Lynch, while standing on top of car No. 2, set the hand brake and then climbed down and disconnected the air brake between cars Nos. 1 and 2. Next he gave a signal, in response to which the motorman slackened the pull on car No. 2 so that a coupling pin could be drawn. This was accomplished by Lynch by pulling a lever at the side of car No. 2. This he was able to do, and did do, without going between the cars. The signal was received by a man who stood by the side of the motorman and who transmitted the signal to the motorman, the latter not being in position where he could see Lynch's signals. Lynch then signaled for the motorcar and car No. 1 to move ahead, and this was done, car No. 2 remaining stationary on the track. When the two cars had moved about three feet the power went off, and the motorcar with its attached car No. 1 started back toward car No. 2. In the meantime, for some reason or impulse not explained, Lynch had moved into the space between the rails, immediately in front of car No. 2 and between the coupling apparatus of that car and car No. 1, and as the cars came together he was crushed between them. Hearing Lynch's cry of distress, the man opposite the motorman called to the motorman, who as quickly as possible sent his cars forward, the electric power having at that moment returned to the line. Lynch was thereby released, but he had received fatal injuries. There is no direct evidence showing why the power under which the train was moving was lost during the brief interval in which this accident occurred. It does appear, however, that the supply of power available for the use of the gravel train varied on account of the movements of the passenger cars; that the men of the gravel train were in the habit of timing their work according to their knowledge of the arriving and leaving time of the passenger cars on the Clifton section; and that as to whether they had electricity off or on, they judged by the lights on the motor car.

[1] The defendant by its answer denied that it had negligently failed to furnish sufficient electricity to pull the train. This was an admission that the amount of power was not entirely sufficient; the admission being coupled with the denial that such failure was negligent. The evidence showed that this insufficiency was known to Lynch who, for that reason, had caused car No. 2 to be detached. Under all of these circumstances it cannot be that defendant was guilty of neg-

ligence causing the injury and death of Lynch, unless it can be maintained that it was the defendant's duty to furnish a supply of power at all times sufficient to move the train, and that it owed this duty to its employés, notwithstanding that they had full information concerning the actual condition of the power supply. This would be a more extreme rule than is necessary to meet the requirement that the employer shall use reasonable care to provide its employés with safe appliances with which to do their work. We have not been referred to any decisions enforcing such extreme rule.

[2, 3] At the time of the accident to William Edward Lynch there was in force an act, approved April 8, 1911, commonly known as the Roseberry Act. Under section 1 thereof it was provided that in any action to recover damages for death resulting from personal injury sustained within this state by an employé while engaged in the line of his duty or the course of his employment as such, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, "the fact that such employé may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employé." Stats. 1911, p. 796. In addition to its denial of any negligence on its part, the defendant pleaded contributory negligence of the deceased. Appellant contends that by reason of the above-mentioned statute this defense was not available to the respondent, and that it was solely for the jury to determine the amount or degree of negligence of the employer and employé, or of both, so that the terms of the statute might be applied to the facts thus found. Upon the facts of this case, which we have stated very fully, it probably was very difficult for the trial judge to avoid the conclusion that the gross negligence, comparatively speaking, shown by the evidence, was that of the deceased, rather than of the defendant. For reasons which we are about to state, the judge was authorized to take these facts into consideration in determining how he would instruct the jury, or what he would direct the jury to do.

It is true that, as claimed by appellant, usually in actions of this kind the question of negligence of the defendant should be determined by the jury, and that the court may not grant a nonsuit on the evidence introduced by the plaintiff if that evidence tends to establish the fact of negligence. But the court here directed a verdict for the defendant after the entire case had been presented. This being so, the situation is very much the same as where the jury has returned a verdict and the judge has set aside that verdict as not sustained by the evidence. If the trial court has not abused its discretion in making such order, the order will not be reversed. So here, under like circumstances, the court's order directing a verdict for the defendant should be sustained. The condition of the evidence was such that the judge determined that he would not be justified in allowing the verdict to stand if it deprived the defendant of the defense of contributory negligence to which it seemed well entitled in this case, or he determined that there was not sufficient proof of negligence on the part of defendant. In acting upon this determination his discretion was properly exercised, upon either or both of the grounds above stated. "To withhold a case from the jury is no greater interference than to set aside their verdict." Bohn v. Pacific Electric Ry. Co., 5 Cal. App. 622, 91 Pac. 115, and cases there cited.

The judgment is affirmed.

We concur: **JAMES, J.**; **SHAW, J.**

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33 Cal. App. 8

PEOPLE v. FODERA. (Cr. 663.)

(District Court of Appeal, First District, California. Feb. 14, 1917. Rehearing Denied March 16, 1917; Denied by Supreme Court April 13, 1917.)

1. HIGHWAYS 🔑186—COLLISION—FAILURE TO STOP AND ASSIST—PROSECUTION—SUFFICIENCY OF EVIDENCE.

Evidence on prosecution under Pen. Code, § 367c, of driver of automobile for not stopping and rendering assistance to occupants of vehicle collided with by him, *held* sufficient to justify conviction as against contention of defendant that he did not, at the time, know of the collision.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 476, 477.]

2. WITNESSES 🔑274(2)—CROSS-EXAMINATION—SCOPE.

Asking witnesses who had testified to the reputation for kindness and gentleness of defendant, as bearing on the likelihood that his failure to stop and assist occupants of a motorcycle, struck by his auto, was with knowledge of the accident, whether they had heard that he had been arrested for picking chickens alive, and at another place had run down a boy or man, and had been arrested for unlawfully killing an elk, had a direct bearing on the issue, and in the absence of a showing of bad faith, was within the proper bounds of cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 966.]

3. CRIMINAL LAW 🔑1036(2), 1170½(5)—APPEAL—HARMLESS ERROR.

Prejudicial error cannot be predicated on the making and permitting inquiry of character witnesses for defendant, charged with not stopping to assist occupants of a vehicle with which his auto had collided, as to whether they knew of his arrests and pleas of guilty and fines for unlawful speeding on other occasions; in most cases no objection or assignment of misconduct being made to the questions; most of the witnesses stating that they had never heard thereof; no request for admonition or instruction to disregard the evidence being made; and the good faith of the district attorney in making the inquiries at the time not being questioned.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2640, 3133.]

4. Criminal Law 🔑1144(16)—Appeal—Presumption—Heeding Admonition.

It will be presumed that the jury heeded the admonition that offers of testimony which the court refused to admit, and answers stricken out and insinuations against a party in questions, are not evidence, and should be disregarded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2768, 2901, 3034.]

5. Criminal Law 🔑1037(2) — Appeal — Waiver of Error.

Prejudicial misconduct cannot be predicated on the asking by the district attorney whether witness ever heard that on the day of the matter in issue, a violation of the law of the highway, defendant was visiting a person who had been arrested as a member of the Black Hand Society; the defendant allowing the question, and the answer in the negative made before he could object, to stand, and making no request for admonition or instruction to disregard the same, though the court, on objection by him, stated that if he wished it would be stricken out.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645.]

6. Highways 🔑186 — Collision — Failure to Stop and Assist—Knowledge as Element.

Aside from Pen. Code, § 20, providing that in every crime there must be a union of act and intent, it is necessarily to be implied from section 367c, declaring the duty of the driver of a vehicle colliding with another to stop and assist the occupants of the vehicle collided with, and making violation thereof an offense, that knowledge by the driver of the collision is essential to the offense.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 476, 477.]

7. Witnesses 🔑293—Privilege—Testimony Against Himself—Statutes.

Pen. Code, § 367c, requiring the driver of an auto colliding with any vehicle to stop and give aid, and to give information as to the number of his machine and his name and address, and making violation of any provision thereof an offense, does not compel him to give evidence against himself, in violation of Const. art. 1, § 13.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1009-1014.]

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Antone Fodera was convicted of violating Pen. Code, § 367, and appeals. Affirmed.

W. E. Foley, and Devoto, Richardson & Devoto, of San Francisco, for appellant. U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and Arthur M. Free, Dist. Atty., and Archer Bowden, Deputy Dist. Atty., both of San Jose, for the People.

LENNON, P. J. This is an appeal from a judgment of conviction of the defendant upon the charge of a violation of section 367c of the Penal Code, requiring drivers of automobiles colliding with other vehicles to stop and render assistance to the occupants of the vehicle collided with and who may have been injured by such collision, under penalties which render the act or neglect of such drivers in failing or refusing to comply with such requirements a felony.

[1] The facts of this case immediately preceding, attending, and succeeding the collision are substantially these: On the evening of October 31, 1915, a little after sunset the defendant was proceeding northward along the state highway near the town of Mayfield, in the county of Santa Clara, on his way home to San Francisco from Coyote, in that county, to which place he had made the trip earlier in the day. There were four companions with the defendant in the car which he was driving at a rate estimated as exceeding 40 miles an hour. A closed limousine, in which two ladies—Mrs. Carolan and Miss Shute—were being driven by a chauffeur, was also proceeding northward along the highway at that point at about 25 miles an hour. The defendant undertook to pass the limousine, swerving to the left in order to do so. At the moment of passing, a tandem motorcycle, driven by one Hector Zapata with one Joseph Ottens as his companion, two young students of the University of Santa Clara, was going southward at the rate of 18 to 20 miles an hour, and was also about to pass said limousine, when a collision occurred between the defendant's machine and said motorcycle, in which Zapata was instantly killed and Ottens severely injured. The defendant did not stop or check his speed, but rather increased it until he was overtaken at Mayfield by the Carolan car, when the chauffeur called to the defendant to stop. There is also some evidence that the chauffeur, who spoke English imperfectly, made some remark to the defendant to the effect that he had killed somebody. The defendant stopped momentarily, but did not return to the scene of the collision, but continued rapidly on his way to San Francisco until he was finally halted by the officers at Burlingame. He insisted at all times that he did not know of the collision at the time of its occurrence, and in this he was supported by the testimony of the four other persons who were occupants of the car. The evidence educed at the trial disclosed, however, that the impact of the collision was distinctly heard by the two ladies who were within the closed limousine, and also by a Mr. Van Gordon, who was sitting upon the porch of his residence 100 yards away from the scene of the collision. It also appeared that the body of Zapata had been carried along by the defendant's car for a distance of from 45 to 60 feet before falling from it to the roadside; while from the exhibits produced at the trial and exhibited to this court upon the oral argument of this appeal, consisting of photographs of the defendant's car, and also of articles of clothing worn by one of the occupants thereof sitting on the side nearest to the point of contact, it appeared that the fenders and tool box of the

defendant's car had been bent and indented by the impact, while the sides of the machine and the coat of its said occupant were bespattered with the blood and brains of Zapata.

It would thus appear that the evidence before the jury was abundantly ample to justify the defendant's conviction. Notwithstanding this fact the appellant insistently contends that the judgment of conviction herein should be reversed on account of certain alleged acts of prejudicial misconduct on the part of the district attorney occurring during the trial and the argument of the case and claimed to have resulted in a miscarriage of justice. The specific acts of alleged misconduct relied upon for a reversal, substantially stated, are these:

[2] During the trial of the cause and prior to the time when the defendant himself had taken the stand as a witness in his own behalf his counsel proffered proof that his general reputation for truth, honesty, and integrity was good. The trial court, upon objection made, limited the evidence offered in this regard to proof of the general reputation of the defendant for kindness and gentleness, as being the particular qualities involved in the particular inquiry. The defendant apparently accepted this limitation; and proceeding upon the theory that it would be unlikely that a person of gentle and kindly nature would disregard the promptings of humanity as well as the commands of the law requiring him to stop and render aid to those who might be injured by a collision if he was aware of the fact or likelihood of such injury, the defendant called several witnesses, who testified that the general reputation of the defendant for kindness and gentleness was good. Of the witness George Filmer the district attorney asked upon cross-examination whether he had ever heard it discussed that the defendant, with several other poultry men of San Francisco, had been arrested for picking chickens alive. The same question was asked of each of the other witnesses to the defendant's general reputation for kindness and gentleness. A number of these replied to the question that they had never heard the matter discussed, while others stated that they had heard of it, but had investigated it and found that the rumor had no foundation in fact. The district attorney also asked of most, if not all, of said witnesses if they had not heard that the defendant had run down a boy or a man upon the streets of San Francisco and been arrested, for it, to which most of them replied that they had never heard of it. Of some of said witnesses the district attorney also inquired if they had not heard of the defendant's arrest for unlawfully killing an elk. To this line of questions in most instances no objection or assignment of misconduct was made at the time, nor was the good faith of the district attorney in asking these questions assailed at the trial; and it seems very clear that the questions themselves had a direct bearing upon the issue as to the particular qualities of the defendant to which these several witnesses were called to testify, and that, in the absence of a showing of bad faith on the part of the prosecuting officer, they were within the proper bounds of his cross-examination.

[3] The district attorney also asked of a number of said witnesses whether they had heard that the defendant had on several occasions been arrested for speeding his automobile beyond the legal limit, and in some instances had pleaded guilty and paid fines therefor. In most cases this question was asked and answered negatively without objection or assignment of misconduct. It may be seriously questioned whether a person habituated to reckless driving of an automobile to the extent of being in a number of cases and in several counties arrested therefor is of that kindly and humane disposition which the character witnesses of the defendant herein would have had the jury believe him to be; but however this may be it appears, as above stated, that in most instances no objection or assignment of misconduct was made to these questions, and that also in most cases the witnesses stated that they had never heard of the matter, and in some instances the witnesses admitted that they had heard of these episodes. It further appears from the record that no request was made to the court for an admonition to the jury to disregard this evidence; nor was any instruction to that effect requested; nor was the good faith of the district attorney in making these inquiries at the time brought into question. Under these circumstances no prejudicial error can be predicated upon the action of the district attorney in making, or of the court in permitting, the inquiry as to whether the character witnesses for the defendant knew of his arrests and pleas of guilty and fines for unlawful speeding.

[4] The district attorney is also charged with misconduct in asking several of said witnesses whether they had heard it discussed that the defendant was under investigation by the police department of San Francisco for the selling of several stolen automobiles. The question was improper, and the action of the district attorney in asking it an act of misconduct on his part; but the record shows that the court in each instance sustained the defendant's objections to the question; and further shows that while the defendant's counsel assigned the act of the district attorney as misconduct, no request was made of the court to admonish or instruct the jury to disregard the same. Notwithstanding this, the court of its own motion gave the jury the following instruction:

> "Offers of testimony by either counsel which the court refused to admit in evidence, and answers given by witnesses which may have been stricken out by the court, are not evidence, and should be disregarded by you. It sometimes happens that counsel asks a question of a witness

which contains an insinuation against one or other party to the action. The insinuations contained in such questions are not evidence and you must disregard them."

It is to be assumed that the jury heeded this admonition with respect not only to this precise inquiry, but also as to other questions of doubtful propriety respecting which objections were made and sustained by the court. People v. Burke, 18 Cal. App. 72, 122 Pac. 435.

[5] The district attorney is also charged with misconduct in having asked of the witness Charles Swanberg the following question: "Q. Did you ever hear it discussed, Mr. Swanberg, that on the day of this affair he [the defendant] was visiting at the home of a person who had been arrested as a member of the Black Hand Society?" Before objection could be made the witness responded, "I never heard it discussed." The defendant then made his objection and assignment of misconduct; whereupon the court stated to the counsel for the defendant, "If you wish, it will be stricken out." No such request was made, however, nor was the court asked to either admonish or instruct the jury, nor was the district attorney charged with bad faith in making the inquiry. It is sufficient to say, therefore, that since the defendant chose to allow the question and answer to stand, and made no request for an admonition or instruction to the jury to disregard it, no prejudicial misconduct sufficient to justify a reversal of the case can be predicated upon the asking of the question.

The appellant further contends that the district attorney was guilty of misconduct in producing a justice of the peace of San Mateo with his docket, for the purpose of showing affirmatively that the defendant had in fact been arrested, and pleaded guilty and paid a fine upon the charge of unlawful speeding. It is sufficient to say that the evidence was incompetent, and its proffered introduction improper, but that the court promptly sustained an objection to it, and that the defendant neither assigned the proffer of it as misconduct, nor asked for an instruction to the jury to disregard it. The error and impropriety of its offer in evidence must therefore be held to have been cured by the foregoing voluntary instruction of the court in its final charge to the jury.

With regard to the alleged acts of misconduct on the part of the district attorney during the argument of the case, we do not deem it necessary to deal with these in detail, for the reason that in most instances the court admonished the district attorney to confine himself to the evidence in the case; and for the further reason that upon the whole these imprudent remarks of the district attorney were not in our opinion sufficiently prejudicial to have seriously affected the verdict or to warrant a reversal of the case, particularly in view of the fact that, as above stated, the proof presented to the jury in the form of testimony and exhibits was amply sufficient to justify the verdict of conviction, and to warrant the conclusion that none of the several alleged acts of misconduct on the part of the prosecuting officer were sufficiently prejudicial in character or influential in effect as to cause the verdict of conviction in this case to have been a miscarriage of justice.

[6] The final contention of the appellant is that the section of the Penal Code under which the defendant was prosecuted and convicted is unconstitutional, for two alleged reasons: First, that the section does not expressly embody in its phraseology words limiting its application to those persons who knowingly cause their vehicles to collide with those occupied by others. But our reading of the section in question convinces us that the element of knowledge of the fact of the collision is necessarily to be implied from the requirements of the act, to the effect that drivers of such vehicles must stop and render aid to those who may possibly have been injured in the collision. Moreover, section 20 of the Penal Code, which is to be read together with and into the section under review, provides that "in every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence." We are of the opinion that the act is not unconstitutional for the first reason assigned.

[7] The appellant urges as the second reason for its alleged invalidity its provision requiring the driver or occupant of a vehicle striking another to give certain information as to the number of the vehicle, the name and address of the driver and of the owner and of its passengers. It is claimed that this requirement, by compelling the persons of whom such information is demanded to be witnesses against themselves, amounts to a violation of section 13 of article 1 of the state Constitution. But the appellant concedes that this point has been decided adversely to his contention in a number of cases from other states which, as respondent shows, have been approved by this court in the case of People v. Diller, 24 Cal. App. 799, 802, 142 Pac. 797. There is, therefore, no merit in this contention.

Judgment and order affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

33 Cal. App. 19

RAMISH v. WORKMAN et al. (Civ. 2201.)

(District Court of Appeal, Second District, California. Feb. 14, 1917. Rehearing Denied by Supreme Court April 12, 1917.)

1. JUDGMENT 🔑603—ACTIONS BARRED—ACTION FOR RENT.

Under Code Civ. Proc. § 1176, providing that an appeal taken by defendant shall not stay proceedings upon the judgment unless the court so directs, where lessees under a lease which gave a right of re-entry for default in payment of rent continued to occupy the premises, pending the final determination of an appeal in an action for unlawful detainer in which the landlord recovered judgment, and no stay was directed, the lease constituted the measure of the lessees' liability for such time as they remained in possession, and the judgment did not constitute a bar to the maintenance of an action for the rent for such period.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1118.]

2. LANDLORD AND TENANT 🔑184(2)—LEASE —CONSTRUCTION.

Where a lease for ten years provided that the lessees "will pay to the lessor as a further consideration for his lease for this lease in addition to the rent hereinabove reserved the sum of $7,200, the receipt of which is hereby acknowledged by the lessor," and that, if the lessees should pay the rent reserved when due, and perform the agreements of the lease for first nine years, seven months, and twelve days of the lease, and the lease shall not be terminated by the re-entry of the lessor within said period, etc., he will credit the sum of $7,200 the remainder of the rent due, the $7,200 was in the nature of a bonus or additional consideration for the lease of the premises under the conditions specified, and the lessees did not part with the money, as a penalty or as security, and title to it passed absolutely to the lessor, unaffected by the fact that he agreed upon the performance of certain conditions by defendants to give them credit therefor, and in the absence of such performance by the defendants they have no claim to the fund.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 745–748.]

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Adolph Ramish against Elmer N. Workman and another, in which the named defendant filed a cross-complaint. From a judgment for plaintiff and an order denying a motion for a new trial, the defendants, and named defendant, as cross-complainant, appeal. Affirmed.

I. Henry Harris and Williams, Goudge & Chandler, all of Los Angeles (Hunsaker & Harris, of Los Angeles, of counsel), for appellants. Olin Wellborn, Jr., and Alfred H. McAdoo, both of Los Angeles, for respondent.

SHAW, J. This controversy grew out of a lease of property made by plaintiff to defendants Workman and Sturm and their assignors, for a term of ten years, for the sum of $180,000, payable in advance in monthly installments of $1,500.

Default was made in the payment of the rent due December 1, 1912, whereupon plaintiff instituted a proceeding in unlawful detainer for restitution of the property and recovery of the rent then due for said month, for which judgment was rendered on January 31, 1913, pursuant to which, notwithstanding an appeal perfected therefrom by defendants, they were evicted from the property on February 10th following.

The present action, filed April 26, 1913, was to recover the rent for the period extending from January 1st to February 10th, during which the premises were held and occupied by defendants, and for which judgment in the sum of $2,000 was rendered in favor of plaintiff, from which, and an order denying their motion for a new trial, both Workman and Sturm, as defendants, and the former also as cross-complainant, appeal.

[1] The lease provided, among other things, that upon default in payment of the rent reserved, the lessor, at his option, might enter upon the demised premises and remove all persons therefrom. By another provision it was agreed that the lessees "will pay to the lessor as a further consideration for this lease in addition to the rent hereinabove reserved the sum of $7,200, receipt of which is hereby acknowledged by the lessor," and "that, if the lessees shall pay the rent herein reserved when the same becomes due hereunder, and shall well and truly perform and observe all the covenants and agreements herein contained on their part to be performed and observed, during the first nine years, seven months, and twelve days of this lease, and this lease shall not be terminated by the re-entry of the lessor as hereinafter provided within said period of nine years, seven months and twelve days, he will credit the sum of $7,200 hereinafter provided to be paid to him by the lessees upon the last four months and eighteen days' rent under this lease."

While appellants admit that they occupied the premises during the month of January and up to February 10th, the rent for which period under the terms of the lease was $2,000, they insist their obligation to pay the same was fully adjudicated in the action for unlawful detainer, wherein judgment was rendered for $1,500, which judgment they claim constituted a bar to the maintenance of this action. At the trial it was in substance stipulated that in the unlawful detainer action no claim was made for any damages, nor for rent, other than $1,500 due for the month of December, for which and the restitution of the premises judgment was rendered, but not executed as to restitution until February 10th. The action did not involve the rent for the period extending from January 1st to February 10th, nor was there any judgment therefor rendered. Moreover, this judgment was not final for the reason that an appeal was perfected therefrom, and hence, there being no final determination of the question as to plaintiff's right to forfeit the lease, the question was left as though it had never been tried, even though no stay was directed by the court as provided in section 1176, Code of Civil Procedure. Hence, so long as defendants continued to occupy the premises, pending the final determination of the action for unlawful detainer, the lease constituted the measure of their liability for such time as they remained in possession.

Appellants' chief ground for a reversal, and upon which they devote much of their argument, is based upon the provision of the lease pursuant to which they paid plaintiff $7,200, claim to which is asserted in both the answer and cross-complaint. Notwithstanding the plain language in which the provision is couched, the meaning of which, to our minds, admits of no controversy, they insist that it should be construed as security for the payment of the rent reserved during the time ending with their eviction and any damages sustained by plaintiff; that when the landlord elected to evict defendants from the premises for nonpayment of rent he waived all claim to the $7,200, except in so far as it was necessary to apply it in payment of rent then due or accrued. As stated in Dutton v. Christie, 63 Wash. 373, 115 Pac. 857, where a similar question was involved: "We cannot agree with this contention without in effect writing a new contract for the parties."

[2] Clearly the $7,200 was paid for a ten-year lease of the premises, upon the conditions and terms specified therein. Defendants parted with the money, not as a penalty or as security, but as a payment the consideration for which was the execution of the lease on the part of plaintiff. The title thereto passed absolutely to the lessor, unaffected by the fact that he agreed, upon the performance of certain conditions by defendants, to give them credit therefor. The conditions were never performed by defendants, and hence they could have no claim to the fund. The authorities which appellants cite in support of their contention all appear to have been cases where the deposit was made with the lessor upon the execution of the lease as security for the payment of the rent, and in such cases, upon the lessor evicting the tenants, it is uniformly held that he cannot assert claim to the amount so deposited, over and above rent due, with damages sustained. The cases cited by appellants involve deposits made as "a guaranty," "as indemnity," as "a penalty," "for security," etc., and hence are readily distinguished from the case at bar. This view finds full support in the case of Dutton v. Christie, supra.

The provisions of the lease in question hereinbefore quoted should be interpreted in accordance with the plain import of the language used, and, thus construed, it is clear that the parties intended the $7,200 to be in the nature of a bonus or additional consideration paid the lessor as an inducement to make the lease upon the terms and conditions therein contained; and, as stated, the fact that upon the performance of all the covenants and agreements contained in the lease to be performed by the lessees during the first nine years, seven months, and twelve days of the term thereof he promised in effect to release them from the payment of rent at the rate of $1,500 per month for the last four months and eighteen days of the term so demised furnishes no reason for appellants' contention.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; JAMES, J.

(32 Cal. App. 764)

HILLYER v. EGGERS, Sheriff. (Civ. 1870.)

(District Court of Appeal, First District, California. Feb. 9, 1917.)

1. Replevin 🔑4, 59—Action of Claim and Delivery—Description of Property.

In an action in claim and delivery, it is essential that the specific personal property claimed should be described with a reasonable degree of certainty, and, as a rule, money is not the subject of such an action unless it is marked or designated so as to make it specific as regards its capability of identification.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 4–19, 21–26, 215–218.]

2. Action 🔑32—Claim and Delivery.

Under Code Civ. Proc. §§ 509–520, providing an auxiliary remedy whereby when a party sues to recover personal property he may claim that the property be immediately delivered to him without awaiting the trial, where the complaint showed plaintiff to be entitled to recover from a sheriff an amount of money taken from him wrongfully under execution, upon the theory that he had, as required by the Code, stated the facts constituting his cause of action, or facts showing a cause of action for money had and received, judgment for plaintiff was proper, though the complaint did not describe the money sufficiently to entitle plaintiff to its return in specie in an action in claim and delivery; there being no forms of civil actions in California.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 257–261, 316.]

Appeal from Superior Court, City and County of San Francisco; Hon. Geo. E. Crothers, Judge.

Action by Curtis Hillyer against Frederick Eggers, Sheriff of the City and County of San Francisco, State of California. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. Tomsky, of San Francisco (J. L. Nagle, of San Francisco, of counsel), for appellant. Curtis Hillyer and Thomas W. Forsyth, both of San Francisco, for respondent.

KERRIGAN, J. This is an appeal by the defendant from an adverse judgment in an action for the recovery of $730, claimed to have been unlawfully taken under execution.

In the early part of the year 1914 the Sequoia Motorcar Company gave in payment for legal services rendered to it its promissory note for $300 to its attorney, O. C. Pratt. Prior to its maturity the payee, for a valuable consideration, transferred it to the plaintiff. At its maturity it was unpaid. Subsequently H. J. Small became a judgment creditor of the company in the sum of $3,000. It also appears from the record that Mrs. H. A. Gillis was indebted to the company in the sum of $1,000 upon a stock subscription, the indebtedness being evidenced by her promissory note, given, however, with the understanding that the note was not to be negotiated. Contrary to this agreement it was negotiated; and Mr. Henley C. Booth, attorney for both H. J. Small and Mrs. H. A. Gillis, wishing to find out who had possession of the note, communicated with plaintiff by telephone, telling him that he represented Mrs. Gillis, and asking him if he knew where the note was. Plaintiff replied that he did not, but would try to find out and let Mr. Booth know. Later, having ascertained that the note was held by a Mr. W. W. Allen, plaintiff communicated with Booth, and negotiation ensued, resulting in Booth agreeing to pay plaintiff the sum of $730 for it. The latter then purchased the note from Allen, paying him therefor the sum of $550, hoping apparently through the completion of the transaction with Booth to recoup in part the loss he had sustained by his purchase of the note given by the company to Pratt, the company being now insolvent.

About this time, according to the argument of the respondent, Booth appears to have conceived the idea of acquiring for Mrs. Gillis her note, and that the price to be paid for it should go to his other client, Small. Accordingly, he agreed with the plaintiff that the payment of the $750 for the note should be made in his (Booth's) office, at a certain time, harboring the intention, however, that at the moment of receiving the note from the plaintiff and tendering payment thereof the money should be seized in execution of Small's judgment. This plan was carried out, so that when the plaintiff's agent handed the note to Booth the latter placed $730 in currency on the desk in front of him, and before the messenger of the plaintiff could pick it up, a deputy of the defendant, who was waiting in the room for that purpose, seized the currency and levied upon it pursuant to an execution issued in favor of Small upon a judgment obtained by him against the Sequoia Motorcar Company. Plaintiff immediately demanded of the defendant the return of the money, and filed with him a claim for the same. Defendant refused to comply with his demand, whereupon plaintiff brought this action for its recovery.

The record further shows that the plaintiff, prior to its maturity and without notice of the collateral agreement of the company not to transfer it, paid a valuable consideration for the note; that no fraud was either charged or proven against the plaintiff, and that no fiduciary relation existed between him and any of the parties to the transaction, and that title to the note was vested in him.

[1] Passing now to the only objection seriously urged by the appellant for a reversal of the judgment, it is that the plaintiff has apparently proceeded upon the theory that his remedy was an action in claim and delivery. In such an action it is essential that the specific personal property claimed should be described with a reasonable degree of certainty; and as a rule money is not the subject of such an action unless it be marked or designated in some manner so as to make it specific as regards its capability of identification. Eddings v. Boner, 1 Ind. T. 173, 38 S. W. 1110; Griffith v. Bogardus, 14 Cal. 410, 413; Sharon v. Nunan, 63 Cal. 235; Hawley v. Kocher, 123 Cal. 77, 55 Pac. 696. The description of the money in this case is not sufficient to entitle the plaintiff to its return is specie.

[2] The complaint, however, irrespective of what the plaintiff has styled it, is sufficient to show him to be entitled to recover from the defendant the amount of money taken from him wrongfully under execution, upon the theory that he has, as required by the Code, stated the facts constituting his cause of action, or facts showing a cause of action, for money had and received. Under the circumstances of this case the judgment of the trial court must be sustained notwithstanding the contention of the appellant, as it is apparent from a decision of our own Supreme Court in Faulkner v. First National Bank, 130 Cal. 258, 62 Pac. 463, where it is said:

> "Courts and law writers have sometimes inadvertently spoken of the Code 'action of claim and delivery' as if there were really here a form of action called by that name—just as there were forms of action at common law, such as 'debt,' 'covenant,' 'replevin,' 'trover,' etc. But we have here no forms of civil actions. We have only one form of action, which has no name; so that an action cannot be here defeated, as it could have been at common law, because not properly named. Sections 509 to 520 of the Code of Civil Procedure are preceded by the heading 'claim and delivery of personal property,' but the sections themselves show the meaning of this heading. They merely provide an auxiliary remedy by which, when a party brings an action to recover personal property, he may 'claim' that the property be immediately delivered to him at the commencement of the action and without waiting the trial. * * * These sections merely give to a plaintiff suing to recover personal property an auxiliary remedy very similar to the auxiliary remedy of 'attachment' given to a plaintiff suing upon a contract for the direct payment of money, and to the auxiliary remedy under the head of 'arrest and bail' and 'injunction during litigation.' But it is no more proper to speak of an action 'of claim and delivery' than to speak of an action 'of attachment.'"

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

32 Cal. App. 735

ROBINSON v. SMITH-BOOTH-USHER CO.

(Civ. 2198.)

(District Court of Appeal, Second District, California. Feb. 7, 1917.)

1. TRIAL ⟹296(4, 5)—INSTRUCTIONS—CURE OF ERROR.

Where the judge erroneously instructed that servant could not recover for injuries if he was contributorily negligent in any degree, the error was cured by subsequent specific instruction repeated a second time that the servant's recovery if he was contributorily negligent should merely be diminished in the proportion that his negligence bore to that of his master.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709.]

2. APPEAL AND ERROR ⟹928(1)—PRESUMPTIONS—RECORD—SUFFICIENCY OF PRESENTATION OF QUESTIONS.

In view of Code Civ. Proc. § 475, providing that there shall be no presumption that error is prejudicial, where complaint is made of instructions, but all the instructions are not included in the record, no error is shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749, 3753.]

Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by E. J. Robinson against the Smith-Booth-Usher Company. From judgment for defendant and order denying motion for new trial, plaintiff appeals. Affirmed.

Randall & Gaines and Shepard & Alm, all of Los Angeles, for appellant. Oscar Mueller, Gibson, Dunn & Crutcher, and Norman S. Sterry, all of Los Angeles, for respondent.

CONREY, P. J. This is an action wherein the plaintiff seeks to recover damages for personal injuries sustained by him while employed by the defendant in its machine shop; it being alleged that these injuries were caused by the negligence of the defendant. The answer denied all negligence on the part of the defendant, and also pleaded contributory negligence on the part of the plaintiff. The jury returned a verdict for the defendant, and judgment was entered accordingly. The plaintiff appeals from the judgment and from an order denying his motion for a new trial.

Appellant first insists that the evidence proved negligence on the part of the defendant and failed to prove contributory negligence of the plaintiff. There was a substantial conflict in the evidence upon these questions, and the evidence favorable to the defendant, if believed by the jury (as it was), is sufficient to support the verdict.

Appellant directs attention to certain instructions given by the court to the jury at the request of the defendant. It is claimed that by these instructions the jury was told that, if the plaintiff was guilty of a want of ordinary care in the slightest degree contributing directly to his injury, plaintiff could not recover, regardless of the negligence of the defendant or its servant. Reliance is placed upon the fact that at the date of this accident, November 25, 1911, there was in force a statute relating to the liability of employers to their employés (Stats. 1911, p. 796), wherein it was provided that in actions of this class:

> "The fact that such employé may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employé." Section 1.

In addition to the instructions complained of by appellant, the court gave to the jury an instruction requested by plaintiff, stating the doctrine of contributory negligence in accordance with said statute.

[1] At the close of his reading of instructions to the jury, the judge suggested that there was an inconsistency in the instructions relating to that issue. He then specially directed the attention of the jury to the instruction which he had given at plaintiff's request and read it to them a second time, with the further direct statement that this was a correct statement of the law. In view of this action by the court, we deem it unnecessary to examine the instructions complained of. Assuming that they were erroneous, the instruction as finally given had the effect of withdrawing those erroneous instructions from the consideration of the jury. That a court may thus correct its own error seems too plain to leave room for argument.

[2] Appellant also complains of defendant's instructions numbered 14 and 24 as given by the court. These instructions related to the question of negligence of the defendant, if from the evidence the jury believed certain stated facts. The criticism upon these instructions is that each of them purported to state a complete defense, but omitted certain facts concerning which evidence had been introduced pertaining to defendant's alleged negligence. Assuming that the omitted evidence should have been stated, the record is not in the condition necessary to enable us to determine that the error was prejudicial to the plaintiff.

> "There shall be no presumption that error is prejudicial, or that injury was done if error is shown." Code of Civ. Proc. § 475.

The statement of the case, as set forth in the transcript, says that:

> The court, "on its own motion and at the request of the plaintiff, instructed the jury in part as follows."

After setting forth certain instructions thus given, it is further said:

> "That thereupon the court instructed the jury in part as follows, at the request of the defendant."

After setting forth those instructions, it is said that:

"Other instructions were given by the court of its own motion and by request of plaintiff and defendant not here set forth."

There is not even a statement that the instructions placed in the record include all of the instructions given with respect to the propositions covered by the instructions put into the record.

"It is said in the transcript that the instruction complained of, 'among others,' was given. The others referred to are not contained in the transcript, and we have no means, therefore, of judging what bearing they may have had upon the one in question. If it should be conceded, therefore, that the instruction complained of should have been qualified or modified in some degree, it may be that the instructions omitted would have qualified or modified the one in question, and the rule is well settled that instructions are to be read and considered as a whole, and the fact that, when taken severally, some of them have failed to enunciate in precise terms and with legal accuracy propositions of law, does not render them erroneous." Hanson v. Stinehoff, 139 Cal. 171, 173, 72 Pac. 913, 915.

"Where numerous instructions are given [as in this case] it may well be that some particular instruction fails to contain a complete or accurate statement of the law. If, however, when the entire charge is examined the omissions or inaccuracies in a particular instruction appear to have been supplied, and the jury fairly and consistently instructed, generally, as to the law, this is sufficient to defeat any claim of error predicated on defects in particular instructions." Henderson v. Los Angeles Traction Co., 150 Cal. 689, 699, 89 Pac. 976, 980.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

(32 Cal. App. 711)

PEDREIRA v. PEDREIRA. (Civ. 1632.)

(District Court of Appeal, Third District, California. Feb. 6, 1917. Rehearing Denied by Supreme Court, April 4, 1917.)

1. HUSBAND AND WIFE 🔑296—ACTION FOR SEPARATE MAINTENANCE—EVIDENCE.

In a wife's action for separate maintenance for cruel and inhuman treatment, where the pleadings contained no appropriate allegation with reference to defendant's acts before the marriage, plaintiff's evidence that defendant had had intercourse with her frequently for seven or eight years before their marriage, and at nearly every such occurrence had promised to marry her, was improperly admitted as without the issues, and calculated to prejudice defendant with the jury and court.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1089.]

2. HUSBAND AND WIFE 🔑296—ACTION FOR SEPARATE MAINTENANCE — EVIDENCE — PLEADING.

In an action for separate maintenance on the ground of cruel and inhuman treatment, allegations of specific cruel treatment did not warrant admission of evidence of specific acts of cruelty other than those presented by the pleadings.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1089.]

3. HUSBAND AND WIFE 🔑298(1, 2)—ACTION FOR SEPARATE MAINTENANCE—INQUIRY INTO WIFE'S NECESSITIES.

The Court should have permitted an inquiry into plaintiff's necessities and her manner of living in order that a suitable award might be made for her maintenance; the discretion of the trial court not being arbitrary, but to be exercised in view of the necessities of the parties, and defendant's financial condition and his earning capacity, together with plaintiff's possessions and her accustomed style of living, being proper elements to be regarded.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1093.]

4. WITNESSES 🔑275(3) — CROSS-EXAMINATION—ACTION FOR SEPARATE MAINTENANCE.

Where plaintiff set up defendant's having had her committed to a hospital for the insane as an act of cruelty, and, on her direct examination, she testified to facts concerning the occurrence that would necessarily create the impression that she was sane at the time, defendant's inquiry on cross-examination, directed to the point that plaintiff did not know she was examined or committed, in other words, that her mind was a blank as to what happened, should have been permitted.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 969.]

5. HUSBAND AND WIFE 🔑297—ACTION FOR SEPARATE MAINTENANCE — PREPONDERANCE OF EVIDENCE.

In a wife's action for separate maintenance on the ground of cruel and inhuman treatment, the law requires that the jury be convinced of cruelty by a preponderance of evidence to justify finding for plaintiff.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1090.]

6. HUSBAND AND WIFE 🔑298½ — ACTION FOR SEPARATE MAINTENANCE — INSTRUCTIONS.

The court instructed that if the jury found plaintiff was sane at the time of the marriage, and there was evidence of cruelty, verdict would be for plaintiff in the amount the jury might determine to be adequate, etc., and that, if the jury believed from the testimony that plaintiff was treated in a cruel and inhuman manner, as alleged, and that the general treatment of plaintiff by defendant from the time of marriage to the date of commencement of trial was cruel and inhuman, verdict would be for plaintiff. *Held*, that the instruction was erroneous as ignoring the consideration of the weight and credibility of the evidence as to the cruelty and the jury's proper function in relation thereto, also in failing to state the elements that should enter into the determination of the amount to be awarded plaintiff.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1091, 1092.]

7. HUSBAND AND WIFE 🔑298½ — ACTION FOR SEPARATE MAINTENANCE — INSTRUCTIONS.

An instruction as to the general treatment of plaintiff was not justified by the pleadings, there being no allegation of general cruel treatment of plaintiff by defendant.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1091, 1092.]

8. HUSBAND AND WIFE 🔑298½ — ACTION FOR SEPARATE MAINTENANCE — INSTRUCTIONS.

In a wife's action for separate maintenance for cruel and inhuman treatment, wherein she alleged, as an act of cruelty, that her husband procured her commitment to a hospital for the insane, the husband had a right to expect that the jury would be instructed along the line suggested by him in requests concerning his theory as to the wife's insanity at the time of the marriage.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1091, 1092.]

9. HUSBAND AND WIFE 🔑298½ — ACTION FOR SEPARATE MAINTENANCE — INSTRUCTIONS.

In a wife's action for separate maintenance for cruel treatment, though the jury's verdict was simply advisory, it was nevertheless important that the jury should be clearly instructed, particularly in view of the usual inclination on the part of the judge to adopt its findings, and the fact that they were adopted.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1091, 1092.]

10. HUSBAND AND WIFE 🔑298(1, 2) — ACTION FOR SEPARATE MAINTENANCE—ALLOWANCE FOR ATTORNEY'S FEES — BURDEN OF PROOF—STATUTE.

A wife is entitled to an allowance for attorney's fee in her suit for separate maintenance only when it is necessary to enable her properly to maintain her action, and the burden is on her to show that the allowance is necessary; Civ. Code, § 137, governing the matter, contemplating that it shall be made only when necessary to enable the wife to present her case.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1093.]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action for separate maintenance without divorce by Mary Pedreira against A. F. Pedreira. From judgment for plaintiff, defendant appeals. Reversed.

F. W. Henderson and Hugh K. Landram, both of Merced, for appellant. Jack Mahon, of Merced, for respondent.

BURNETT, J. The action, brought under section 137 of the Civil Code and grounded upon cruel and inhuman treatment, was for separate maintenance without divorce. The specific instances of cruelty alleged were: (1) Defendant absented himself during the birth of a child to plaintiff; (2) defendant did not provide a doctor or nurse for plaintiff during childbirth; (3) said neglect caused plaintiff great physical pain and mental anguish by reason of which the child was born dead; (4) that on April 14, 1914, defendant caused plaintiff to be moved to the Merced sanitarium, and thence to the Merced county jail, whence the plaintiff was committed to the state hospital at Stockton; (5) that, upon her release from said hospital in July 1914, defendant refused to take plaintiff to his home or to live with her as his wife.

In the answer there was a specific denial of the allegations of cruelty, an admission that plaintiff was committed to said hospital, but an explanatory averment that defendant was advised by the medical attendants of plaintiff that it was necessary, for the protection of the plaintiff and those who might come in contact with her, that she be committed to said hospital because she was violently insane, and that she was regularly committed to the state hospital after a hearing in the superior court of the county of Merced. Defendant further alleged that plaintiff had agreed to accept from defendant the sum of $40 per month as and for her separate maintenance. By way of cross-complaint it was further averred that at the time of the marriage of plaintiff and defendant she was of unsound mind and not capable of contracting marital relations; that because of this insanity defendant prayed for an annulment of the marriage.

The action was tried with the assistance of a jury. The jury found that the plaintiff was not insane at the time of the marriage; that defendant had treated plaintiff in a cruel and inhuman manner subsequent to said marriage; that plaintiff had not agreed to accept the sum of $40 per month for her separate maintenance; and that $75 per month was a reasonable amount for such purpose. The court adopted said findings and rendered judgment accordingly, and in addition allowed plaintiff $400 for her attorney's fees.

It is claimed by appellant that many prejudicial errors are disclosed by the record, and we proceed to notice some of the assignments.

Over objection, plaintiff was permitted to testify that the defendant had had intercourse with her frequently for seven or eight years prior to their marriage, and that at nearly every such occurrence he promised to marry her. The court declared "it would not be evidence that you could rely upon," but overruled the objection.

[1] The evidence seems to have been entirely outside of the issues made by the pleadings and could hardly assist "in getting at the truth of the facts disputed." The natural effect of such testimony would be to excite sympathy for the plaintiff and hostility toward the defendant. It can be easily imagined how the jury, or the judge of the court, for that matter, would regard with indignation and contempt a man who, under repeated promises of marriage had seduced plaintiff and had actually been guilty of such illicit conduct while his first wife lay upon her deathbed. The prejudice thus aroused would hardly permit of a dispassionate and impartial consideration of the evidence relevant to the issues made by the pleadings.

Respondent contends that:

> "The object of this testimony was, not to prejudice the defendant in the eyes of the jury, but to arrive at facts which would and did throw light on the issues involved. These acts of intercourse bore directly on the attitude of the defendant at the time he married plaintiff, and were the very acts upon which his subsequent treatment of plaintiff was based; they were facts necessary to be before the jury in order to obtain a fair understanding as to the relations of the parties."

As to this we think plaintiff is in error. If it had been supposed that it was important to inquire into the acts of appellant before the marriage, there should have been some appropriate allegation in reference thereto. The fact is, said evidence refers to a time remote from anything referred to in the complaint and to conduct before marriage, whereas the cause of action is entirely based upon treatment of plaintiff by defendant after the marriage took place. Of course, the general rule is as stated in Jones on Evidence, vol. 1, par. 140a, that:

> "Evidence of other acts of the parties, outside of the acts in record and unconnected with it, are not generally admitted in evidence."
>
> "The rule excludes," as stated in People v. Lane, 100 Cal. 379, 34 Pac. 856, "all evidence of collateral facts, or those which are incapable of affording a reasonable presumption or logical inference as to the principal fact or matter in dispute; and evidence of another offense cannot be given unless there is some clear connection between the two offenses by which it may be logically inferred that if guilty of the one the defendant is also guilty of the other."

The statement was made in a criminal case, but the same principal would manifestly apply here. We can see no logical connection between said conduct before marriage and the acts after marriage which are set out in the complaint.

[2] Objection was also made to evidence of other specific acts of cruelty than those presented by the pleadings. If important enough to be shown, they were certainly important enough to be alleged. It may be permissible to show a general course of conduct as supplementing specific acts of cruelty where only the specific acts are set out, but the rulings complained of could hardly be justified except upon the erroneous theory that it is not necessary to allege any specific act but that a general allegation of cruel treatment is sufficient.

[3] We think, also, that the court should have permitted an inquiry into the necessities of the plaintiff and her manner of living in order that a suitable award might be made for her maintenance. Manifestly, much discretion in this matter must be confided to the trial court, but the discretion is not an arbitrary one and must be exercised in view of the circumstances of the parties. The financial condition of the defendant and his earning capacity, together with the possessions of the plaintiff and her accustomed style of living, were proper elements to be regarded in the consideration. In Kusel v. Kusel, 147 Cal. 60, 81 Pac. 295, there is an interesting discussion of the difference between an allowance to the wife on divorce and the separate maintenance that is contemplated by the Code. Referring to the latter, it is said:

> "The action does not contemplate a divorce, but, on the contrary, that the parties shall continue to remain as they were before, husband and wife. The rights of the wife in the remaining property of the husband are not destroyed or affected in the least by the decree or judgment. The necessity for the separate maintenance may terminate at any time by reconciliation of the parties, or by the death of one of them. The law favors the reconciliation of the parties, and it should not be construed so as to afford a temptation for the wife to press an action for maintenance rather than to seek restoration to her marital rights."

This view of the spirit of the law emphasizes the importance of confining the allowance to the necessary maintenance of the wife in comfort and decency according to her accustomed standard of living.

[4] We think the cross-examination of plaintiff in reference to her commitment to the hospital for the insane was improperly curtailed. On her direct examination she had testified to facts concerning said occurrence that would necessarily create the impression that she was sane at the time. It would be argued from this that the husband had knowledge of her condition and was therefore chargeable with cruelty in having her committed. To rebut this unfavorable inference several questions were asked of the witness directed to the point that she did not know even that she was examined or committed; in other words, that her mind was a blank as to what happened. The inquiry was addressed to the same matter involved in the direct examination and should have been permitted. It may be added that counsel for appellant, at the time of the direct examination, sought to have respondent declare whether she claimed to have been sane at the time she was committed, and her counsel answered: "Yes, you bet she was." It is true that a moment after he said:

> "I don't claim she was railroaded. The jury can draw their own conclusion. I don't claim that she was sane or insane."

However, the effect of her testimony was as we have indicated, and appellant had the legal right to subject it to the test of cross-examination. The gravity of the inquiry is quite apparent, as it involved the most serious charge of cruelty in the case.

After stating to the jury that they must first find whether plaintiff was sane or insane at the time of her marriage, the court, on request of plaintiff, gave this instruction:

> "If you find that the plaintiff was sane at the time of the marriage and there is evidence of cruelty, then your verdict will be for the plaintiff, in the amount that you may determine to be adequate, and for her attorney's fees and for her costs of suit.
>
> "I instruct you that if you believe from the testimony introduced in this case that the plaintiff was treated in a cruel and inhuman manner as alleged in the complaint, and you believe that the general treatment of the plaintiff by the defendant from the time of the marriage to the date of the commencement of this trial was cruel and inhuman, your verdict will be for the plaintiff."

[5, 6] Probably the most serious objection to the instruction is that it authorized the jury to find for plaintiff if there was any evidence of cruelty. The law, of course required that they be convinced by a preponderance of the evidence in order to justify such finding. The instruction as given also ignored the consideration of the weight and credibility of such evidence and the proper function of the jury in relation thereto. It is subject, also, to criticism in failing to state the elements that should enter into the de-

termination of the amount to be awarded plaintiff.

[7] The instruction as to the general treatment of plaintiff by defendant was not justified by the pleadings. There was no such allegation, and therefore it was not within the issues. Following the instruction, the jury might have believed that none of the specific allegations of cruelty was supported, and yet have found in favor of plaintiff upon this sweeping direction as to general treatment. This would be contrary to the established rules of practice.

[8] Appellant complains also of the action of the court in refusing certain instructions proposed by him concerning his theory as to the insanity of plaintiff at the time of the marriage. They seem to embody a correct principle of law, and it is not shown that they were inapplicable to the evidence. Appellant had a right to expect that the jury would be instructed along the line suggested.

[9] In considering the instructions, we are mindful of the fact that the verdict of the jury was simply advisory, and that the erroneous action of the court thereon must be regarded in a somewhat different light from the case where a jury may be demanded as of right. However, in view of the natural and usual inclination on the part of the judge to adopt the findings of the jury and the fact that they were adopted in this case, it seems quite important that the jury should have been correctly instructed.

[10] There is apparent justification for appellant's complaint as to the allowance of $400 for an attorney's fee. As we understand it, the law is settled that a wife is entitled to an allowance of this kind only when it is necessary to enable her properly to maintain her action and the burden is upon her to show that such allowance is necessary. Respondent is challenged by appellant to point out any evidence showing such necessity. It is declared that plaintiff made no attempt of any kind to prove that it was necessary, that the record is absolutely silent upon the point, and that there are no findings of fact upon which such an order could be based. The only reply is that the contention is absurd, but it can hardly be so easily answered. The statute itself, section 137 of the Civil Code, contemplates that the order shall be made only when it is necessary to enable the wife to present her case, and, in commenting upon this provision of the law, the Supreme Court, in Loveren v. Loveren, 100 Cal. 494, 35 Pac. 87, said:

> "The plain object of this statute was to empower the court, * * * upon a proper showing made by the wife for that purpose, to compel the husband to provide her with the means necessary to enable her to prosecute or defend the action."

Other errors are claimed by appellant, but it is deemed unnecessary to notice them specifically. It is earnestly contended that the evidence is utterly insufficient to support the findings of cruelty. There is force in the contention, but we are not prepared to say that there is an entire failure in that respect. The evidence, however, bearing upon and lending support to the allegations of the complaint, seems quite meager, and we think in fairness to appellant that there should be a new trial. If the evidence were strong and convincing, it might be held that the errors committed were without prejudice; but, as the case appears so doubtful upon the merits, in view of the record we think the judgment should not be permitted to stand.

It is therefore reversed.

We concur: CHIPMAN, P. J.; HART, J.

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32 Cal. App. 792

PORTER v. STOCKDALE et al. (Civ. 1628.)

(District Court of Appeal, Third District, California. Feb. 12, 1917.)

1. SPECIFIC PERFORMANCE ⚿119—ADEQUACY OF CONSIDERATION—EVIDENCE.

In an action for specific performance of a contract to convey placer mining land, the contract itself does not afford any evidence of the adequacy of the consideration, though, the contract being in writing, the presumption is that it was for a valuable consideration.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 382, 383.]

2. SPECIFIC PERFORMANCE ⚿123—PROOF OF ADEQUACY OF CONSIDERATION—STATUTE.

Under Civ. Code, § 3391, providing that specific performance cannot be enforced against a party to a contract if he has not received an adequate consideration, where plaintiff, in an action for specific performance of an agreement to convey placer mining land, failed to prove that the consideration was adequate, though the point was put in issue by the pleadings and his attention was called to it on the motion for nonsuit, when, if requested, the court would have permitted him to supply the evidence, judgment of nonsuit was proper.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 397, 399.]

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by Frank R. Porter against Lien Ellen Stockdale and others. From a judgment of nonsuit, and an order denying motion for new trial, plaintiff appeals. Judgment and order affirmed.

H. H. Eaton, of San Francisco, for appellant. Hennessy & Peterson, of Grass Valley, for respondents.

BURNETT, J. The action is for specific performance of an agreement to convey certain placer mining land in Nevada county. After plaintiff had introduced his evidence at the trial a motion for nonsuit was made upon the grounds that the complaint failed to state a cause of action; that the plaintiff was barred by his laches in making tender of payment more than 3 years and 5 months after the third payment in his contract became due, and more than 2 years and 5 months after the fourth payment became due; that time was of the essence of the contract, and therefore plaintiff could not recover; that the delay in making his tender constituted laches from the very nature of the land, it being mining property; that plaintiff had failed to prove the value of the land, and that he had not shown that the sum of $700, as set forth and mentioned in the contract sued upon, was and is a fair and adequate consideration and price for the land therein described. The court held that time is an essential feature in contracts relating to the sale and purchase of mining property, and that, since the tender of payments was made long after they became due, the plaintiff was barred by his laches, and, furthermore, that plaintiff had failed to prove an adequate consideration or whether it was fair and equitable. A motion for a new trial was made and denied, and the appeal is from that order and the judgment of nonsuit.

It is to be observed that appellant seems to have been rather indifferent to the view of the trial court as to the adequacy of the consideration, it appearing that in his assignment of his reasons for excepting to the ruling there is no allusion whatever to this ground, although the court had made it very emphatic, stating:

> "Further than that, it seems to me, even if the court should hold against the defendant upon the ground of inexcusable delay and laches, there is no showing before the court which would enable the court to say what is the value of the land, or whether the compensation agreed upon is fair and equitable. * * * It is an action in equity, and that is one of the essential factors that the compensation is fair and reasonable."

We notice, also, that in the assignments of error there is the same omission and the opening brief of appellant is entirely silent on the subject. Nevertheless, the question is of vital importance in this state. The statute itself is clear and the decisions applying and enforcing it numerous and conclusive. We may notice a few of these.

In Morrill v. Everson, 77 Cal. 115, 19 Pac. 190, it is said:

> "Before the Code, the preponderance of authority was, that mere inadequacy of consideration, not amounting to evidence of fraud, was not ground for refusing specific performance. Pomeroy on Specific Performance, § 194. But the Civil Code contains the following provision: 'Sec. 3391. Specific performance cannot be enforced against a party to a contract in any of the following cases: (1) If he has not received an adequate consideration for the contract; (2) if it is not as to him just and reasonable.' Here the inadequacy of consideration seems to be mentioned as a distinct ground from the injustice and unreasonableness; and the provision seems to be explicit and absolute. We do not doubt that the point of time to which the question of adequacy must relate is the time of the formation of the contract."

In Windsor v. Miner, 124 Cal. 492, 57 Pac. 386, the appeal was from an order denying the motion for nonsuit, and, in reversing it, the court said:

> "Specific performance is an equitable remedy, and it is incumbent upon the plaintiff in an action of this character to show both in the averments of his pleading and in the evidence at the trial that he is entitled to the equitable relief which he seeks. In the absence of any averment or evidence as to the value of the land involved in the controversy, either as to the whole of it or as to any portion of it, with nothing stated upon which to base any estimate of the value or worth of the option and privilege to purchase, how is the court to determine whether defendants have received an adequate consideration or whether the contract is as to them just and reasonable? * * * It may be that this land is worth $500 an acre; if so, $100 per acre is not an adequate consideration for it. * * * The allegations and evidence as to improvements being placed upon the land by plaintiff do not tend to obviate or cure the defects in plaintiff's case already pointed out."

In White v. Sage, 149 Cal. 616, 87 Pac. 193, after citing various prior decisions of the Supreme Court, it is said:

> "The effect of these decisions is that the mere statement of the price agreed to be paid, as in this case, will not suffice. There must be a showing of the value, at least, so that the court can determine whether or not it was in reasonable proportion to the price to be paid, or of other facts which are sufficient to satisfy the court that the contract is just and reasonable to the buyer in all its material elements."

So in Kaiser v. Barron, 153 Cal. 788, 96 Pac. 806, it was declared that:

> "Specific performance of a contract for the conveyance of land cannot be had by a vendee where it is neither alleged nor proved that the vendor had received an adequate consideration for the contract, and that as to him it was just and reasonable, nor that facts exist which would justify the inference that such conditions existed."

Finally, in Haddock v. Knapp, 171 Cal. 59, 151 Pac. 1140, it is said:

> "Whatever may be the rule in the absence of statute—and on this point the authorities in other jurisdictions are not in harmony—section 3391 of the Civil Code and the decisions of this court establish beyond the possibility of question the proposition that inadequacy of consideration is, under the law of California, an independent and distinct ground for denying specific performance. * * * The burden of alleging and proving the adequacy of the consideration is upon the party seeking the relief."

Coming to the facts here, we find that plaintiff alleged in his complaint:

> "That the sum of $700 as set forth and mentioned in said instrument was and is a just, fair and adequate consideration and price for the land therein described."

Defendants' answer to this was full and specific in denying that the sum of $700 was or is adequate or fair or just, and no evidence whatever was even offered as to the value of the property at the time the contract was executed, nor do any circumstances appear tending to show that said consideration was adequate or fair or just.

[1] The contract was not denied, but in this class of cases the contract itself does not afford any evidence of the adequacy of the consideration. Being in writing, the presumption is that it was for a valuable consideration, but, as we have seen, the adequacy is a distinct and independent ground in an action for specific performance, and it

must be proved, or else equity will afford the plaintiff no relief.

[2] If the proof was available plaintiff can blame only himself for the condition of the record. The issue was made by the pleadings, and he should have been placed on his guard. His attention was also called to it on the motion for nonsuit, and, no doubt, if requested the court, would have permitted him even then to supply the evidence. He chose, however, to ignore that feature, probably for a good reason. At any rate, it seems decisive of the controversy, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

32 Cal. App. 738

ALTPETER et al. v. POSTAL TELEGRAPH-CABLE CO. (Civ. 1588.)

(District Court of Appeal, Third District, California. Feb. 7, 1917.)

1. MUNICIPAL CORPORATIONS 🔑663(3), 691—STREETS—NUISANCES—TREES ALONG SIDEWALKS.

Trees may be lawfully grown and maintained along the sidewalks in the streets of cities and towns and in front of premises of abutting property owners, and trees so grown are not nuisances.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1440, 1492–1508.]

2. MUNICIPAL CORPORATIONS 🔑663(3) — STREETS—INJURING TREES—RIGHT OF ACTION.

While the owner of property in front of which trees are grown and standing has only a qualified or limited interest in them, an interest subject and subordinate to the rights of the city to trim and remove the trees whenever the public interests require such action, if a person injures such trees without lawful right or authority, the owner can recover such damages as he may be able to show he has suffered by reason of any depreciation in the value of his property occasioned by the injury to the trees.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1440.]

3. MUNICIPAL CORPORATIONS 🔑680, 681(1)—POWER TO GRANT FRANCHISE TO PUBLIC UTILITIES.

Cities and towns are empowered, as agents of the state, to grant to public utility corporations, such as those engaged in the distribution of water, gas, electricity, or the transmission of telegrams, etc., the right to use the streets in a reasonable manner.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1459.]

4. MUNICIPAL CORPORATIONS 🔑663(3) — STREETS — INJURIES TO TREES — RIGHT OF TELEGRAPH COMPANY TO CLEAR WIRES OF BRANCHES OF TREES.

A telegraph company did not subject itself to an action for damages when it cut the branches of trees growing in front of city property along a sidewalk to clear its wires to prevent interference with their proper operation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1440.]

5. MUNICIPAL CORPORATIONS 🔑663(3) — STREETS — INJURIES TO TREES — RIGHT OF TELEGRAPH COMPANY TO CLEAR WIRES FROM BRANCHES.

A telegraph or telephone corporation, in trimming or severing the branches of trees to prevent contact of wires therewith, can do no more than is necessary for the proper and efficient working of wires, without subjecting itself to civil liability for damages.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1440.]

6. MUNICIPAL CORPORATIONS 🔑671(4) — STREETS — INJURIES TO TREES — REMOVING BRANCHES FROM WIRES.

In an action by property owners against a telegraph company for damages caused by the company's cutting off the branches of trees in front of plaintiffs' property to clear its wires, the burden was on plaintiffs to show either that it was entirely unnecessary to remove any branches from the trees, or that the company removed more branches than the situation with respect to its wires called for.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1447, 1450.]

7. MUNICIPAL CORPORATIONS 🔑671(4) — STREETS — INJURIES TO TREES — REMOVING BRANCHES FROM WIRES—EVIDENCE.

In such action evidence *held* insufficient to sustain plaintiffs' burden.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1447, 1450.]

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by Catherine Altpeter and another against the Postal Telegraph-Cable Company, a corporation. From a judgment for plaintiffs, defendant appeals. Reversed.

See, also, 25 Cal. App. 255, 143 Pac. 93; 26 Cal. App. 705, 148 Pac. 241.

Willard P. Smith and B. B. Blake, both of San Francisco, for appellant. E. E. Gaddis, of Woodland, for respondents.

HART, J. This is an action for damages for the alleged injury of certain walnut trees standing and growing in and on Court street, in the city of Woodland, in front of the plaintiffs' houses, situated on lots 8, 9, and 10 of block 4 of said city, said lots being the property of the plaintiffs.

The complaint alleges a wrongful and unauthorized cutting of the limbs of the trees, the charge so alleged being that the defendant without lawful or any authority knowingly and willfully cut down, chopped, mangled, mutilated, disfigured, and destroyed four of said trees, and prays for a judgment for $500 and treble any sum at which damages may be assessed. Code Civ. Proc. § 733.

The answer denies the allegations of the complaint, and as an affirmative defense describes the character of the defendant's business, alleges the necessity of clearing its wires from the branches of the said trees, through the branches of which said wires pass, alleges that the lines of the defendant have been maintained on the street in question and through said trees for a long period of time prior to the acquisition by the plaintiffs of the premises in front of which said trees stand.

The cause was tried by the court without a jury, and judgment rendered and entered in favor of the plaintiffs for the sum of $450, and costs. This appeal, supported by a bill of exceptions, is prosecuted by the defendant from said judgment.

The action is founded on section 733 of the Code of Civil Procedure, supra, which reads:

> "Any person who cuts down or carries off any wood or underwood, tree or timber, or girdles or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village, or city lot, or cultivated grounds; or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any court having jurisdiction."

Section 3346 of the Civil Code prescribes the measure of damages for the wrongful injuries to timber, trees, or underwood "upon the land of another, or removal thereof." The general contention of the defendant is that the findings derive no support from the evidence.

The particular proposition urged by the defendant, however, is whether or not a telegraph company which maintains its lines in the public streets of a town or city may, as against an abutting property owner, lawfully trim trees growing and standing in a street, and through which its wires pass, for the purpose of preventing branches of such trees from interfering with the proper operation of the wires as transmitters of telegraph messages.

[1-3] These propositions will not be controverted: (1) That trees may lawfully be grown and maintained along the sidewalks in the streets of cities and towns and in front of the premises of abutting property owners, that is to say, that trees so grown are not nuisances as would be a purpresture of any character which would ordinarily have the effect of obstructing or materially interfering with traffic in and over the street; (2) that, while the owner of property in front of which trees are grown and standing has only a qualified or limited interest in the trees—an interest which, in other words, is subject and subordinate to the rights of the city to trim or remove them whenever the public interests require such action—if a person injures such trees without lawful right or authority, such owner may maintain an action for damages for the injury so inflicted and recover such damages as he may be able to show that he has suffered by reason of any depreciation in the value of his property which has been occasioned by such injury; (3) that, where trees so grown are cut, trimmed, or removed by the city or town for the purpose of facilitating the use of the street in a legal manner by the public, then the damage resulting from such cutting or removal to the owner of the property in front of which such trees are standing is damnum absque injuria; (4) that cities and towns are generally empowered, as agents of the state, to grant to public utility corporations such as are engaged in the distribution of water, gas, electricity, or the transmission by electric currents of telegrams or messages the right to use, in a reasonable manner, or so as not to interfere with common traffic, their streets for the purpose of installing and maintaining in such streets the equipments essential to the carrying on of the business of such corporations, and that, when such right or privilege or franchise is so granted, such corporations are authorized, upon such conditions or under such restrictions as may have reasonably been imposed, to remove from the streets so used any object or thing which will, if permitted to exist, prevent proper and efficient service by them as such corporations to the public.

[4] The last stated of the foregoing propositions is peculiarly applicable to telegraph and telephone corporations maintaining their wires over and along the streets of cities and other urban communities.

> "The telegraph company," well say counsel for the defendant in their opening brief filed herein, "exercises its franchise in the street as a public agency, and not as a private individual. It is charged with a public duty which it can neither shirk nor avoid. It must maintain its lines at all times in a safe and workable condition, so that the messages of the public may be transmitted over them without delay and without error. In this respect it exercises the same functions over its wires that the public authorities exercise over the streets and highways themselves. The latter are endowed with the right and charged with the duty of removing trees whenever they become an obstruction to travel by foot or vehicle over the surface of the highway. The same reasoning which supports this right requires that the owners of the telegraph lines dedicated to public use should be endowed with a similar right and charged with a similar duty whenever the free transmission of telegrams over their wires is obstructed by the growth of the branches of trees among the wires or from any other cause. And just as the street and highway authorities are given a wide latitude of discretion in performing their duties, so the telegraph company should be given a broad latitude in removing limbs of trees so long as the removal is not done carelessly or in bad faith. Furthermore, the telegraph company having been granted the right by the state to construct its lines on the public highways, such incidental powers as are necessary to make the principal grant effective naturally follow it. If it were otherwise the principal grant would exist only in name and would be absolutely of no value or effect for practical purposes. Recognizing the soundness of this reasoning, the courts have uniformly held that the power and right to trim trees interfering with telegraph wires exists in the telegraph company owning the wires."

See Southern Bell Tel. Co. v. Constantine, 61 Fed. 61, 9 C. C. A. 359; Southern Bell Tel. Co. v. Francis, 109 Ala. 224, 229, 19 South. 1, 31 L. R. A. 193, 55 Am. St. Rep. 930; Meyer v. Standard Tel. Co., 122 Iowa, 514, 98 N. W. 300; Wyant v. Central Tel. Co., 123 Mich. 51, 81 N. W. 928, 47 L. R. A. 497, 81 Am. St.

Rep. 155; Miller v. Detroit, etc., Ry., 125 Mich. 171, 84 N. W. 49, 51 L. R. A. 955, 84 Am. St. Rep. 569; Dodd v. Consolidated T. Co., 57 N. J. Law, 482, 31 Atl. 980.

[5] Of course, a telegraph or telephone corporation, in trimming or severing the branches of trees to prevent contact of their wires therewith, will not be permitted to do more in that respect than is necessary for the proper and efficient working of their wires. If it goes beyond this or wantonly and unnecessarily cuts or mutilates the trees —that is, if such corporation removes branches or limbs which do not, and from their situation with respect to the wires cannot, interfere with or impair the proper and efficient use of such wires—then it is liable for any damages thereby caused to the owner of the premises in front of which the trees stand.

The principles stated above are elementary, and, applying them to the facts of the instant case as the evidence presented before us discloses them, we cannot perceive how the findings may be upheld.

The facts are: That the predecessor in interest of the defendant installed a telegraph line in the city of Woodland and erected the wires over and along Court street in said city and through the trees in question in the year 1886, and have ever since so maintained said wires. From time to time during the period from 1886–87 down to the date of the trimming of said trees in August, 1911, the defendant and its predecessor in interest have, when the exigency of the case required it, trimmed and severed from the trees certain of the branches and limbs thereof. That such cutting and trimming are absolutely necessary whenever the branches and limbs have so grown and spread out as to bring them in contact with the defendant's wires is so obvious a proposition that it will not be disputed. But a clearer understanding of this proposition may be obtained from the testimony of Mr. Blake, president and general superintendent of the defendant. For over 40 years, as an operator, a chief operator, an inspector of lines, and as manager, Blake has been identified with the telegraph business. His testimony stands in the record uncontradicted, as indeed it could not in its general aspect be contradicted, since it involves a lucid explanation of the philosophy of telegraphy, the method of its operation, and the effect of the contact of telegraph wires with foreign substances under certain conditions upon messages transmitted over the wires, all of which propositions are nowadays quite obvious to the average understanding. He explained:

> "Telegrams are transmitted over wires by the electromagnetic system of telegraph invented by Prof. Morse. The electricity flows on the wire and the messages are made by dots and dashes. Certain combinations of dots and dashes produce letters, and the dots and dashes are made by closing and breaking the circuit, then completing the circuit, allowing the electricity to flow through the wire and back through the ground by interrupting it, and a dot is really a short dash. In the different capacities in which I have been employed it has been my duty to ascertain matters interfering with the working of lines of telegraph. The limbs of a green tree growing from the ground up into and among the wires affect the transmission of messages by diverting a certain amount of current from the wire to the ground. A dry tree will do the same thing when wet by rain, and when a green tree is wet by rain it causes a greater escape, as we call it. That is very similar to putting a hole in a water pipe that you are putting water through. A small hole has very little effect. The larger the hole the more water escapes and the less the force at the end of the pipe. The same thing applies to electricity; if it leaks off the line, you lose the strength, and that strength is required to operate the telegraph instrument. Where the telegraph is employed for business purposes, you can't work the wires safely where trees are among them. Sometimes you can't work them at all, but never safely if there are any limbs touching the wires. If a limb were lying against the wire solidly, it would interrupt the signal on the wire so that the current would not pass through to the far end of the wire and produce a signal. If the wind was blowing the limb against the wire, making an intermittent escape, it would mutilate the signals. We have had cases where telegrams were sent from San Francisco to New York where a very plain word appears on the tape in San Francisco and a totally different word appears in New York. Something hit the wire and mutilated the signals and made a complete change. We have three claims for damages we have traced to that very thing."

As to the cutting of the trees, the plaintiff called as a witness E. P. Heller, the line repairer and "trouble man" of the defendant in Woodland in August, 1911. Heller did the cutting and trimming complained of by the plaintiffs. After testifying on direct examination that he trimmed the trees and severed therefrom a certain number of branches, he was turned over for cross-examination, and testified:

> "I trimmed out the new growth that had been formed on the trees since they had been trimmed the last time; that is, the suckers and the new growth that had formed on these limbs since the previous trimming. This new growth was merely limbs that had grown out from the stubs where they had been cut off previously; in other words, it is what is commonly known as suckers that sprang out from around the top of the old stubs. I don't think these stubs would exceed two or three inches in diameter. The suckers had formed around where the limbs had been cut off previously, forming a little bush at the top and just immediately under that edge and probably two or three or four inches down. We cut it off like that (indicating) and let it down to make a clean job of it. With reference to the wires of the telegraph company, *we trimmed the trees just enough to clear them well under the wires and to get them away from the wires enough not to cause trouble.* [Italics ours.] I did not use an axe. I never trim a tree with an axe."

The witness Hutchinson, testifying for the plaintiff, declared that he saw Heller and his assistants cutting the branches, and that the work was, he thought, done with a hatchet, although he subsequently stated that he looked at the severed branches or limbs the morning following the day they were removed from the trees, and that the larger limbs had the appearance of having been "sawed off." This same witness further testified that:

> "The size of the big limbs sawed off were from as big as my thumb up to three inches. * * * There was a place cut out through the trees that looked four or five feet wide. That left the big limbs coming up on either side."

The witness Keehn stated:

> That he was "called in by Mr. Altpeter after the cutting of these trees. I measured up the size of the limbs that were cut. They averaged all the way from 1 to 1½ inches. The stubs are still on the trees and can be measured up if desired. I couldn't tell exactly how many limbs were cut. I should judge all the way from five to six branches on each tree, mostly out of the center of the tree. The brush on the ground after it was cut would make a good sized wagonload, I should judge. The trees were black walnut, about 18 or 20 years old. Some of these cuttings were on an average of about 10 or 12 feet below the cross-arm."

The witness Murray, for the plaintiffs, testified that:

> "The tops were cut out of the trees, leaving the wires six or eight feet from the points where the limbs were taken from the trees."

Mrs. Altpeter, one of the plaintiffs, testified:

> That the trees were in the month of August, 1911, "terribly disfigured by cutting them off right straight at the top. They have no shade at the top. * * * We had no trees trimmed at that time and gave no permission to any one to trim them. * * * I did not see any of the branches that were cut off. The main limbs of the trees were cut. I don't know how big the limbs were that were cut off, but they were the main limbs, the center limbs, I would call it."

[6] The foregoing comprehends substantially a statement of all the testimony presented by the plaintiffs upon the question as to the cutting or trimming of the trees. The burden was upon the plaintiffs to show that either it was entirely unnecessary to remove any branches or limbs from the trees for the purpose claimed by the defendant or that the latter removed more limbs and branches than the situation with respect to its wires called for.

[7] This burden they wholly failed to sustain. Heller was the only witness who gave any testimony upon this question, and he declared, as will be observed, that only so much and such parts of the trees were trimmed and cut as were necessary to prevent collision between the wires and the branches —a collision or contact which would have caused such interference with the transmission of messages over the wires as would necessarily have destroyed that efficient service which the defendant, as a telegraph corporation, owes to the public, and the failure to furnish which may subject it to the severest penalties in one form or another. This was one of the vital questions of fact in the case. Indeed, it constituted the very foundation of plaintiffs' right to a recovery; for obviously, since the defendant, as a public service corporation, is, as above explained, charged with the duty of so maintaining its wires as to facilitate the proper and efficient performance of its obligations to the public, it is necessarily its duty to remove from any point along the route over which it has been granted the right, either by the public authorities or by judgments in condemnation or by agreements with private individuals, to run and maintain its lines, any obstruction interfering with the safe and proper transmission of messages. As has been shown, it had the lawful authority (Code Civ. Proc. § 733) to cut or trim limbs and branches from the trees in question, if necessary for a safe and proper transmission of messages over its wires passing through and in said trees. Therefore the number of the branches or limbs removed, whether large or small, or the size of the limbs or branches so removed, whether large or small, or what influence and to what extent, if any, the severance of the limbs and branches from the trees exerted in depreciating the value of the property in front of which the trees stand and grow, constitute facts which become wholly immaterial and unimportant unless it be shown that the defendant unnecessarily stripped the trees of certain of their branches and limbs or destroyed more branches and limbs than the necessities of the situation actually required. In this case, whatever may be the extent and effect of the damage the cutting and trimming of the limbs and branches of the trees might have had on the property of the plaintiffs, it having been shown by the evidence without conflict that such cutting and trimming were necessary to the safe and proper operation of the defendant's wires as transmitters of messages, the damage so inflicted is damnum absque injuria, and therefore can form no basis for a recovery by the plaintiffs.

The defendant has presented and argued other points in impeachment of the judgment, but, in view of the conclusion above announced, they need not be considered.

For the reasons above explained, the judgment must be reversed; and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

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32 Cal. App. 751

TURTON et al. v. SHINN et al. (Civ. 1605.)

(District Court of Appeal, Third District, California. Feb. 8, 1917.)

1. Guaranty ⚷25(3)—Acceptance of Guarantor—Evidence.

In an action on a guaranty signed by three guarantors, evidence *held* insufficient to show that the creditor refused to accept the first signer alone so as to release him.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 104.]

2. Guaranty ⚷85(2)—Liability of Guarantor—Demand and Notice.

Though the guarantor may make his obligation depend on notice or demand, the law, in view of Civ. Code § 3532, requires no idle act,

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

and as a failure to observe a precedent condition is not always fatal to recovery, where defendant guarantor denied that he had been accepted as a guarantor, it was not necessary for the guarantees to allege demand.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 99.]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Nellie Turton and another against C. G. Shinn and others. Judgment for plaintiffs, and defendant Shinn appeals. Affirmed.

Shinn & Shinn, of Sacramento, for appellant. White, Miller, Needham & Harber, of Sacramento, for respondents.

CHIPMAN, P. J. The action is against defendants as guarantors of a certain lease executed by plaintiffs as lessors and the Morgan Shoe Company, a corporation, as lessees, the premises being situated at No. 801 K street, in the city of Sacramento. The guaranty reads as follows:

"In consideration of the foregoing lease or agreement, and one dollar to me paid, the receipt whereof is hereby acknowledged, we do hereby covenant, promise and agree, to and with the said Nellie Turton and Kate Turton that the said Morgan Shoe Company, a corporation, shall well and truly pay all rents and perform and execute all the covenants therein contained on its part, and that on its failure to do so in any particular will on demand pay unto said Nellie Turton and Kate Turton all rents or damages that may happen or occur by reason of such failure, not exceeding the sum of fifteen hundred dollars, and immediate notice of default is hereby expressly waived.

"Dated and signed on this 29th day of September, 1913. C. G. Shinn.
"H. S. Baxter-Hooper.
"Dave Ahern.

"Signed, sealed and delivered in the presence of A. L. Shinn, A. B. Erway, H. F. De Back."

The complaint is verified.

Answering the complaint, defendant Shinn denied that he, together with the other alleged guarantors, "subscribed or delivered to the plaintiffs an agreement guaranteeing the payment of all or any rents or damages that might happen or occur by reason of the failure of the Morgan Shoe Company to pay the said rent," etc.; averred that defendant affixed his signature to said instrument, and it "was thereupon presented by the Morgan Shoe Company to plaintiff for acceptance"; that plaintiff refused to accept defendant as guarantor, and defendant was forthwith notified by said company of said refusal; that said company "thereafter obtained the signatures of said Hooper and Ahern to said instrument as the guarantors of the rents and damages as aforesaid; that plaintiffs accepted the said Hooper and Ahern as the only guarantors of said rents and damages, and plaintiffs ever since said acceptance have treated with the said Hooper and Ahern as the only guarantors of the said rents and damages"; denied that plaintiffs ever notified him of the company's default in the payment of said rents, or ever demanded from defendant the payment thereof. The cause was tried by the court without a jury, and plaintiffs had judgment for $1,500 and costs of suit, taxes at $20. Defendant Shinn appeals.

It is not necessary to state the terms of the lease, as no question arises concerning its purport. The lessee, Morgan Shoe Company, became insolvent and defaulted in payment of rentals in an amount in excess of $1,500. Hence the action against the guarantors.

Appellant specifies the following particulars wherein he claims the evidence to be insufficient to justify the decision of the court:

"(1) The evidence is insufficient to justify the portion of finding No. V, viz.: 'That proof of such demand upon defendant, C. G. Shinn, was neither required nor necessary.' The contract of guaranty expressly provides that demand must be made. (2) There is no evidence to justify that portion of finding VII, viz.: 'That the averments in the answer of defendant C. G. Shinn, and each of them, is not true.' He avers that his offer to guarantee was not accepted by plaintiffs. The evidence of plaintiffs' agent, Frank Hickman, shows that the offer was conditionally accepted, and that defendant never assented to the condition thus imposed."

The lease was prepared by Frank Hickman, a real estate and insurance agent, acting in the matter as plaintiffs' agent. He testified:

That he secured the Morgan Shoe Company as tenant of the premises; that the Morgan Shoe Company obtained the signatures of the guarantors and as executed by that company with the guaranty signed by the three parties the lease was presented to him and signed by plaintiffs. "Q. State the circumstances concerning the signatures of the guarantors. A. The best of my recollection, they brought the lease in with the name of Shinn. I told them that was not sufficient; then followed with Mr. Hooper—I did not know Hooper—and made the same objections. They finally brought in Mr. Ahern's name, then I told him I thought the three of them would be satisfactory. We accepted the lease."

He testified to the occupancy by the Morgan Shoe Company; its bankruptcy later; the amount of rentals paid and still unpaid, etc., as to which no question arises. On cross-examination he testified:

"By Mr. Carl Shinn: Q. Do you recall who presented the lease wth the signature of C. G. Shinn attached? A. One of the men of the Morgan Shoe Company. Q. That was Mr. Tom Finlayson, was it not? A. I think so. Q. What did you tell him? A. I told him that I did not know Shinn. I would like to have additional bondsmen—additional security on the lease. Q. Did you ever communicate with Mr. Shinn in reference to obtaining other signatures? A. No, sir. Q. You never communicated with him in any respects regarding the guaranty? A. No, sir. Q. All your dealings occurred with the Morgan Shoe Company? A. Yes, sir. Q. He never expressed his assent to that arrangement stated by you for other signatures? A. I do not think I had any conversation with Mr. Shinn whatever. Q. All you know is you objected to his signature for the reason that it was not sufficient? A. I simply asked for additional security on the lease. I did not object to the signatures; no, sir. Q. You refused to accept that signature, however? A. No, sir; I did not refuse to accept any signature on the lease—merely asked for additional security, in addition to Mr. Shinn and Mr. Hooper. Q. You made a conditional acceptance at that time? A. Yes, sir. Q. Plaintiffs had nothing to do with the execution of the lease or the guarantors on it; you attended to all that entirely? A. Yes, sir. Q. What did Mr. Finlayson say to you when he returned with the lease signed by the three parties? A. I could not tell you. Q. There has never been any understanding between you and Mr. C. G. Shinn in reference to that guaranty? A. No, sir. Q. Of any kind? A. No, sir. Mr. Shinn: That is all."

Defendant Shinn testified as follows:

> "Q. State briefly what connection you had with the lease. A. I had acknowledged the signatures of the Morgan Shoe Company. Mr. Finlayson asked me if I would go on the bond. I told him yes, if it would help him; so he took it away.
>
> "The Court: Was Mr. Finlayson one of the firm? A. One of the members of the Morgan Shoe Company.
>
> "Mr. Carl Shinn: Q. You say Mr. Tom Finlayson was negotiating the lease and guaranty in behalf of the Morgan Shoe Company? A. Yes. Q. Is Mr. Tom Finlayson now living? A. No, sir; he died about three months ago."

The remaining questions put to this witness called for conversations later between Finlayson and the witness and were objected to and not answered.

The foregoing is substantially all of the evidence bearing upon the findings objected to.

[1] Appellant's defense is that plaintiffs refused to accept him as a guarantor and accepted Hooper and Ahern as the only guarantors. Niles v. Hancock, 14 Cal. 161, and other like cases are cited, in which it was held that:

> "Where an offer has once been rejected, the party rejecting cannot afterwards, at his option, accept the rejected offer, and thus convert the same into an agreement by acceptance."

The evidence does not warrant the application of this principle. The case here is quite different from the cases cited. Appellant signed the guaranty, as he testified, at the request of the Morgan Shoe Company—not at plaintiffs' request. He testified:

> "Mr. Finlayson asked me if I would go on the bond. I told him yes, if it would help him; so he took it away."

He did not testify, and there was no evidence, that appellant attached any condition to his guaranty, nor was any conditional offer communicated to plaintiffs. Neither was there any evidence that plaintiffs refused to accept him as a guarantor, nor that plaintiffs offered to accept him as a surety on terms different from those found in the written instrument executed by appellant. The instrument seems to have been drawn in contemplation of being signed by more than one person, for its language is, "We do hereby covenant," etc. There is an entire failure of proof in support of appellant's answer, and hence the finding that its "averments are not true" was justified.

The court made the following findings:

> "That no proof of service of demands of said rentals upon defendants C. G. Shinn and H. S. Baxter-Hooper was offered; that it appears from the verified answers of said defendants last named that such demand would have been idle, needless, and useless; that defendant C. G. Shinn in his answer denied the execution and delivery to plaintiffs of said hereinbefore mentioned agreement, and alleged that plaintiffs refused to accept him as guarantor of the rents or damages, and that plaintiffs accepted the said Hooper and Ahern as the only guarantors of said rents and damages; * * * that said last-named defendants denied the relationship existing between them and plaintiffs by reason of the execution and delivery by them of said contract and the liabilities and consequences arising therefrom; that proof of such demand upon defendants Shinn and Hooper was neither required nor necessary."

[2] It is contended that:

> "It is within the power of a guarantor to make his obligation dependent upon notice, demand, or any other condition he deems proper for his own protection and safety"; that his liability cannot be extended beyond the terms of his contract.

This view of the law may not be questioned. But "the law neither does nor requires idle acts" (section 3532, Civ. Code); and the courts frequently resort to this maxim in dealing with the contractual relations of men. A failure to observe a precedent condition is not always and under all circumstances fatal to recovery. This is very well shown in Parrott v. Byers, 40 Cal. 614, 622:

> "It is a familiar rule that where the relations between the parties are such that a demand and refusal is a condition precedent to the right of the plaintiff to maintain the action, a denial in the answer of the relation on which the action is founded will dispense with the necessity of an averment in the complaint of a previous demand and refusal. In an action by a landlord against his tenant, or by a vendor against his vendee for the possession, or by a cestui que trust against the trustees to enforce the trust, if a demand and refusal were otherwise necessary, a denial in the answer that the alleged relation exists between the parties will dispense with the necessity of averring or proving a prior demand and refusal. The law does not require a useless act to be performed; and, when it is plain from the answer that if a demand had been made it would have been refused, it does not lie in the mouth of the defendant to object that no demand was made."

This case has been many times cited and with approval. In his verified answer appellant not only denied any liability, but denied the relationship in which he placed himself towards plaintiffs by the instrument sued upon. It seems to us quite apparent that a demand of payment before commencing the action would have been fruitless and unavailing, and hence was unnecessary.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

32 Cal. App. 718

McCLATCHY et al. v. LAGUNA LANDS, Limited, et al. (Civ. 1627.)

(District Court of Appeal, Third District, California. Feb. 6, 1917.)

1. Navigable Waters 🔑34—Public Nuisance—Abatement—Remedy.

In an action by the State Reclamation Board to abate as a nuisance diversion of waters into San Joaquin river, under St. 1913, p. 252, § 12, declaring that diversion of waters that will increase the flow of the Sacramento and San Joaquin rivers is a public nuisance which may be prevented or abated by the reclamation board, where the allegations in the complaint are comprehensive enough and injunctive relief is asked for, it may be awarded where it accomplishes purposes of abatement.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 59–63, 67–70, 72.]

2. Navigable Waters 🔑34—Public Nuisance—Action.

The merits of an action to abate as a nuisance diversion of water of a river contrary to St. 1913, p. 252, § 12, cannot be tried on affidavits.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 59–63, 67–70, 72.]

3. Venue 🔑5(5)—Action to Abate Public Nuisance.

An action to abate as a public nuisance diversion of water contrary to St. 1913, p. 252, § 12, declaring diversion of water that will increase flow of Sacramento and San Joaquin rivers a public nuisance, where it involves injuries to real property, must be tried in the county in which the subject of the action or some part thereof is situated.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 9.]

4. Navigable Waters 🔑34—Public Nuisance—Action—Complaint—Sufficiency.

A complaint in an action brought in San Joaquin county to abate as a public nuisance diversion of water into San Joaquin river contrary to St. 1913, p. 252, § 12, need not allege that some specific tract of land in said county has been injured, or that injury is immediately present, it being sufficient if it can be gathered from complaint that lands therein are directly threatened with the injury complained of.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 59–63, 67–70, 72.]

5. Venue 🔑16 — Abatement of Public Nuisance.

Where real property injured by a public nuisance is situated partly in one county and partly in another, an action to abate such nuisance may be brought in either county under Code Civ. Proc. § 392.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 23, 25–27.]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by V. S. McClatchy and others, as members of the State Reclamation Board, against the Laguna Lands, Limited, L. A. Nares, Summit Lake Investment Company, and others. From an order denying a motion of the defendants named for a change of place of trial, they appeal. Affirmed.

Short & Sutherland and H. P. Brown, all of Fresno, for appellants. C. H. Oatman and Geo. O. Perry, both of San Francisco, for respondents.

CHIPMAN, P. J. This is an appeal from an order denying appellants' motion for a change of the place of trial from San Joaquin county to Fresno county.

The action is for the abatement of an alleged public nuisance and for an order restraining the defendants from doing any of the acts mentioned in the complaint, and is brought under the provisions of an act of the Legislature in effect August 10, 1913. Stats. 1913, p. 252. The act provides for the creation of a drainage district to be known as Sacramento and San Joaquin Drainage District, describing its boundaries, the appointing of a reclamation board for the management and control of said district, defining the powers and duties of the reclamation board, and for the prevention of the diversion of the waters of any stream into the Sacramento and San Joaquin rivers. Section 12 of the act declares that the board shall have power "to maintain actions to restrain the diversion of the waters of any stream that will increase the flow of water in said Sacramento or San Joaquin rivers or their tributaries, and such diversion of the waters of any stream into the said rivers or any of their tributaries is hereby declared to be a public nuisance which may be prevented or abated by the reclamation board." Section 7 of the act of 1913 declares that:

> "The state of California and the people thereof are hereby declared to have a primary and supreme interest in having erected, maintained and protected on the banks of the Sacramento and San Joaquin rivers and their tributaries and the by-passes and overflow channels mentioned herein, good and sufficient levees and embankments or other works of reclamation, adequately protecting the lands overflowed by said streams, and confining the waters of said rivers * * * within their respective channels"

—and it is made the duty of the reclamation board to enforce the erection, maintenance and protection of such levees, etc.

It appears from the verified complaint that Kings river and the San Joaquin river have their source on the easterly slope of the Sierra Nevada Mountains, the San Joaquin river rising near the northeasterly portion of Fresno county, taking a westerly course and generally parallel with Kings river, which latter river is about 35 miles distant and south from San Joaquin river; that these rivers reach a designated point somewhere near the boundary line dividing Kings county from Fresno county, where, when unobstructed, the natural flow of Kings river diverges to the south, and has not naturally flowed into or become a part of the San Joaquin, and empties into Tulare Lake, while the San Joaquin river turns northerly, passing through the San Joaquin Valley in the counties of Fresno, Madera, Merced, Stanislaus, San Joaquin and Contra Costa, where it empties into Suisun Bay, an arm of San Francisco Bay. The complaint sets forth with much particularity that the defendants are engaged in efforts to turn the waters of Kings river in a northerly direction in the vicinity where the two rivers take opposite directions naturally, and have been engaged in the construction of artificial works for the purpose of forcing the water out of the natural channel of Kings river in a northerly direction and towards the San Joaquin river; that by these works defendants turned out said Kings river water to a point whence it could readily be turned into the San Joaquin river, and that defendants then constructed what is designated "the new channel," which furnished the means for the water to force its way to the San Joaquin river. The character of the soil through which this new channel is constructed is described as easily eroded, widened, and deepened by the action of the water, and has been since its construction so widened and deepened as to increase its carrying capacity until it is now capable of carrying from the watershed and slope of Kings river and into the watershed and slope of said San Joaquin river nearly all the high waters of said Kings river, and by such processes of erosion and enlarging, if it shall be permitted to continue to carry such waters of Kings river, within one or two years, it will be so enlarged as to divert all of the high and flood waters of Kings river and pass the entire flow thereof into said San Joaquin river; that the natural course of the San Joaquin river, as it continues to flow from the point where the waters of said Kings river are so mingled with it, is through the central portion of San Joaquin Valley in a northwest direction until it mingles with the water of Suisun Bay, and is through a low-lying country; that the natural floods of the San Joaquin river and its tributaries have, from time to time, flowed out over the banks of the river and over said low-lying lands, and inundated, within the natural flood planes of the river, upwards of 623,356 acres of such lands; that of these lands 300,000 acres have been sufficiently reclaimed by artificial works to be cultivated to crops and occupied for farms and homes, and approximately 300,000 acres additional are capable of being reclaimed by the erection of works within the jurisdiction of the plaintiff in this action; that the waters of Kings river which have been diverted therefrom by reason of said dams and other obstructions heretofore described as having been erected and maintained by defendants, "added to the natural high-water plane of said San Joaquin river, have so increased, and will, unless said works are abated, continue to increase, the water plane of said San Joaquin river at high water, that it has impaired, and, unless said works and diversions are abated, will continue to impair and destroy, a great portion of the reclamation work along said San Joaquin river, and has made, and will continue to make, it more difficult and expensive to reclaim the unreclaimed portions of land along said San Joaquin river, as hereinbefore described"; that if said dams, embankments, and channels mentioned in the complaint are not abated, all of the flood or high waters of said Kings river will be diverted and turned into the San Joaquin river to the extent of 25,000 cubic second feet to 35,000 cubic second feet of water; that with the average velocity of said San Joaquin river between the point where said waters have been and will be commingled and the outlet of said San Joaquin river at four feet per second, and the average width of the San Joaquin river of from 500 to 750 feet, if the added waters of Kings river are permitted to flow through the San Joaquin river and confined to the width of the natural channel of the river, it will result in raising the water surface of San Joaquin river from 8 to 15 feet in elevation.

The prayer of the complaint is for judgment that "said dams, obstructions, embankments, and channels so erected, constructed, and maintained by said defendants be decreed to be and constitute a public nuisance, or public nuisances," and that defendants be required to abate the same, "and that said defendants, and each of them, be enjoined and restrained from the doing of any act or thing that may be injurious to any of the works necessary to control the flood waters of said San Joaquin river, or interfere with the successful execution of any plan of said state reclamation board which may be adopted for the control of such flood waters, and that they, and each of them, be forever enjoined and restrained from the diversion of any of the waters of said Kings river that will increase the flow of said San Joaquin river, * * * and for such other and further relief as may be conformable to equity."

At the hearing defendants submitted two affidavits in support of the motion. L. A. Nares deposed that he is familiar with the obstructions mentioned in the complaint, and also with the water measurements of the San Joaquin river and the various reports of the general government covering a period of years commencing prior to the construction of said obstructions; that the said reports "show that the flood waters of Kings river * * * have not, even during periods of highest known water on said Kings river, increased the water plane of the San Joaquin river at high water on said San Joaquin river"; that said reports show that the natural period of high water on the San Joaquin river at or near the southerly boundary of San Joaquin county, caused by water in said river from streams other than Kings river, "occurs much earlier in point of time than the natural period of high water at said point caused by water from said Kings river, and that in each season for many years last past, when the crest of the flood waters from the Kings river has reached the southerly boundary of said San Joaquin county, the flood waters reaching said point from streams other than the Kings river have already passed down said San Joaquin river, and the water plane of said San Joaquin river at said point has invariably fallen so far below high-water mark at said point that the flood waters from said Kings river, diverted as set forth in said complaint, have never raised the water plane of the said San Joaquin river to the high-water mark of said river at said point"; that all the said obstructions are situated in Kings county. Affiant appends to his affidavit an excerpt from a report made by the engineer of the reclamation board concerning the unusually high flood of 1914, which, it is contended, corroborates affiant's statement as to the San Joaquin river clearing itself before the flood waters of the Kings river reach the southern boundary of San Joaquin county.

I. Teilman deposed that he is familiar with said obstructions, and that they are situated in Kings county near the southerly boundary of Fresno county; "that the waters of the Kings river, which flow north and empty into the San Joaquin river flow in natural channels, known as Fish slough, sometimes called Fresno slough; that said natural channels flow in a general westerly and northwesterly direction in said Fresno county, and empty into said San Joaquin river in said county; that such water of the Kings river as is diverted, if any, by the dams, obstructions, embankments, excavations, and channels described in the complaint on file herein passes immediately into Fresno county and into the slough above described, and that if any damage is caused by the flood waters of Kings river passing into said slough, it is caused solely and only to real property situated in the said county of Fresno."

[1-3] While the gravamen of the action may be for the abatement of the obstructions referred to in the complaint, the averments therein are comprehensive enough to involve the question of plaintiffs' right to an injunction to prevent the threatened injury, and the prayer of the complaint seeks injunctive relief as well as the abatement of the alleged nuisance. The court said, in People v. Selby Smelting & Lead Co., 163 Cal. 84, 90, 124 Pac. 692, 695 [Ann. Cas. 1913E, 1267]:

> "While it is undoubtedly true that, strictly considered, the words 'abate' and 'enjoin' have technically different meanings (Ruff v. Phillips, 50 Ga. 133) in California, the rule is well established that in proper cases injunctive relief, which accomplishes the purposes of abatement without its harsh features, is permissible."

We do not think the merits of the action can be tried on affidavits. For the purposes of the motion defendants concede "that the allegations of the complaint are true." However, in whatever aspect the action be viewed, it involves injuries to real property, and must be tried in the county in which the subject of the action, or some part thereof, is situated. Code Civ. Proc. § 392; People v. Selby Smelting & Lead Co., 163 Cal. 84, 124 Pac. 692, 1135, Ann. Cas. 1913E, 1267. Where the erection of a dam in one county which when complete would cause damage to real property in another county, because of the diversion of waters, the action should be tried in the latter county (Drinkhouse v. Spring Valley Waterworks, 80 Cal. 309, 22 Pac. 252; Last Chance Water Ditch Co. v. Emigrant Ditch Co., 129 Cal. 277, 61 Pac. 960); and the rule applies to threatened injuries. It was held, in City of Marysville v. North Bloomfield Gravel M. Co., 66 Cal. 343, 5 Pac. 507, that actions to enjoin hydraulic mining in this state could be maintained in any county along the river carrying the mines' tailings, where the damage accrued. The question is discussed in Las Animas, etc., Land Co. v. Fatjo, 9 Cal. App. 318, 99 Pac. 393, and the cases cited.

The purport of Mr. Nares' affidavit is that past observation has shown that the flood crest on Kings river has not reached the San Joaquin river when the flood crest was on the latter river. Whether the alleged dams, channels, and obstructions erected by defendants to turn the flood waters into the San Joaquin river will have the effect alleged in the complaint is one of the vital issues in the case, and neither Mr. Nares nor Mr. Teilman deposed to that question. Neither of these affiants showed that there was any injury to real property in Fresno county. Mr. Teilman's statement was that the waters that are caused to flow north "and empty into San Joaquin river" flow through Fish or Fresno slough, and that if any damage is caused by the water "passing into said slough," it is caused solely and only to real property in Fresno county. Mr. Teilman is silent as to the effect of the water after it has passed through Fresno slough into the San Joaquin river.

Appellants claim that:

> "There is no allegation in the complaint as to the location of any particular lands which might be injured because of the increased flow of water in the San Joaquin river caused by such diversion. Although the action was brought in the county of San Joaquin, the complaint is silent as to whether or not any of the lands affected or to be affected by such diversion are situated in San Joaquin county."

It is urged also that there is nothing in the complaint to show that there is at the present time, by reason of the maintenance of said obstruction, any present interference with the rights or enjoyment of property situated in San Joaquin county.

> "Within reasonable limits," there is no question, says Mr. Wood, "but that the Legislature has the power to declare certain uses of property a nuisance and such use thereupon becomes a nuisance per se." 2 Wood on Nuisance, § 763.

The Legislature has, within its undoubted power, declared the acts complained of to be a public nuisance, and such acts constitute a nuisance per se. Nuisances per se are so regarded because no proof is required, beyond the actual fact of their existence, to establish the nuisance. No ill effects need be proved. 2 Wood on Nuisance, § 569. And all parties to a nuisance per se, he who creates it and he who maintains it, are responsible for its effect, without limitations of condition or time. Thornton v. Dow, 60 Wash. 622, 111 Pac. 899, 903, 32 L. R. A. (N. S.) 968.

Equity will interfere by injunction to prevent threatened injury, where acts which create a public nuisance are about to be committed, causing also an inevitable private and special injury to the complainant (Walker v. Shepardson, 2 Wis. 384, 60 Am. Dec. 423); and the rule applies equally where the threatened injury is to the public and the people are the complainants.

[4] We do not think it was necessary to allege that some specific subdivision or tract of land situated in San Joaquin county was injured, nor that the alleged injury was immediately present, for relief will be awarded when the danger is apparent or the mischief already done.

We think the averments of the complaint are sufficient to warrant the inference that the "low-lying lands" referred to as situated along the shores of the San Joaquin river throughout its length where it passes through the counties mentioned, including San Joaquin county, are directly threatened with the injury complained of, and that these lands are within the jurisdiction of the board of reclamation, and are made the subject of its care and protection. The scheme of reclamation contemplated by the act is of state-wide concern as well as of great importance to the territory immediately interested. The effect of the dams, channels, and other means of diversion of the water of Kings river is distinctly pointed out, and it is shown that such diversion will raise the water plane of the San Joaquin river throughout its course in the San Joaquin Valley; that from 25,000 to 30,000 cubic second feet of water will be added to the channel of the San Joaquin river, raising its water surface from 8 to 15 feet in elevation; that said obstructions have impaired, and will continue to impair and destroy, a great portion of the reclamation works along said river and have made, and will continue to make, it more difficult and expensive to reclaim portions of land along said river as in the complaint fully described.

[5] Inasmuch as the affidavits submitted with the motion fail to show injury to any lands in Fresno county, and inasmuch as we think it fairly appears that lands situated in San Joaquin county have been injured and are threatened with further injury, we think the motion was rightly denied. If, however, the complaint, or the affidavits, show injury also in Fresno county the trial may be had in either county where injury has resulted or will result. "Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action." Code Civ. Proc., sec. 392.

The order is affirmed.

We concur: BURNETT, J.; HART, J.

32 Cal. App. 71

DIESTELHORST v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 1604.)

(District Court of Appeal, Third District, California. Feb. 10, 1917.)

1. MASTER AND SERVANT 🔑380—WORKMEN'S COMPENSATION ACT—"SERIOUS AND WILLFUL MISCONDUCT."

"Serious and willful" misconduct means the same as willful misconduct, since any willful misconduct that leads to death or great bodily injury must necessarily be serious.

2. MASTER AND SERVANT 🔑380—WORKMEN'S COMPENSATION ACT—RIGHT TO COMPENSATION—"WILLFUL MISCONDUCT"—MINOR EMPLOYÉS.

Where a minor employed about machinery had been instructed not to oil it while in motion, but thoughtlessly, after the power had been shut off and while the machine was moving of its own momentum, oiled it, and was injured, he was not chargeable with "willful misconduct."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful Misconduct.]

3. MASTER AND SERVANT 🔑405(1) — WORKMEN'S COMPENSATION ACT—RIGHT TO COMPENSATION — WILLFUL MISCONDUCT—MINOR EMPLOYÉS.

Evidence *held* to show that minor's disobedience to order was thoughtless, and not the result of willful misconduct.

Proceedings by Bert Bollinger, employé, for compensation, opposed by William Diestelhorst, employer. On application by the employer for writ of review for annulment of the award by the Industrial Accident Commission and others. Writ discharged, and award affirmed.

Dean & Carter, of Redding, and Thos. B. Dozier and Eric G. Scudder, both of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

BURNETT, J. Petitioner seeks the annulment of an award made by said Commission to said applicant for an injury received by the latter while employed by the petitioner to act as a general helper around a gold dredger. It is claimed that the accident was due to the "willful misconduct of said Bert Bollinger, and therefore the Commission was without jurisdiction to make the award." It is admitted that if no other rational conclusion as to the attributable cause of the accident can be drawn from the evidence, then, in the exercise of its statutory authority, the court should vacate and annul said award. It is, however, the claim of respondents that there is sufficient justification for the finding that the injury was not due to the willful misconduct of the applicant, and that the Commission therefore cannot be properly chargeable with an adjudication in excess of its legal authority.

Indeed, the attack and the defense relate, not only to the evidence, but to the sufficiency of the finding itself to support the conclusion of the Commission. It is the contention of petitioner that the facts found are compatible only with the position that the applicant was guilty of willful misconduct, and that petitioner is therefore not liable under the Workmen's Compensation Act.

We are asked to set aside the award by reason of the following finding:

> "That previous to said injury said employé had been instructed by his employer on two occasions not to oil the said machinery while the same was in motion, and had been warned of the danger of so doing; that at the time of the injury the motive power of the machinery had been shut off, and after so shutting off the power, the machinery continues to move for 15 minutes by its own momentum, and while well knowing the said instructions and the danger of their violation, but for the purpose of saving the time necessary to wait for the machinery to stop, said employé, without waiting until the machinery had stopped, thoughtlessly and without at the time being mindful of said instructions, attempted to oil the same, and in so doing, sustained the injury as above set forth; that by reason of the extreme youth of said employé and his consequent lack of mature judgment and discretion, and for the further reason that the said act of the employé was with the sole motive and for the sole purpose of saving time, and to that extent in the interest of the employer, the act of the employé in violating his instructions as aforesaid was negligent, but was not an act of willful misconduct, and the said injury was not caused by the willful misconduct of the employé."

It is the contention of petitioner that a violation of such reasonable directions constitutes in itself willful misconduct, and that it is not condoned or mitigated by the excuse or apology contained in said finding. He claims:

> "That the cases from all jurisdictions uniformly hold that the breach of an express rule or order, particularly if made expressly for the safety of an employé, constitutes serious or willful misconduct within the meaning of Workmen's Compensation Acts."

He cites a large number of cases, beginning with Scotland. Of these, it is asserted that two are practically on all fours with the case at bar. Both involved minors, and the injuries were occasioned by disobedience of rules. The first is Powell v. Lanarkshire Steel Co., Ltd., 6 Sc. Sess. Cas. (5th Series) 1039 (1904). Therein the father of Patrick Joseph Powell, a minor, claimed compensation for the death of said minor under the Compensation Act of 1897. At the time of his death he was 15 years of age (the same as applicant herein). He was employed in a rolling mill, and was allowed certain intervals for resting. During such an interval the deceased and some other boys of about the same age, who were also employed in the mill, started to play on some wagons on an inclined track. One of the wagons started down the incline, and the deceased, in an attempt to stop it, was thrown beneath the wheels and met his death. The boys, including the deceased, had been instructed not to play about the wagons. Lord Trayner, in his decision, said:

> "The defenders had given this boy and others like him positive instructions that they were not to go across the line of rails or near the wagons. They had been repeatedly warned against doing so for fear of accident, and they knew that in doing so they were doing wrong. I cannot figure anything more serious or willful than positive and intentional disobedience to a strict and positive order. That is the character of the case, and I must hold accordingly."

The other is Fanny Callahan v. Maxwell, 2 Sc. Sess. Cas. (5th Series) 420. Therein Fanny Callahan, a young girl, was employed on a steam thresher to unbind and hand sheaves to the millman which he put through an opening into the mill. She had been instructed to remain at her place, and had been warned of the danger of moving about. The millman had occasion to go beneath the thresher to remove an obstruction, whereupon Fanny attempted to step across the opening for the purpose of speaking to another girl on the other side of the opening. In crossing the opening, her foot slipped and was caught by the revolving drum, and her right leg was taken off below the knee. One question presented to the appellate court was whether her conduct in leaving her place and attempting to step across the opening in the machine amounted to serious and willful misconduct on her part in the sense of the Workmen's Compensation Act. It was held that she was so chargeable, it being stated in the opinion:

> "I do not think that there can be a more distinct case of willful misconduct than one in which a person is injured in consequence of having disobeyed a specific order, such as that given here, and which was given in order to insure her safety."

Many cases, also, from other British jurisdictions are cited, of which we may refer to Best v. London & Southwestern Railroad Company (1907), A. C. 209, 8 Ann. Cas. 1, which went to the House of Lords. In that case, an engine driver, because his train was late, left the foot plate of his engine while in motion and mounted the coal on the tender, in violation of a rule of the company that "enginemen and firemen must not leave the foot plate of their engine while the latter is in motion." He was killed by being struck by a bridge. It was claimed at the trial of the claim for compensation that the driver's object was to try and find better coal in order to make up the lost time. In the decision, the Lord Chancellor (Loreburn) said:

"This unfortunate man broke this rule, which certainly is a very serious rule. There was evidence that he knew of its existence, and that he knowingly and willfully acted in defiance of it. It was a rule to save life and to prevent danger, both to the public and to the servants of the company."

In the same decision Lord Atkinson said:

"I do not attempt to define what 'willful misconduct' is, nor to express any opinion which I might be unable to retract on further consideration, but it would appear to me, I confess, that if a man breaks a rule, knowing at the time that he is breaking it, and is not compelled to break it by some superior power which he cannot resist, he is guilty of a willful breach of it."

Coming nearer home, it is the opinion of petitioner that we have in this state two decisions that virtually govern this, that is, Pacific Coast Casualty Co. v. Pillsbury et al., 162 Pac. 1040, and Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35. In the first of these, an errand boy in the employ of a millinery company in San Francisco had been expressly warned not to ride in or attempt to operate the freight elevators in the building occupied by his employer. Notices to the same effect were also conspicuously posted near the entrances of the freight elevators. Said errand boy, upon returning from an errand, attempted to ascend by way of one of the freight elevators to the floor where his employer had his place of business, and, in so doing, to operate the elevator himself. The boy was killed, and compensation was sought for his death. The Industrial Accident Commission made findings "that the deceased and other employés of the defendant frequently operated said Fifth street elevator by themselves without reproof or discipline by said defendant," and "that the signs placed by the owners of said building upon the doors of the elevators were habitually disregarded without protest," and furthermore, "that the protection of its employés from serious bodily injury or death in connection with the operation of such elevators was not made plain to them nor to Cassell [the deceased] in a manner suited to the intelligence of a person of his age," and therefore compensation was allowed. It was decided by the District Court of Appeal for the First District that there was no evidence to support these findings, and the award was accordingly annulled. In denying the petition for rehearing the court said:

"We are of the opinion that the undisputed evidence in the case showed that the deceased had been expressly warned not to ride in, or attempt to operate, the freight elevators in the building in which he met his death, under penalty of discharge, and that notices were posted at, or near, the entrance of such elevators of similar import, and that the disregard of such warning by the employé must, in the absence of evidence mitigating such disobedience, be held to constitute such willful misconduct as would prevent a recovery before the Commission, where, as in the instant case, there is no evidence tending to show that the disregard of its warnings, orders, and notices was condoned by the employer."

In the Great Western Power Case, supra, the award by the Commission was annulled by the Supreme Court by reason of the willful misconduct of deceased, Mayfield, who had been employed as a lineman by said company. The company had issued orders that employés should not work on poles carrying live wires without using rubber gloves provided by the company. It was not shown that Mayfield did not know or understand this rule. On the day of the accident, Mayfield ascended a pole to cut a wire without taking his gloves, and he received a shock which caused his death. In discussing the meaning of the term "willful misconduct" the Supreme Court declared:

"But it cannot be doubted that a workman who violates a reasonable rule made for his own protection from serious bodily injury or death is guilty of misconduct, and that where the workman deliberately violates the rule, with knowledge of its existence and of the dangers accompanying its violation, he is guilty of willful misconduct."

It was held that the evidence showed a deliberate violation of the rule, and hence the annulment.

It must be conceded that petitioner makes a strong and persuasive argument, buttressed as it is by an imposing array of authorities. On the other hand, the contention of respondents is entitled to serious consideration. It is claimed that the defense of willful misconduct is an affirmative defense in the nature of a penal provision forfeiting compensation for willful wrongdoing, that the burden of proof is upon the employer to establish this defense, and that it was not established in the present case by reason of the failure of the employer to prove the necessary element of willfulness. In amplifying their position, respondents indulge in an interesting historical review of the common law and of the statutes culminating in the workmen's compensation acts as they relate to the redress for injuries afforded to the employé. The dissimilarity between the common-law remedy and that under the modern legislation is pointed out, and it is declared that under the system of workmen's compensation acts now adopted in California and in approximately 35 states of the Union, the industry is made to carry the cost of injuries sustained by its employés in the course of its operation, without regard to the fault of either the employer or employé. Or, as stated by the Supreme Court of Montana in Lewis & Clark County v. Industrial Acc. Board of Montana, 52 Mont. 6, 155 Pac. 268, L. R. A. 1916D, 628:

"Liability and compensation statutes cannot be grouped together, since they are the antipodes of labor legislation, having their foundation in essentially different social and economic ideas; the liability statutes being intended to limit the defenses of the master, and the compensation statutes to provide compensation for the workman regardless of negligence of master, fellow servant, or himself."

Attention is then called to a peculiar provision of the California act and of some of the other states, penalizing, so it is claimed, the employer or employé, as the case may be, for wanton and intentionally evil conduct, as provided in section 12b and section 12a (3) of our statute (Stats. 1913, p. 283), and it is claimed that this provision as to the employé was not intended as a substitute for contributory negligence, and it should not be so construed, but should be regarded in the spirit of section 21 of article 20 of the Constitution, authorizing the Legislature by appropriate enactment to "create and enforce a liability on the part of all employers to compensate their employés for any injury [sustained] by the said employés * * * irrespective of the fault of either party." To give effect to this provision and the obvious purpose of the said Compensation Act, it is claimed that the misconduct which would defeat the right of the employé to compensation must be more than even gross contributory negligence, in fact, must be the violation of reasonable rules or the doing of an extremely hazardous act which, under the common law, would amount to a breach of the duty owed to the employer, and, in addition, must be accompanied by a willfulness of intent or wrong motive amounting to a mens rea. It is insisted that this is demanded by the language and spirit of the Compensation Act, and is supported by the decisions of this state and of other jurisdictions.

Among the decisions cited from foreign jurisdictions is Jensen v. Bowen Bros. & Co., Ct. of Abr. of New Zealand, Canterbury Ind. Dist. (1909), vol. 8, Decisions under the Workmen's Compensation for Accident Act, 49, 50, wherein it is said:

> "The question of serious and willful misconduct is one of fact to be determined on the circumstances of each case. In dealing with the question the court is not bound to treat every violation by a worker of a rule in force in the factory or works as amounting necessarily to serious and willful misconduct. Whether it is so or not depends on the nature of the rule and the circumstances in which the violation has taken place."

The Supreme Court of Massachusetts, in the Matter of Nickerson, 218 Mass. 158, 105 N. E. 604, Ann. Cas. 1916A, 790, declared that "serious and willful misconduct," for the consequences of which the employé is not entitled to compensation, under the Workmen's Compensation Act of that state, "means more than even gross negligence, and resembles closely the wanton or reckless misconduct which renders one liable to a trespasser or to a bare licensee," and it was held that:

> "Where an employé, engaged in cleaning and painting, began work around a moving shaft shortly before noon, although he had been ordered to do that work during the noon hour, while the machinery was stopped, his disobedience was a thoughtless act on the spur of the moment, rather than deliberate disobedience, and does not deprive his dependent of compensation under [said] act."

In that case, it seems that the deceased, less than half an hour before he was killed, was told by the superintendent to do the work at the noon hour, and yet the court said:

> "The fact that the injury was occasioned by the employé's disobedience to an order is not decisive against him. To have that effect, the disobedience must have been willful, or, as was said by Lord Loreburn, in Johnson v. Marshall Sons & Co., Ltd. (1906), A. C. 409, 411, 'deliberate, not merely a thoughtless act on the spur of the moment.'"

It is asserted that the same rule is recognized by our Supreme Court in the quotation hereinbefore made from 170 Cal. 180, 149 Pac. 35, where willful misconduct is described as the deliberate violation of a reasonable rule made for the workman's benefit, where he has knowledge of its existence and of the dangers accompanying its violation.

As to the two cases from this state cited by petitioner, respondents find substantial disparity with this. It is pointed out that in the Pacific Coast Casualty Company Case the young employé was killed in the accident, and it was impossible to discover his exact mental state in violating the rule, that is, whether it was willful disobedience or the result of an inadvertence, and in the absence of testimony on that point, the court naturally, from the bare fact of disobedience, drew the inference that it was deliberate and willful. This, probably, was what the court had in mind in its opinion denying the petition for rehearing when it referred to the "absence of mitigating circumstances." Herein there is express testimony, negativing the willfulness which overcomes any inference drawn from the bare fact of disobedience.

In the Mayfield Case, supra, 170 Cal. 180, 149 Pac. 35, there was not only an absence of testimony tending affirmatively to establish inadvertence, but there was, in addition, testimony that the deceased had been warned, within a few hours before his death, of the danger of not wearing gloves, which was sufficient to establish willfulness. Mayfield was, moreover, a man of mature years.

As to the cases from foreign jurisdictions cited by petitioner no specific attention is paid to them by respondents. However, the most important ones appear for the first time in the reply brief of petitioner, it being stated therein that:

> "Since receiving respondents' reply brief we have been to some trouble to look up the cases under workmen's compensation acts interpreting or defining 'willful misconduct,' and have found that most of said cases originated in the courts of Great Britain."

It would have been more satisfactory if petitioner had taken the trouble to do that before filing his opening brief. We cannot undertake to examine these cases in detail. Most of them, we may say, involved adults and accidents under circumstances leading necessarily to the conclusion that there was willful violation of reasonable rules for the safety of the workmen.

[1] Again, while some of the cases called for a consideration of "serious and willful misconduct," it is apparent that the word

"serious" added nothing to the gravity of the conduct. Any willful misconduct that leads to death or great bodily injury must necessarily be serious.

In reference to the Powell Case, from Scotland, it is apparent that the decision is based upon two grounds: First, that the accident did not arise "out of the employment" of the deceased; and, second, that he was guilty of deliberate and intentional wrongdoing when he went to a place where he had no right to be and placed himself in a dangerous position against which he had been warned.

The Fanny Callahan Case was decided upon the same grounds.

[2] In all these cases holding that the victim of the accident was chargeable with willful misconduct, it seems to have been assumed that the violation of the rule was intentional and deliberate, and, as far as we are advised, there was no attempt to excuse it on the ground of inadvertence or thoughtlessness. The violation of a rule known to the party would, of course, raise the presumption that it was done deliberately and intentionally, but is it not a disputable presumption? May not a person, although guilty of an infraction of an order given for his protection, show that at the time he was unmindful of the order, and that his act was the result of inattention and thoughtlessness and without any real purpose to be contumacious? Petitioner contends that to permit this course would open the door to fraud and perjury. In some cases, no doubt, such would be the effect, but these evils will never be entirely avoided in the attempt to administer justice through human instrumentalities. But the objection goes rather to the weight and effect of the evidence than to its admissibility. When the person violates a known rule, it should be held ordinarily that he does it deliberately, but we do not think that the door should be closed entirely against the inquiry whether it may not have been the result of thoughtlessness and inadvertence, at least in the case of a mere child. Where a minor is involved why should not the same consideration be shown as in the ordinary action for damages wherein contributory negligence is urged as a defense? Why should not the distinction be recognized that is so learnedly pointed out in the case of Maud Guyer v. Sterling Laundry Co., 171 Cal. 761, 154 Pac. 1057? Therein, as to minors, it is said:

> "Mentally, a tremendous growth must take place, * * * before knowledge has ripened into wisdom and wisdom coupled with experience, has developed a sound and sane judgment. * * * Youth is ever the time of heedlessness, of impulsiveness, and of forgetfulness. Lacking power of continuous application and concentration, it will, upon the other hand, center its thought for a brief time and to its peril upon one matter to the exclusion of all else."

With this well-known characteristic of youth in view why should it be thought a strange thing that a boy of 15 should forget an order given him, and, in a moment of forgetfulness, do that which was forbidden? And acting thus, how could his conduct be justly denominated "willful misconduct"? In that event it would be, properly speaking, willful misconduct to no greater degree than if he did the act in the absence of any order. In either case it might be, and, in this case it would be, contributory negligence but nothing more.

It is probably true, as contended, that the portion of the finding as to oiling the machinery while in motion in order to save time does not indicate a sufficient palliation or excuse for his conduct, yet it is at least opposed to the idea that he had an intentionally disobedient frame of mind, and is in aid of the conclusion that there was an absence of willfulness.

[3] Looking at the evidence, we find sufficient support for the inference that he was not intentionally and deliberately disobedient. The boy himself, when asked: "Were you aware at the time that you were violating your employer's instructions? Did you know and think at the time that you were disobeying orders?" replied: "No, sir; I didn't think." He further said that at the time he did not remember that Diestelhorst had told him not to oil the machinery while in motion. Indeed, one cannot read the record without obtaining a strong impression of the candor and honesty of the witness. He was anxious to save time, and he wanted to get out as much dirt as possible. He was in the habit of oiling right after lunch before the machinery was put in motion, but on this occasion he started it in obedience to the direction of petitioner, or, as the boy explained it:

> "We were then eating dinner, and right after dinner Diestelhorst wanted to go and fix a bridge across the creek, and there was a 'jack' out where we were dredging, and he said to move that, and I started up, and he passed the chain around it and moved it, and I shut off the power and went to oiling."

We think from these considerations that the Commission might conclude with legal propriety that the boy was not chargeable with such willful misconduct as to deprive him of the benefits of the Compensation Act and the writ is therefore discharged, and the award affirmed.

We concur: CHIPMAN, P. J.; HART, J.

33 Cal. App. 15

DILGER v. WHITTIER. (Civ. 1616.)

(District Court of Appeal, Second District, California. Feb. 14, 1917.)

1. Highways 🔑184(2)—Injury to Pedestrian—Evidence—Sufficiency.

In an action for personal injuries sustained by a child when struck by an automobile, which was diverted from the roadway by reason of a collision with an automobile operated by defendant, evidence *held* to justify a finding that the injury was due solely to defendant's negligence in operating his car, and that the operator of the other car was not guilty of any negligence which contributed to plaintiff's injury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 472, 473½.]

2. Appeal and Error 🔑1032(1)—Burden to Show Prejudicial Error.

It devolves upon an appellant to show prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047, 4051.]

3. Appeal and Error 🔑928(2)—Review—Presumptions.

Where the instructions are omitted from the record on appeal, the appellate court must presume that the jury was properly instructed as to the law applicable to the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3750, 3753.]

4. Evidence 🔑474(8)—Speed—Knowledge of Witness.

As the objection that a witness who testified as to the speed of defendant's car had not seen the car in sufficient time prior to the collision to enable him to testify on the subject goes to the weight, rather than to the competency, of the evidence, and as such testimony differed but little from that offered by the defendant on the same subject, its admission was not error.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2202.]

5. Appeal and Error 🔑1050(1)—Harmless Error.

Any error in the admission in evidence of the torn clothes of the child, and testimony as to tears and rents therein, was harmless as the evidence did not tend to show either negligence of defendant or injuries to the child.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157.]

6. New Trial 🔑88—Grounds—Discretion of Court.

As no facts were stated from which the trial court could determine what effort the sheriff had made to serve a subpœna upon two alleged material witnesses for defendant, and it was not shown that the defendant placed the subpœna in the hands of the sheriff before the trial was commenced, there was no abuse of discretion in denying a new trial upon the ground of surprise, which ordinary prudence could not have guarded against.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 176.]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Florencia Dilger, a minor, by W. J. Dilger, her guardian ad litem, against C. F. Whittier. From a judgment for plaintiff, and an order denying a motion for new trial, defendant appeals. Affirmed.

Geo. E. Whitaker, of Bakersfield, for appellant. Rowen Irwin, of Bakersfield, and Fred L. Seybolt, of San Francisco, for respondent.

SHAW, J. This is an action brought by plaintiff, a minor four years of age, to recover damages for personal injuries sustained while playing in a vacant lot adjoining her father's place of business, as a result of being struck by an automobile driven by one Earl Oldham, which, it is claimed, was diverted from the roadway and precipitated against plaintiff by reason of colliding with another automobile negligently operated by defendant. The case was tried by a jury, which rendered a verdict for plaintiff in the sum of $1,000, for which judgment was entered in her favor, and from which, and an order denying his motion for a new trial, defendant appeals.

Appellant's chief contention is that the verdict is not justified by the evidence, in that it fails to show that defendant was guilty of any negligence in operating his car, but, on the contrary, shows that the injury sustained was due to Oldham's negligence. Not only is the evidence touching the action of both Oldham and defendant in operating their respective cars conflicting, but the plat of the location and position of the cars used by the witnesses in testifying is not before us; hence much of the testimony is meaningless. No purpose could be served by an extended reference to the conflicting evidence. Suffice it to say, there appears to be testimony which tended to show and which, when illustrated by the plat in connection with which it was given, might, and therefore since it is not brought up we must assume that it did, clearly justify the jury in finding that the injury was due solely and alone to defendant's negligence in operating his car.

[1-3] The accident occurred in the unincorporated town of Fellows, in Kern county, through which a highway, known as the Midway road, extended north and south. The father of the plaintiff, W. J. Dilger, had a place of business on the east side of this highway, which, between the sidewalks, was some 47 feet in width. Adjoining Dilger's place of business on the north were two vacant lots, on one of which, and next to the northwest corner of her father's house, plaintiff was playing. Defendant was driving a Cadillac car on the right-hand side of this highway, going in a southerly direction at a speed of some 20 or 25 miles per hour, and Oldham, driving a Ford car, was closely following a Santa Fé car going northerly and traveling near the center of the roadway. At a point about opposite Dilger's place, defendant met the Santa Fé car, when, instead of passing it to the right, he turned to the left thereof, and when clear of the Santa Fé car met the one driven by Oldham, who, while in the rear of and close to the Santa Fé car, was nearer to the sidewalk on his right. At the time it appears that Oldham was traveling at a speed of 5 miles per hour, and, seeing defendant approaching at a high speed

immediately in front of him on the wrong side of the highway, turned sharply to the right, toward the vacant lot, in an effort to escape, when defendant's car collided with the side of the Ford machine, projecting it some 15 feet, against the child on the vacant lot. Presumably the jury concluded the accident would not have occurred had defendant observed the law of the road, which required him to pass to the right of the Santa Fé car. On the other hand, Oldham, since he was operating his car slowly on the side of the street to which he was entitled, was not, as shown by the record, guilty of any negligence which contributed to plaintiff's injury. It devolves upon an appellant to affirmatively show prejudicial error. Upon the record presented it cannot be said there is an absence of sufficient evidence to justify the verdict of the jury, which we must presume, in the absence of the instructions, copy of which is omitted from the record, was properly instructed as to the law applicable to the case.

[4] Basing his claim upon the fact that W. J. Dilger's view of defendant's car prior to its colliding with that of Oldham was not of sufficient length as to time as to enable him to testify upon the subject, appellant insists the court erred in permitting him to testify that it was running at a speed of 20 to 25 miles per hour. In our opinion, the objection goes to the weight rather than to the competency of the evidence, which differed little, if any, from evidence upon the same subject offered by defendant. In no event could it have affected the verdict.

[5] The court, over defendant's objection, permitted plaintiff to introduce in evidence the torn clothes of the child, and to testify as to tears and rents therein. While the evidence was immaterial, inasmuch as it did not tend to show either negligence on the part of defendant or injuries to the child, nevertheless it is impossible to conceive how defendant could have been prejudiced by the ruling. Surely the dress shown to have rents in it was not calculated to appeal to the passions of the jury to such an extent as to cause it to render a verdict for excessive damages; nor is the verdict in this case, when the child's injuries are considered, subject to such objection.

[6] One of the appellant's grounds of motion for a new trial was surprise which ordinary prudence could not have guarded against, in support of which defendant filed the affidavit of his attorney, from which it appears that at some time—whether before or pending the trial is not shown—he placed in the hands of the sheriff of Kern county for service a subpœna for Earl Oldham and one Mait Smith, both of whom, it was claimed, would give material testimony in favor of the defendant; that diligent search was made by said sheriff for said witnesses, without success. No facts are stated from which the court could determine what effort the sheriff made to serve the subpœna, and from aught that is shown to the contrary, defendant did not place the subpœna in the hands of the sheriff with instructions to serve it until the trial was commenced. It cannot be said there was any abuse of discretion on the part of the court in denying the motion upon such ground.

Finding no prejudicial error in the record, the judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; JAMES, J.

32 Cal. App. 756

HAMMOND v. PACIFIC ELECTRIC RY. CO. (Civ. 2205.)

(District Court of Appeal, Second District, California. Feb. 8, 1917.)

1. STREET RAILROADS 🔑98(6)—ACCIDENTS ON TRACKS—DUTY TO PEDESTRIANS.

The duty of a pedestrian in crossing a city street is to use ordinary care with regard to street cars, which is the degree of care which people of ordinary prudent habits would reasonably be expected to exercise under the circumstances of a given case, and the rule governing the duty of a pedestrian about to cross a steam railroad or an interurban electric railroad in the country does not apply to city streets "in all its strictness."

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 207.]

2. STREET RAILROADS 🔑114(13)—ACCIDENTS ON TRACKS—ACTIONS—EVIDENCE—SUFFICIENCY.

In action for damages for personal injuries received by plaintiff when hit by defendant's street car, in which negligence of defendant was established, evidence *held* to support a jury finding that plaintiff was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 248.]

3. TRIAL 🔑260(8)—PERSONAL INJURY—INSTRUCTIONS.

The rule stated in a requested instruction, that a person alighting from a car and intending to cross the street behind the same is charged with the duty of exercising ordinary care to look and listen for approaching cars before attempting to cross, and is charged with the duty of keeping up the exercise of ordinary care in looking and listening for approaching danger until the last moment, before passing from a place of safety to one of danger, and that the omission of such ordinary care constitutes negligence, and if thereby plaintiff contributes directly or proximately to the injury she cannot recover, was sufficiently and correctly stated in an instruction that the motorman in charge of a car has the right to assume that a pedestrian in the street is in possession of all his faculties, unless there is notice to the contrary, and will use reasonable diligence and ordinary care to avoid danger to himself, and that the failure to use such diligence and care is negligence, and that if the plaintiff negligently placed herself in a position of danger from which she was unable to escape, and the motorman of defendant's car, which struck her, used every effort in his power to avoid striking her after discovering her danger, verdict must be for defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 657.]

4. Trial 🔑296(4, 5)—Personal Injury—Instructions.

An instruction that if plaintiff found herself suddenly in peril, without sufficient time to consider all the circumstances, she might be excusable for omitting some precautions in making an immediate choice under this disturbing influence, although, if her mind had been clear, she ought to have done otherwise, and that if she found herself in imminent danger just prior to and at the time of the collision, and at that time tried to escape the peril, and in thus doing acted as an ordinarily prudent and reasonable person would have acted under the same or similar circumstances, the jury could not find on this account that she was guilty of contributory negligence, did not purport to say that a person in sudden peril by his own negligence is relieved from the imputation of contributory negligence, but only stated the principle that an unwise choice under such peril is not of itself contributory negligence, when considered with instructions that if the plaintiff had failed to use such care that a person of ordinary prudence would have used under the same or similar circumstances, and such failure contributed proximately caused the injury, plaintiff could not recover, and an instruction that all of the instructions ought to be considered as a whole in arriving at the verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709.]

5. Trial 🔑295(1)—Instructions.

It is the duty of the jury to consider all of the instructions given as a whole in arriving at the verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703, 704, 713, 714, 717.]

6. Street Railroads 🔑102(2) — Injury to Pedestrians—Contributory Negligence—Proximate Cause.

The mere fact that plaintiff was careless and negligent is not of itself sufficient to excuse the defendant, if such carelessness is remote in the chain of causation and did not contribute proximately to the cause of the injury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 203.]

7. Appeal and Error 🔑1066 — Review — Prejudicial Error.

Although an instruction that the mere fact that plaintiff was negligent did not excuse defendant's negligence, if plaintiff's negligence was remote and did not contribute proximately to the injury was irrelevant, it was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Trial, Cent. Dig. § 558.]

8. Street Railroads 🔑118(11)—Action for Injury—Instructions.

An instruction that if plaintiff, at the time of the accident, may or may not have been guilty of such contributory negligence as under the instructions of the court relieved the defendant of liability, which otherwise would have attached, before the jury could find for defendant it must appear by the preponderance of the evidence that plaintiff was guilty of such contributory negligence as to excuse the defendant, which must appear from satisfactory evidence or such inferences as the jury may legally draw from the evidence, that the jury must not speculate or guess, but their minds must be convinced, does not state the doctrine of comparative negligence, but only requires that it be established that plaintiff was guilty of such contributory negligence as to excuse defendant.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 268.]

Appeal from Superior Court, Los Angeles County; Willis I. Morrison, Judge.

Action by Leah Hammond against the Pacific Electric Railway Company. From a judgment for plaintiff, and from an order denying motion for a new trial, defendant appeals. Affirmed.

Frank Karr, R. C. Gortner, and A. W. Ashburn, Jr., all of Los Angeles, for appellant. W. O. Morton, Harry A. Hollzer, T. A. Williams, and C. B. Morton, all of Los Angeles, for respondent.

CONREY, P. J. This is an action to recover damages for personal injuries received by the plaintiff, who was hit by a car of the defendant while she was crossing a street in the city of Pasadena. Fair Oaks avenue runs north and south, and is intersected by California street. The defendant has a double-track railroad on each of those streets. Its interurban cars run on Fair Oaks avenue, and some of its north-bound cars turn east on California street at that intersection. Some of its local cars run westerly on California street from Fair Oaks avenue. The plaintiff was a passenger coming from Los Angeles, and as such passenger she received a transfer entitling her to go west on a California Street car. The northbound two-car train from Los Angeles, on which she was a passenger, stopped at California street, and then turned east on that street. The plaintiff alighted from the rear car of the train at a point about 100 feet south of California street. A West California Street car was waiting on the west side of Fair Oaks avenue to receive passengers. This was at 6 o'clock in the evening on January 29, 1912. When she alighted from the steps of her car on the east side thereof, she looked north and saw some of the passengers at the front of the train, who were moving around the front of the train to go to the California Street car. The plaintiff looked south, and then crossed the track at the rear of her train, and started to cross the westerly or south-bound track to go to the California Street car. In so doing she did not look to the north, and did not either see or hear an approaching south-bound car which was coming toward her at the rate of about 12 miles per hour. The car was so close to her that, after coming into the place of danger, she was unable to escape, and the motorman was unable to stop the train in time to avoid striking the plaintiff.

The plaintiff alleged that the defendant was negligent, in that it was moving its train at an excessive and dangerous rate of speed, and in that no warning or signal was given by which she could be notified of the approach of the car. Although there is some conflict in the evidence, there is sufficient evidence to support the jury's finding of negligence on the part of the defendant, and we shall assume that such negligence was duly established. The defendant, in addition to denying its own negligence, pleaded that the plaintiff did not exercise ordinary care to avoid being injured, and that her injuries were directly and proximately contributed to and caused by her own negligence. The verdict and judgment were in favor of the plaintiff, and the defendant appeals from the judgment, as well as from an order denying its motion for a new trial.

[1, 2] On behalf of appellant it is insisted that the evidence proves, without conflict, that the plaintiff was guilty of contributory negligence directly causing her injury, since it is admitted by her own testimony and shown by all of the evidence in the case that she passed over from the north-bound track to the south-bound track without looking northward to see whether any car was approaching. In order to sustain this contention it would be necessary to hold, as matter of law, that under the circumstances stated the plaintiff was negligent in failing to look to the north before she moved into the place of danger. Whatever might be said as to the rule governing the duty of a pedestrian about to cross a steam railroad or an interurban electric railroad in the country, it does not apply "in all its strictness" as against pedestrians in crossing a city street. Under the circumstances of this case, the plaintiff was required to use ordinary care, and that is the degree of care which people of ordinary prudent habits could reasonably be expected to exercise under the circumstances of a given case. We may say here, as was said in Driscoll v. Cable Railway Co., 97 Cal. 553, 567, 32 Pac. 591, 33 Am. St. Rep. 203, that considering all the evidence and circumstances in the case at bar, we cannot say that the jury abused its power in holding that the deceased was not guilty of contributory negligence. To same effect see Arbunich v. United Railroads, 28 Cal. App. 291, 294, 152 Pac. 51.

[3] It is claimed that the court erred in refusing to give an instruction requested by the defendant as follows:

> "A person alighting from a car as the plaintiff did in this case, and intending to proceed across the street behind the same, is charged with the duty of exercising ordinary care in looking and listening for approaching cars, before proceeding to attempt the crossing, and is charged likewise with the duty of keeping up the exercise of ordinary care in looking and listening for approaching danger, until the last moment before passing from a place of safety to one of danger. The omission of such ordinary care constitutes negligence and if thereby a plaintiff contributes directly or proximately to the injury ensuing, she cannot recover."

This instruction might well have been given, as it is a correct statement of the law. We find, however, that in other instructions the same rule was correctly stated in sufficiently definite terms. The jury was told that the motorman in charge of a car has the right to assume that a pedestrian on the street is in possession of all his faculties, unless there is notice to the contrary, and will use reasonable diligence and ordinary care to avoid danger to himself, and that the failure to use such diligence and care is negligence. They were also instructed:

> "If you find from the evidence that the plaintiff negligently placed herself in a position of danger from which she was unable to escape, and that the motorman of defendant's car which came in contact with her, used every effort in his power to avoid striking her after discovering her danger, then your verdict must be in favor of defendant."

In Arbunich v. United Railroads, supra, the appellant complained that the court erred in modifying the following instruction requested by the defendant:

> "In cases of this character the correct rule of law is that one riding or walking along or across the tracks of a street railroad company must use reasonable care in the exercise of his faculties of sight or hearing to watch or listen for cars going in either direction."

The court gave that instruction in the following modified form:

> "In cases of this character the correct rule of law is that one riding or walking along or across the tracks of a street railroad company must use reasonable care and precautions for his own safety."

Discussing this matter, the District Court of Appeal of the First District said:

> "It must be conceded that the cases cited by the appellant in support of the correctness as a matter of law of the foregoing instruction in the form requested by it sustain its contention in that regard, and that, had the court refused to give said instruction or one similar to it in effect, its action in so refusing would have been reversible error; but, in our opinion, the court gave in substance and effect, although not in its requested detail, the defendant's instruction, and that the language of the court, requiring persons walking across the tracks of a street railway to use reasonable care and precautions for their own safety, would suggest to the minds of the jurors as reasonable men that such care and precaution would naturally consist in the exercise of their faculties of sight and hearing."

The Supreme Court denied a rehearing in that case.

[4, 5] Error is predicated upon instructions 19, 25, and a part of 24, as given by the court to the jury. No. 19 is as follows:

> "In judging the conduct of the plaintiff, you must view the situation as it appeared to her just prior to or at the time of the accident. If she found herself suddenly put into peril, without having sufficient time to consider all the circumstances, then she might be excusable for omitting some precautions or taking an immediate choice under this disturbing influence, although, if her mind had been clear, she ought to have done otherwise. If she found herself in imminent danger just prior to and at the time of the collision, and at that time, tried to escape the peril, and in thus doing acted as an ordinarily prudent and reasonable person would have acted under the same or similar circumstances and conditions, then you cannot find on this account that she was guilty of contributory negligence. As the court has instructed you, negligence is commensurate with the circumstances under investigation."

No. 25 is as follows:

> "If the plaintiff, at the time of the accident, may or may not have been guilty of such contributory negligence, as under the instructions of the court would relieve the defendant from any liability which otherwise would have attach-

ed, then before you can find for the defendant it must appear further by a preponderance of the evidence plaintiff was guilty of such contributory negligence as to excuse the defendant. This must appear to you from satisfactory evidence, or such inferences as you may legally draw from the evidence, and you must not speculate or guess, for your minds must be convinced."

The objection urged against instruction 19 is that it presented to the jury an irrelevant suggestion, and omitted to point out that, if the plaintiff's own negligence had placed her in a position of imminent danger, then the jury might find that she was guilty of contributory negligence, even though the exercise of ordinary prudence in her efforts to escape could not then avail to save her from injury.

Appellant directs attention to the fact that the case of Schneider v. Market St. Ry. Co., 134 Cal. 483, 490, 66 Pac. 734, where the rule stated in instruction No. 25 was declared, was a case in which it appeared that the plaintiff's presence on the tracks was caused by reason of perturbation and panic induced by the negligence of the defendant, and not by his own negligence. There is force in the distinction thus pointed out by appellant. It is true, however, as suggested by counsel for respondent, that the instruction did not purport to say that a person in sudden peril by his own negligence is relieved from the imputation of contributory negligence, but only stated the principle that an unwise choice under such peril is not of itself contributory negligence, as the court said that the jury could not "on this account" find that the plaintiff was guilty of contributory negligence. While the phraseology, standing alone, may be obscure, we think that respondent's explanation of it is supported by other instructions given to the jury, and which must be considered in connection with the instruction in question. The court very properly stated to the jury:

"You are not to take any one part of these instructions as expressing all the law, but are to consider the whole thereof in arriving at your verdict."

And they were instructed that if they believed from the evidence that the plaintiff had failed to use such care as a person of ordinary prudence would have used under the same or similar circumstances as those then under investigation, and that such failure contributed proximately to or proximately caused the injury complained of, then plaintiff could not recover.

[6, 7] There was no error in adding to this statement the last sentence of instruction No. 24, of which the defendant complains, and which is as follows:

"The mere fact that the plaintiff may have been careless and negligent is not of itself sufficient to excuse the defendant, if you find that her carelessness or negligence is remote in the chain of causation, and did not contribute proximately to cause the injury."

It may be, as suggested by appellant, that the quoted sentence was irrelevant under the evidence presented; but as a proposition of law the statement was correct, and we cannot see that it was likely to affect the verdict.

[8] The additional objection urged against instruction 25 is that it suggests the idea of degrees of negligence on the part of the plaintiff, and the thought that plaintiff might be guilty of some contributory negligence, and yet not of such contributory negligence as to excuse the defendant; that it presents the idea of comparative negligence, whereas the law is that even slight contributory negligence on the part of plaintiff would bar her recovery. The answer is that the instruction does not state the doctrine of comparative negligence, but only requires that it be established that the plaintiff was guilty of "such contributory negligence as to excuse the defendant," and that other instructions correctly and sufficiently inform the jury as to what constitutes contributory negligence, and that if the plaintiff was guilty of such negligence which contributed proximately to cause the injury, the verdict must be in favor of the defendant.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

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32 Cal. App. 782

PACIFIC GAS & ELECTRIC CO. v. ROLLINS et al. (Civ. 1498.)

(District Court of Appeal, Third District, California. Feb. 10, 1917.)

1. New Trial ⊶128(5)—Motion—Specification of Grounds—Statute.

Under Code Civ. Proc. § 657, designating insufficiency of the evidence to justify the verdict as a ground of motion for new trial, and section 659, providing that the moving party must designate in his notice of intention to move for a new trial the grounds upon which the motion will be made, where defendants' notice set forth as one of the grounds of the motion "insufficiency of the evidence to justify the verdict," the motion for a new trial on the grounds set forth in the notice of intention, following which was a statement of the grounds set forth in the notice of intention, was sufficient.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 261.]

2. New Trial ⊶128(5) — Grounds — Insufficiency of Evidence — Specification of Particulars.

In eminent domain proceedings, where defendants moved for new trial on the ground of insufficiency of the evidence, and their specification of the particulars in which the evidence was claimed to be insufficient to justify the verdict directed attention to the particular elements of value constituting the basis upon which compensation should be fixed, each element being mentioned, and stated that the testimony bearing on such elements did not justify the jury's conclusion that the property was of no greater value than that fixed by the jury, such specification of particulars was sufficient, since plaintiff could have experienced no difficulty in determining therefrom the particular facts as to

⊶For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes which it stated the evidence was not sufficient to justify the verdict on the question of value, which was all that was necessary.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 261.]

3. Appeal and Error 🔑933(4) — Review — Order Granting New Trial—Grounds.

Where the trial court, in granting a motion for new trial, does not expressly limit the order granting such motion to any particular ground of those stated, it is the duty of the appellate court to sustain it if it can be upheld on any ground embodied in the notice of intention.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3426, 3775.]

4. Appeal and Error 🔑933(4) — Review — Presumption.

On appeal from an order granting defendants new trial in an action in eminent domain, where there was a wide variance between the witnesses for the respective parties on the question of value, the appellate court is authorized to presume, in support of the order appealed from, that one of the reasons impelling the trial court to allow motion was that the evidence was insufficient to justify verdict; that being a ground brought forward by defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3426, 3775.]

5. Appeal and Error 🔑979(1) — Eminent Domain 🔑224—Review—Order Granting New Trial—Insufficiency of Evidence.

The granting or denying of a new trial on the ground that the evidence is insufficient to sustain the verdict, where there is a substantial conflict, rests so fully in the discretion of the trial court that its action is conclusive on appeal, unless there has been an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871, 3872; Eminent Domain, Cent. Dig. §§ 574-579.]

6. Eminent Domain 🔑224—Motion for — Insufficiency of Evidence—Discretion of Trial Court.

In an action in eminent domain, it was within the trial court's discretion, in considering the motion for new trial on the ground of insufficiency of the evidence to sustain the verdict, to determine whether the verdict, in so far as it concerned the value of the property, was justified, or reasonably in accord with the evidence on the question.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 574-579.]

7. Eminent Domain 🔑224—Order Granting—Abuse of Discretion.

In an action in eminent domain against a mining company to condemn a right of way for water, where defendants' witnesses testified that the value of all defendants' properties was from $100,000 to $125,000, and plaintiff's witnesses testified that the properties were valueless for any purpose; the order of the trial court granting defendants a new trial for insufficiency of the evidence to sustain the verdict that the value of the property $4,000 was not an abuse of discretion.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 574-579.]

8. Appeal and Error 🔑979(2)—Review—Order Granting New Trial.

The appellate court cannot weigh the testimony of witnesses in determining whether the trial court abused its discretion in granting new trial for insufficiency of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3871.]

9. Evidence 🔑474(16)—Competency of Experts—Parties—Determination.

Defendants, in an action in eminent domain, being otherwise qualified, were competent to testify as witnesses in their own behalf to the value of their property.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2215.]

Appeal from Superior Court, Placer County; J. E. Prewitt, Judge.

Action by the Pacific Gas & Electric Company, a corporation, against J. L. Rollins and others, as trustees of the Erie Mining Company, a defunct California corporation, and of its stockholders. From an order granting new trial, plaintiff appeals. Order affirmed.

Wm. B. Bosley and Thos. J. Straub, both of San Francisco, and John M. Fulweiler, of Auburn, for appellant. C. W. Kitts and C. W. Cross, both of San Francisco, and A. C. Lowell, of Auburn, for respondents.

HART, J. This is an appeal from an order granting a new trial. The action is in eminent domain to condemn a right of way for the conveyance of water. The plaintiff is engaged in the business of storing, selling, and distributing water, for power, mining, irrigating, domestic, and other purposes, and particularly for supplying counties, cities, and towns, etc., in the state of California, and the inhabitants thereof, with water for all of said purposes. To carry out these objects, it has constructed and now maintains and operates canals, reservoirs, dams, ditches, flumes, aqueducts, and all such other works, structures, machinery, and appliances necessary for the collection, storage, and distribution of water for the purposes mentioned. The plaintiff, it appears, was, at the time of the commencement of this proceeding, constructing a large storage reservoir in the county of Nevada, called "Lake Spaulding Reservoir," through which the South Yuba river flows, and owns the right to divert and appropriate from said river at said reservoir 11,000 or more miner's inches of water, and has near the outlet of said reservoir constructed an aqueduct through which it proposes to conduct and convey approximately 14,000 miner's inches, and, as soon as the right to do so has been acquired, will discharge the same into the channel of Bear river at the lower end of said aqueduct, thence through and along said channel of said Bear river to the plaintiff's diverting dam. The right of way adopted by the plaintiff for conveying said water to said diverting dam includes the channel of that portion of said Bear river which is included between the lower end of said aqueduct and said diverting dam, and particularly that portion of the channel of said river which crosses the defendants' tract of land, of which a specific description is given in the complaint. The property which the plaintiff herein seeks to condemn and appropriate to its purposes, above mentioned, is the right of way for conveying said water in and along that portion of the channel of the said Bear river which is included between the most northerly boundary line of defendants' said tract of land and the most southerly boundary thereof. It appears from the complaint that the defendant Erie Mining Company had, prior to the commencement of this action, failed to pay the state license tax imposed upon it for the year 1905, as provided by law (Stats. 1905, p. 493), and as a consequence had forfeited its charter to the state on the 14th day of December, 1905. Hence the action was brought against the directors of the defendant Erie Mining Company, as trustees of the corporation and its stockholders and members (Stats. 1907, p. 746), amendatory of the act of 1905 (Stats. 1905, pp. 493, 494). Upon the complaint, setting forth sufficient facts, and the denials of the answer, the cause was brought to issue and trial. The jury found that the market value of the right of way sought to be condemned was the sum of $4,000, and that the damages which will be sustained by the defendants on account of injury to the remainder of the tract of land owned by the defendants, and of which the land sought to be condemned is a part, by reason of the taking and the severing therefrom of the said right of way, would be $1,000. The court thereafter caused to be entered what is called in the record a "judgment." Within due time, the defendants served and filed a notice of intention to move for a new trial upon the following grounds: (1) Insufficiency of the evidence to justify the verdict of the jury; (2) that the verdict was and is contrary to and against the evidence; (3) that the verdict is contrary to law; (4) errors of law occurring at the trial and excepted to by defendants. The said notice stated that "said motion will be made upon a statement of the case," etc. The statement on the said motion was within due time prepared and served, and, on the 14th day of September, 1915, the court duly allowed and settled the same. On the 11th day of October, 1915, the matter of the motion for a new trial on the statement as allowed and settled was called for hearing. At said time, the defendants presented a motion for the amendment of said statement and specification of errors so as to make it appear in the appropriate place therein that "no findings were made or filed by the court, and that findings were not waived by defendants," and to add to the assignments of errors the following:

> "That the judgment herein entered is contrary to law in this: That the court did not file its findings of fact upon the issues presented in the case other than the issue of compensation, as required by law; that the final order or decree of condemnation herein entered is contrary to law in this: That the court did not file its findings of fact upon the issues presented in the case other than the issue of compensation, as required by law."

To said motion the plaintiff interposed an objection upon the ground, among others, that no notice of said motion to amend had been given as provided by section 473 of the Code of Civil Procedure. The motion was denied by the court without prejudice to the right of the defendants to renew the same, and, against the objection of the plaintiff to any further delay, the court continued the further hearing of the motion for a new trial until the 18th day of October, 1915. On the 13th day of October, 1915, the defendants served upon the plaintiff their notice to amend the said statement in the manner and particulars above mentioned. Said notice was accompanied and supported by an affidavit. Upon hearing said motion as so presented, the court allowed the same over a number of specifically enumerated objections by the plaintiff.

It is preliminarily objected by the appellant: (1) That the motion for a new trial as made did not set forth any grounds upon which the court could properly have granted the motion. The argument in support of this proposition is that "the grounds as stated in the motion were too general and indefinite to enable the court to know wherein the evidence was insufficient to justify the verdict; * * * that it was incumbent upon respondents in making such motion to state specifically the grounds of the motion or refer to some paper on file wherein such grounds were specifically stated (citing Williams v. Hawley, 144 Cal. 97, 77 Pac. 762; Hayne, New Trial and Appeal, sec. 164); that respondents did not state specifically the grounds upon which they relied, nor did they refer to any paper on file in the case wherein such grounds were stated." (2) That the specification of the insufficiency of the evidence to justify the verdict is insufficient, in that it is too general and fails to point out the particulars in which the evidence does not justify the verdict.

[1] As to the point first suggested, section 657 of the Code of Civil Procedure designates the grounds upon which a motion for a new trial may be made. Among the grounds so specified is that of the insufficiency of the evidence to justify the verdict or other decision. Section 659 provides that the moving party must designate in his notice of intention to move for a new trial the grounds upon which the motion will be made. This latter provision obviously refers to the grounds upon which a new trial may be allowed as specified in section 657, and contemplates that the grounds designated shall go no further than to specify them in the notice of intention in the general language of the last-mentioned section. This is precisely what was done by the respondents in this case. The statement as settled and allowed contains the notice of intention, in which is set forth, as one of the grounds of the motion, "insufficiency of the evidence to justify

the verdict," which is the exact language of subdivision 6 of said section 657. The statement further contains the following statement:

> "Thereupon the matter of motion for a new trial being before the court, defendants made the following motion: The defendants move the court for a new trial of this action upon the grounds set forth in the notice of intention, to wit"

—following which is a statement of the grounds set forth in the notice of intention.

The above motion was sufficient in all respects to meet the requirements of the law where, as here, the motion is, as the notice of intention here stated would be done, supported by a statement of the case. There is nothing said in Williams v. Hawley, supra, from which it may be implied that the court intended to hold or suggest that the motion as made here is not sufficient to warrant the trial court in considering and acting upon it. In that case the moving party, in making his motion, referred to the notice of intention theretofore served and filed, but, in making up the bill of exceptions prepared and settled for the support of his motion, failed to include therein said notice of intention. It was therefore very properly held that, not being a part of the record, although inserted in the transcript, the notice of intention could not be examined by the court for a statement of the grounds of the motion. The court in that case did say, however, that:

> "It is not necessary, * * * for the appellant in making the motion to state the grounds at length. He must, in some way, inform the court what are the grounds of the motion, but this may be done as well by reference to some paper on file in the action, in which the grounds are stated, as by word of mouth."

See, also, Taylor v. Northern Elec. Railway Co., 26 Cal. App. 765, 770, 148 Pac. 543.

[2] The specification of the particulars in which the evidence is claimed to be insufficient to justify the verdict, so far as compensation or value is concerned, while perhaps not as specific as it might have been, is, nevertheless, sufficient. By said specification (after the statement that the verdict, so far as it involved a decision of the question of the value of the property sought to be condemned, is not justified by the evidence) attention is directed to the particular elements of value which constitute the basis upon which compensation of the defendants for the taking of their property should be fixed, each such element being mentioned, and it states in effect that the testimony bearing upon such elements does not justify the conclusion of the jury that the property involved was of no greater value than that fixed by the jury. This was sufficient to point the particular evidence thus referred to, and the particulars in which it was claimed that it was not sufficient to justify the verdict. The plaintiff could have experienced no difficulty in determining from the specification the particular facts as to which it was thus stated that the evidence was not sufficient to justify the verdict upon the question of value, and this is all that is needful in specifications. Indeed, the plaintiff seems to have perceived and understood the particulars to which the specification referred, as the statement contains a fairly complete statement of the testimony addressed to the several elements of value.

The rule respecting and requiring specifications of particulars, etc., is now much more liberally viewed and applied than in our earlier juridical history. Formerly the rule was very strict, and even a mere informal statement in such specifications might, and often did, operate to bring about a refusal by the courts to consider the points thus attempted to be pointed out. Many decisions have been from time to time made upon the subject, and finally the Supreme Court, in American, etc., Co. v. Packer, 130 Cal. 459, 62 Pac. 744, held that:

> "Whenever there is a reasonably successful effort to state 'the particulars,' and they are such as may have been sufficient to inform the opposing counsel and the court of the grounds, * * * this court ought not to refuse to consider the case on appeal."

See also, Drathman v. Cohen, 139 Cal. 310, 73 Pac. 181; 1 Hayne on New Trial and Appeal (Rev. Ed.) p. 755.

Taking up now a consideration of the merits of this appeal, we first remark that there seems to be much force in the point made by the appellant that the document purporting to be and characterized in the record as the "judgment" (the preliminary or interlocutory judgment) not only constituted such a judgment, without which, manifestly, the court would have no authority or jurisdiction to make the final order of condemnation, but also embraces findings of all the essential facts and conclusions of law. But, assuming this to be true, we need not, in view of the conclusion arrived at herein upon another consideration presented here, stop to inquire whether the document referred to might legally stand for the findings, conclusions of law, and judgment, or whether on an appeal involving the merits of the controversy, the cause would be reversed for the sole and single reason that the findings of fact and conclusions of law are not separately stated, as required by section 633 of the Code of Civil Procedure, which is expressly made applicable to proceedings in condemnation by section 1256 of said Code. It might be that the provisions of section 4½ of article 6 of the Constitution would apply in such case. But, as stated, it is not necessary to consider this proposition. We think the cause may be disposed of on another ground.

It has been shown that one of the grounds upon which the motion for a new trial was based and pressed was that the evidence was insufficient to justify the verdict. The order granting the motion is in the following language:

"The motion of the defendants in the above-entitled case for a new trial coming on regularly to be heard upon the bill of exceptions, the notice of intention to move for a new trial and the judgment roll, and the motion having been made upon all the grounds specified in said notice of intention and duly argued and submitted, and the court having considered the same, the premises considered, it is ordered that the said motion for a new trial be, and the same is hereby granted."

[3] It will at once be observed that the order granting the new trial does not indicate the particular ground, or grounds, of the several set forth in the notice of intention upon which it was made, and it is the settled rule in California that where the trial court, in granting a motion for a new trial, does not expressly limit the order granting such motion to any particular ground of those stated, it is the duty of the appellate court to sustain it, if it can be upheld upon any ground embodied in the notice of intention. Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; Newman v. Lossing, 141 Cal. 175, 74 Pac. 761; Bouchard v. Abrahamsen, 4 Cal. App. 430, 88 Pac. 383; Briggs v. Hall, 20 Cal. App. 372, 129 Pac. 288; Shea-Bocqueraz Co. v. Hartman, 20 Cal. App. 534, 129 Pac. 807.

[4] There is in this case a pronounced conflict in the evidence upon the question of the value of the property sought to be condemned. Indeed, there is such a wide variance between the witnesses for the respective parties upon the question of value that it may properly be assumed, and, in fact, we are authorized to presume, in support of the order appealed from, that one of the reasons impelling the trial court to allow the motion for a new trial was that the evidence was insufficient to justify the verdict. We may dispose of the case upon this presumption, and, therefore, consideration of other grounds and points involving an attack upon certain rulings of the court may be waived.

It is a well-established rule that:

"The granting or denying a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive upon this court, unless it appears that there has been an abuse of such discretion." Domico v. Casassa, 101 Cal. 413, 35 Pac. 1024; Warner v. Thomas, etc., Works, 105 Cal. 411, 38 Pac. 960; Eidinger v. Sigwart, 13 Cal. App. 667, 676, 110 Pac. 521.

See, also, Bjorman v. Ft. Bragg R. R. Co., 92 Cal. 500, 28 Pac. 591; Cole v. Wilcox, 99 Cal. 549, 34 Pac. 114; Bledsoe v. Decrow, 132 Cal. 312, 64 Pac. 397.

[5] We shall not undertake herein a detailed statement of the testimony upon the question of value. It is conceived to be sufficient to say: (1) That the witnesses for the defendants, having previously declared that they were familiar with the properties of the Erie Mining Company and were familiar with mining operations and the use and the methods of the impounding of water for power purposes, and the availability of the properties of the company for the development and use of water for such purposes, and that the mine itself contained large deposits of rich and paying gravel, expressed the opinion that the value of all said properties was from $100,000 to $125,000 for all the purposes to which they may properly and profitably be adapted; that the right of way sought by the plaintiff herein, if allowed, would completely destroy and render valueless all the properites of said Erie Company and the defendants, and render them worthless for any practical mining or water power purpose, to which they are alone adapted. (2) That the witnesses for the plaintiff, having first shown themselves to be experts upon mining and kindred subjects, including the development and conservation of water for power purposes, and that they were familiar with the properties of the Erie Company, and knew their value for any purpose to which they might with profit be put, testified that said properties were absolutely valueless for any purpose.

Thus it will be observed that, as stated, there is a wide diversity of opinion between the witnesses as to the value of the property sought to be taken. In fact, it has no value whatever, according to the plaintiff's witnesses. But, that it has some value is evidenced by the verdict, and, although it is not so made to appear in the record, it is stated in the brief of counsel for the plaintiff that the jury viewed and inspected the property sought to be condemned.

[6] But, at all events, it was, as above pointed out, entirely within the discretion of the trial court, in considering the motion for a new trial to determine whether the verdict, in so far as it concerned the value of the property sought to be appropriated, was justified, or reasonably in accord with the evidence upon that question.

[7] The order granting the motion is evidence of the opinion of the court that the verdict as rendered was not, in respect of value, justified, and, as it cannot upon the record as we must view it justly be said that the court, in granting the motion on that ground, abused its discretion, it cannot be disturbed.

[8] We have not, in considering this record, overlooked the analytical examination of the testimony presented by the defendants by counsel for the plaintiff in their briefs and their argument following therefrom against the reliability of said testimony. But this court cannot weigh the testimony of witnesses. This was, obviously a matter entirely for the jury in the first instance and then for the court when considering the motion for a new trial. The defendants appeared to have sufficiently qualified themselves to express opinions on the value of the property. This is all that this court need know, and whether the testimony given by

them after so qualifying themselves was entitled to great or little or no weight is a matter with which, as suggested, a reviewing court, in the very nature of the case cannot concern itself. These observations apply as well to the argument that, since the only testimony in favor of the defendants upon the question of value was given by the defendants themselves, who were directly interested in the result of the trial, such testimony is not dependable.

[9] The defendants were competent to testify as witnesses in their own behalf, and whether they were influenced in their opinions on value by the fact that they were interested parties was a matter entirely for the determination of the jury and the trial court.

The order appealed from is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(33 Cal. App. 36)

SHULL v. CRAWFORD. (Civ. 2216.)

(District Court of Appeal, Second District, California. Feb. 17, 1917. Rehearing Denied by Supreme Court April 16, 1917.)

1. Contracts 🔑261(1)—Failure of Consideration—Statute.

In view of Civ. Code, § 1689, providing for rescinding of a contract if consideration becomes entirely void, plaintiff could rescind an oral agreement, whereby defendant agreed, but later refused, to teach plaintiff to sell washing machines and subagencies therefor, upon the strength of which plaintiff purchased contract giving him the right to sell subagencies at an enormous profit, and for purchase price of which he had given a mortgage; it being an unexecuted contract, and defendant was not entitled to foreclose mortgage and leave plaintiff to an action for damages.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1174, 1177.]

2. Quieting Title 🔑7(2) — Mortgage as Cloud—Failure of Consideration—Right of Action.

Since plaintiff could show, in foreclosure action, failure of consideration for which a mortgage was given, he may maintain an action to remove from his premises the cloud of such mortgage.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 15, 18, 19, 21–23, 25.]

3. Cancellation of Instruments 🔑22—Total Failure of Consideration—Notice of Rescission.

Where there is a total failure of consideration, it is not necessary to give notice of rescission before bringing suit to cancel the contract.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 30.]

4. Cancellation of Instruments 🔑37(8)—Total Failure of Consideration—Sufficiency of Complaint.

Complaint alleging that defendant orally agreed to teach plaintiff to sell washing machines and subagencies therefor at an enormous profit, whereby plaintiff was induced to make the contract giving him the right of sale, and that defendant refused to perform, *held* to sufficiently state a cause of action for cancellation of the contract.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 68.]

5. Appeal and Error 🔑1170(3)—Harmless Error — Amendment of Complaint—Statute.

Where defendant was not prejudiced by the allowance of an amendment to complaint, after notice, the cause will not be reversed therefor, in view of Const. art. 6, § 4½, providing that no judgment shall be set aside for error as to any matter of pleading unless the error complained of has resulted in a miscarriage of justice.

[Ed. Note.—For other cases, see Appeal and Error, Cent.Dig. §§ 4066, 4075, 4098, 4101, 4542.]

Appeal from Superior Court, Riverside County; W. H. Thomas, Judge.

Action by Joseph M. Shull against W. H. Crawford. From judgment for plaintiff and order denying new trial, defendant appeals. Affirmed.

Miguel Estudillo, of Riverside, for appellant. McFarland & Irving, of Riverside, for respondent.

SHAW, J. This action was brought to cancel and annul a certain conveyance of real estate made by plaintiff and his wife to defendant, which instrument, while in form a deed absolute, was in fact conceded to have been given as a mortgage to secure an alleged indebtedness due from plaintiff to defendant. The appeal is from a judgment in favor of the plaintiff and an order of court denying defendant's motion for a new trial.

It appears that a corporation known as the Domestic Utilities Manufacturing Company was engaged in the manufacture and sale of what was known on the market as the "Vacuum Clothes Washer." The company had adopted a lengthy, complex, and confused form of agency contract in appointing agents and making sales of its washers to those who could be induced to purchase the same in lots of 1,667, and whereby the purchaser was allotted the exclusive right to operate in territory selected and agreed upon. The form and substance of this contract was, if not intended as a means for the perpetration of fraud, well calculated to deceive the unwary and appeal to the gullible, for the reason that, while the purchaser was required to pay $5,000 for which he received 1,667 washing machines, it gave him the right, provided he could find persons equally unsophisticated, to sell like contracts for $5,000, for each of which he was to retain as his commission $3,333, the balance of $1,667 going to the company for the 1,667 washing machines which it furnished to the purchaser of the contract, who likewise was given the right, upon like inducement, to search for "prospects" and, if found, develop them if possible. The evidence, however, shows that to render one a successful agent in selling the vacuum washing machines, and particularly in selling the contracts, from which latter the profits were to be derived, required that the agent or purchaser be "posted, informed, and educated"; so the contract provided that an agent making a sale of "family rights," or to persons to whom he might sell "said articles at wholesale," or those "appointed as subagents," should "post, inform, and educate" them. Whether or not defendant was the holder of one of these valuable contracts is immaterial; at all events, it appears that he was authorized to sell the same, and selected Riverside as a fertile field for operation, and where it seems his labor was rewarded by the discovery of plaintiff, who was recognized as a "likely prospect." Defendant, it seems, was what is known as a "live wire" in the business, and without much effort convinced plaintiff that he, too, upon being "posted, informed and educated," could, with like success, find unsophisticated individuals whom he could induce to buy the privilege of making like sales in this endless-chain scheme.

On September 22, 1911, defendant consummated the sale of a contract to plaintiff, under which the latter was appointed the duly authorized agent of the company in the territory embracing the city of San Diego, and received the 1,667 vacuum clothes washers, with the power to sell like contracts of agency, for which washers he paid defendant as the agent of the company the sum of $1,667, and at the same time executed to defendant the mortgage as security to him for the payment of his commission of $3,333, which plaintiff knew he was to receive. In his complaint plaintiff alleges, and the evidence shows, that, in consideration of his purchase of said contract, the defendant orally promised and agreed that he would "post, inform, and educate" plaintiff with reference to said clothes washer, so that he would fully understand how to operate and demonstrate the same to the best possible advantage, and enable him to secure the appointment of other agents and subagents, and further agreed "that upon said plaintiff's selecting the territory in which he desired to have the exclusive right to sell said washers, that said defendant, Crawford, would accompany said plaintiff to said territory, and would put on lectures for a period of two months, said lectures to be delivered daily during said period with the exception of Sundays"; that plaintiff selected the city of San Diego as territory, where he opened offices for the transaction of said business, and demanded that defendant put on lectures for the purpose of demonstrating and assisting him in the sale of said washers, but that defendant at all times refused to comply with said demand and deliver said lectures, or to post, inform, and educate plaintiff in the use of the same or demonstration thereof; "that the said agreement on the part of the said defendant Crawford to put on said lectures as hereinbefore alleged, and to educate, post, and inform said Shull in the use of said washers and in the methods to be pursued in securing other agents and subagents for the said company was the sole and only consideration which induced the said plaintiff Shull to enter into said agreement with said defendant Crawford, or to accept an appointment as agent of said corporation, or to execute said contract as agent with said corporation, or give said note for $3,333 secured as hereinabove alleged; that said plaintiff, Shull, has, by reason of the failure of said defendant, Crawford, to put on said lectures and instruct and inform and post him in the use of said washers, been unable to sell said washers or to interest the public therein, or to secure other agents or subagents for said company"; that had plaintiff known that said Crawford would not fulfill his said agreement, plaintiff would not have purchased said contract, and would not have given the mortgage to secure to defendant the payment from him of said sum of $3,333; all of which allegations the court, in effect, found to be true. It is also alleged that said deed so given as a mortgage, if left outstanding, would constitute a cloud upon plaintiff's title to the real property therein described.

[1] The theory of the complaint, and that upon which the action was tried, was that the mortgage was given to defendant, which in fact it was, and not to the utilities company, which received from plaintiff all that was due to it; that the consideration for the mortgage so made to defendant was his agreement to perform certain services, without which promise plaintiff would not have bought the contract so made by the utilities company, sale of which was made to him by defendant; that defendant refused to perform the services constituting the consideration for the sale so made by defendant to plaintiff, and upon the ground of a failure of consideration moving to plaintiff from defendant, there remains nothing upon which to found plaintiff's promise to pay to defendant the $3,333 for which the mortgage was given; and likewise for a failure of consideration defendant is not entitled to a foreclosure of the mortgage, which he sought by a cross-complaint. Plaintiff was not seeking to rescind the written contract made with the utilities company under and by virtue of which he obtained the 1,667 washing machines, but sought to rescind the oral agreement made with defendant whereby he was induced to enter into the written contract, for failure to perform the services in consideration of which plaintiff purchased the contract, and to have the mortgage constituting a cloud upon his real estate set aside and annulled. Section 1689 of the Civil Code provides that a party to a contract may rescind the same if the consideration therefor becomes entirely void from any cause.

The consideration for the purchase of the contract was defendant's promise of 60 days' services in posting and educating plaintiff in the operation and demonstration of said machines and assisting him in the making of sales of $5,000 agency contracts at a profit of $3,333, as well as washing machines, which promise defendant refused to perform. Nevertheless, appellant contends that he is entitled to foreclose the said mortgage and leave plaintiff to an action for damages. To our minds, such a course, under the circumstances of this case, would be highly inequitable. In support of this contention counsel for appellant cites the cases of Lawrence v. Gayetty, 78 Cal. 132, 20 Pac. 382, 12 Am. St. Rep. 29, and Schott v. Schott, 168 Cal. 342, 143 Pac. 595, in which the plaintiffs sought to have deeds, which had been made and delivered upon the promise of the grantees to support the plaintiffs during their lives, set aside. Such relief was denied upon the ground that the transaction constituted a fully executed contract. Such, however, is not the case here. It is an unexecuted contract like that involved in Howlin v. Castro, 136 Cal. 605, 69 Pac. 299. Plaintiff has not parted with his property, but has merely given a mortgage thereon to secure his promise to pay defendant $3,333, which the defendant by a cross-complaint is seeking to enforce.

[2] To our minds, plaintiff, as a defense to the foreclosure action, is entitled to show a failure of the consideration for which the mortgage was given; and, if this be true, it must follow that he has the right to maintain an action to remove the cloud from the title to his property.

[3] There was a total failure of consideration for plaintiff's promise to defendant, and hence it was not necessary to give notice of rescission before bringing suit to cancel the mortgage. Glass v. Glass, 4 Cal. App. 604, 88 Pac. 734; Richter v. Union Land, etc., Co., 129 Cal. 367, 62 Pac. 39.

[4] In our opinion, not only did the complaint state a cause of action, but the findings to the effect that the allegations of the complaint were true support the judgment, and they in turn are supported by the evidence. The action is not based upon fraud, either constructive or actual, of the utilities company, nor that of defendant, but solely upon the ground that since defendant failed to perform the promise in consideration of which the mortgage was given, it would be inequitable to enforce it.

Numerous complaints are made as to rulings of the court in admitting evidence. These alleged errors are based upon appellant's contention that the action was one to rescind the contract between plaintiff and the utilities company, instead of which the rulings were based upon the theory of the court that the subject of the litigation was the oral contract made between plaintiff and defendant, which plaintiff sought to have annulled for want of consideration. Considered upon this theory, we find no prejudicial error in the rulings of the court.

[5] Nor was defendant prejudiced by reason of the court permitting plaintiff to file an amended complaint after notice. Even should we concede such error, it could not be said that it resulted in a miscarriage of justice. Section 4½, art. 6, Const.

In our opinion, the judgment and order appealed from should be affirmed; and it is so ordered.

We concur: CONREY, P. J.; JAMES, J.

33 Cal. App. 42

MARVIN v. ENG-SKELL CO. (Civ. 1886.)

(District Court of Appeal, First District, California. Feb. 19, 1917. Rehearing Denied March 21, 1917. Denied by Supreme Court April 19, 1917.)

1. SALES 🔑417 — REMEDIES OF BUYER — FRAUD OF BUYER—SUFFICIENCY OF EVIDENCE.

In an action for damages for breach of a written contract to sell and deliver block tin pipe, evidence *held* insufficient to show that the contract was procured by plaintiff's fraud and misrepresentations.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1173.]

2. DEPOSITIONS 🔑81 — FAILURE TO ATTACH SEAL OF COURT—ADMISSION IN EVIDENCE—STATUTE.

Where a deposition of a witness, taken out of the state on a commission, did not have attached to it the seal of the court, as required by Code Civ. Proc. § 2024, so that the court granted motion to suppress it, but later, on learning that the witness was not in New York, where he was when the deposition was taken, but somewhere in South America, and that to have the deposition taken again would cause an indefinite delay, the court properly granted motion to amend the process of the court by affixing its seal, permitting the deposition to be read in evidence, since the court has control over its process, and it should permit an amendment in the interest of justice, especially when the party complaining can show no resulting injury.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 213–217.]

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by M. E. Marvin against the Eng-Skell Company, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. J. Hayes, of Oakland, for appellant. Louis H. Brownstone, of San Francisco, for respondent.

PER CURIAM. This is an appeal by the defendant from a judgment in favor of plaintiff for $494.80 with interest and costs.

The action was brought for the recovery of damages for the breach of a written contract, under the terms of which the defendant agreed to sell and deliver to the plaintiff four reels of block tin pipe, each reel weighing 500 pounds, at a price of 50 cents per pound, and which contract the defendant refused to carry out.

It appears that the day after the contract was entered into the defendant learned that the market price of block tin pipe had gone up from 45 cents to 68 cents per pound, which increase in price was due, according to the testimony of the defendant's manager, to the European conflict then and now prevailing. This witness also testified that the defendant company was a small dealer in this article of merchandise; that it knew nothing of its sudden rise in price, but that the plaintiff did; that when the plaintiff asked the price of such pipe and stated the quantity he required he was advised by the defendant to place the order directly with the Selby Smelting & Lead Company (which was at that time the only wholesale dealer in the commodity in California); and that plaintiff concealed his true reason for not purchasing from that company (which was that he would have to pay 68 cents a pound therefor), and, with the purpose of misleading and deceiving the defendant, represented to defendant that he was not on friendly terms with the Selby Company and did not care to have any personal dealing with it.

[1] Assuming that the evidence introduced by the defendant tended to sustain the allegations of the answer, that the contract was conceived in fraud, and is therefore void, still we cannot reverse the judgment, were we ever so inclined, for the simple reason that there is an abundance of evidence in the record sustaining the findings of the court that no misrepresentation was made by the plaintiff to the defendant, and that there was no concealment or fraud practiced by the plaintiff upon the defendant. Furthermore, we are at a loss to see how the court could have made any other finding. The record discloses that on the 5th day of August, 1914, the plaintiff called at the place of business of the defendant and asked for a price on block tin pipe, stating also the quantity he desired. The clerk of the defendant was unable at that time to quote a price, and the plaintiff was requested to call again. He did so that afternoon and again on the next day, when the defendant quoted the price above stated and the agreement in writing was made. The plaintiff denied emphatically that he made any of the misrepresentations referred to. It also appears in the record that block tin was quoted in San Francisco at 45 cents per pound the day the agreement was made. We conclude therefore that this first contention of the appellant is without merit.

Equally so is the point that the defendant in purchasing the block tin from the Selby Company to fill plaintiff's order was acting as the agent of the plaintiff. It is sufficient to say in this behalf that the evidence does not sustain this contention.

[2] A more serious question is whether or not the court committed error in admitting in evidence the deposition of M. E. Marvin. When the commission to take the deposition was issued, it did not have attached to it, as required by section 2024 of the Code of Civil Procedure, the seal of the court; and at the trial the defendant for the first time objected to the deposition, and made a motion to suppress it. The motion not being opposed, it was granted, but later, learning that the witness was not in New York, where he was when the deposition was taken, but was somewhere in South America, and it appearing that to again have his deposition taken would cause an indefinite delay, the plaintiff made a motion to set aside the order suppressing the deposition, and to amend the process of the court by affixing its seal thereto. This motion was granted, and the deposition read in evidence. The granting of this motion is now contended to be error.

We are of the opinion that under the facts the court correctly granted the motion. The court has control over its process, and it should permit an amendment to the same in the interest of justice, especially when, as in this case, the party complaining can show no resulting injury. The authorities sustain this view. In the case of Oriental et al. v. Barclay, 16 Tex. Civ. App. 193, 206, 41 S. W. 117, 122, the court, referring to that part of a motion to quash a commission based upon the ground that it did not bear the seal of the court, said:

> "The commission having been issued by the clerk of the court trying the case, and the deposition of the witness having been taken under such commission, the failure to place the seal upon the commission was a mere irregularity, which could not have worked an imposition: and it was not error to allow the clerk to place the seal upon the commission, and to refuse to quash the deposition upon this ground."

See, also, Austin v. Lamar F. Ins. Co., 108 Mass. 338; Goodyear v. Vosburgh, 41 How. Prac. (N. Y.) 421; Linskie v. Kerr (Tex. Civ. App.) 34 S. W. 765; Irvin v. Bevil, 80 Tex. 332, 16 S. W. 21; Wallace v. Byers, 14 Tex. Civ. App. 574, 38 S. W. 228; Wood v. Fleetwood, 19 Mo. 529; Freeman on Executions, vol. 1 (3d Ed.) § 70.

The judgment is affirmed.

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33 Cal. App. 50

CLARK v. BERLIN REALTY CO.

(Civ. 2206.)

(District Court of Appeal, Second District, California. Feb. 20, 1917. Rehearing Denied by Supreme Court April 19, 1917.)

1. ACTION 🔑45(4)—MISJOINDER.

Where a corporate creditor sought to recover from a stockholder its proportionate liability as such for the indebtedness of the corporation, the creditor may, in a single action, join claims for various debts.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 430–448.]

2. PLEADING 🔑54—COMPLAINT—REFERENCE.
In an action by creditor against a corporate stockholder to hold it liable for corporate debts, where there were several counts, essential allegations showing the stockholder's liability contained in one count may by reference be incorporated in another.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 118.]

3. PAYMENT 🔑16(1)—NOTE.
The taking of a promissory note from a debtor or third party will not extinguish the debt and create a new obligation, unless received under an express agreement to that effect.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 63.]

4. PAYMENT 🔑74(3)—PRESUMPTIONS—NOTE.
Where a corporation indebted to plaintiff gave a note in payment of other debts evidenced by notes which were delivered to the corporation marked "paid," the presumption of payment is not conclusive, and does not establish a payment of the earlier debt, so that one who ceased to be a stockholder before the second note was taken was freed from liability.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 138, 230.]

5. APPEAL AND ERROR 🔑1011(1)—REVIEW—FINDING.
Where the evidence was conflicting, a finding by the trial court cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988.]

6. APPEAL AND ERROR 🔑1058(1)—REVIEW—HARMLESS ERROR.
The exclusion of testimony is harmless where other similar evidence of equal value was admitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by S. N. Clark against the Berlin Realty Company, a corporation. From a judgment for plaintiff and order denying new trial, defendant appeals. Affirmed.

Valentine & Newby, of Los Angeles, for appellant. Benjamin E. Page and Arthur C. Hurt, both of Los Angeles, for respondent.

JAMES, J. Judgment in this action was for the plaintiff. The appeal is taken from the judgment and from an order denying the motion made by the defendant for a new trial. Plaintiff, as assignee of the Merchants' National Bank of Los Angeles, brought this action for recovery against the defendant on account of an indebtedness created by the Berlin Dye Works & Laundry Company, a corporation, of which latter corporation defendant was at certain times material herein a stockholder and the owner of 209,535 shares of stock. The total capital of the Berlin Dye Works & Laundry Company was represented by 300,000 shares, all of which had been issued. Recovery was sought against the defendant for its proportionate liability as a stockholder. Plaintiff in his amended complaint, upon which issue was joined and trial had, alleged first in detail the fact of the corporate existence of the Berlin Realty Company and the Berlin Dye Works & Laundry Company. He then set out in the first cause of action that the Merchants' National Bank, on April 1, 1911, loaned to the Berlin Dye Works & Laundry Company (which for convenience we will hereinafter refer to as the "Laundry Company") the sum of $8,000 and the making of a promissory note payable 90 days after date by the Laundry Company to cover the amount of that loan with interest, with a condition as to the payment of attorney's fees. It is then alleged that on the 14th day of April of the same year the same bank loaned to the Laundry Company the sum of $1,500, taking a promissory note in like form, payable one day after date; that on the 8th day of May the same bank loaned to the Laundry Company the sum of $2,000, taking a one-day note in like form as was used in the preceding transactions; that on the 12th day of June of the same year the same bank loaned to the Laundry Company the further sum of $1,000 and took the Laundry Company's one-day note covering that amount; that on the 30th day of June, 1911, a new note for $8,000, and in renewal of the note dated the 1st day of April of that year, was given, and it was alleged that the sole purpose of the making of this note was to renew the $8,000 note formerly given. It was further alleged that on the 29th day of November, 1912, the same bank loaned to the Laundry Company a further sum of $2,000 and took a one-day note covering the amount involved in this last transaction. It was then alleged that on the 5th day of March, 1913, a note was made by the Laundry Company in favor of the bank and duly delivered for the principal sum of $14,500, payable one day after date. This note it was alleged was given, in its aggregate amount, to cover each of the notes hereinbefore described, and it was alleged that the five notes theretofore given were surrendered to the Laundry Company, and that the "said note dated March 5, 1913, for $14,500, was accepted and retained in place and renewal thereof by said bank, and not otherwise." There was also an allegation that the principal amount of the indebtedness so incurred at the several times had not been paid. It was next alleged that at the time the $8,000 indebtedness was incurred the Berlin Realty Company was the owner of 209,535 shares of the 300,000 shares constituting the total and issued capital stock of the Laundry Company. In the second cause of action, plaintiff, by reference therein stated, incorporated all of the material allegations set forth in the first alleged cause of action, and then alleged that at the time the indebtedness of $1,500 was incurred by the Laundry Company on April 14, 1911, defendant herein was the owner of the number of shares of stock described. The third cause of action was in like form, but referred to the indebtedness of May 8, 1911; and the fourth cause of action was set forth in like manner and form, but referred to the $1,000 indebtedness of June 12, 1911. No recovery was sought on account of the $2,000 note dated November 29, 1912, for the reason that the defendant at that time had ceased to be a stockholder of the Laundry Company. Defendant demurred to the complaint setting forth various special grounds therefor, in addition to the general one that sufficient facts were not stated to constitute a cause of action. The demurrer was overruled and an answer filed.

[1, 2] It is contended, first, that the court erred in overruling the demurrer. The complaint in its allegations of fact was simple and quite clear. In it was first set forth the alleged facts of the transactions had by the Laundry Company with the bank, and these allegations were specific and particular as to the amounts of money borrowed, the dates, etc. There seems to be no ground upon which to base the contention, as suggested in one of the asserted grounds of demurrer, that the complaint was uncertain. There was no misjoinder of causes of action. The first alleged cause of action, to be sure, contained statements of the several transactions had with the bank the individual ones of which might no doubt have been set out separately; but we cannot see how, assuming that such a procedure had been followed, defendant could have been any better informed of the facts upon which the plaintiff relied to sustain his suit. The contention that the allegations of the first cause of action, being substantial ones and essential to the pleading, could not by reference be incorporated in the subsequent alleged causes of action, is not supported by the California cases. The case cited on behalf of appellant to this point, to wit, Haskell v. Haskell, 54 Cal. 262, is not sustained by the later decisions in Treweek v. Howard, 105 Cal. 434, 39 Pac. 20, and Green v. Clifford, 94 Cal. 49, 29 Pac. 331.

[3-5] The main contention, however, and that which forms the substance of the defense interposed by the defendant, is that all of the indebtedness incurred by the Laundry Company to the bank and as evidenced by the several promissory notes was extinguished when the note for $14,500 was given on March 5, 1913, which was after the defendant had ceased to be one of the stockholders in the Laundry Company. It appeared in evidence that, at the time the note for $14,500 was made, the notes previously taken were delivered to the Laundry Company and marked "paid." The defendant urged and now insists that, under the facts shown by the evidence, when the last note was made a novation was effected, and under the agreement of the parties the new obligation extinguished the old debt. It has been held numerous times and by the decisions of this state that the taking of a promissory note from a debtor, or of a third party, will not extinguish the debt and create a new obligation, unless received by the creditor under an express agreement that it shall have that effect. It is further asserted in the authorities that there is not a presumption in favor of a note being received as payment under such circumstances; and, where a note was given to take up another note, it was said that because the original note was surrendered and marked paid on its face "was not conclusive evidence of the extinguishment of the debt." In the case of Bonestell v. Bowie, 128 Cal. 511, 61 Pac. 78, the text of the decision supports these statements, and a number of cases are therein collected and cited which are all to the same general point and effect. See, also, Gnarini v. Swiss American Bank, etc., 162 Cal. 181, 121 Pac. 726. In London & S. F. Bank v. Parrott, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64, the court said:

> "In the absence of an agreement to that effect, or evidence that such was the intention of the parties, the taking of a note for an existing liability does not constitute a payment of the debt."

In the same case it is further observed that:

> "The plaintiff's claim against the appellants as stockholders is not upon the note, but upon the liability originally created by reason of the advances made to the corporation."

And such was the action of the plaintiff here. There was, to be sure, some testimony heard by the trial judge which, taken by itself, may be said to tend to show an intention on the part of the bank to consider the last note as creating a new and distinct obligation—one which would cancel the old indebtedness. But the court had other testimony to consider which indicated that no extinction of the original indebtedness was intended to be worked by the taking of the last note, and, such being the condition of the evidence, it is sufficient to say that an appellate court has no right to make any further review of the testimony, for, in view of the conflict, the decision of the trial judge in that matter is final.

[6] We think there was no prejudicial error in refusing to allow a question to be answered which was asked of the cashier of the bank relative to his knowledge as to a change in the management of the Laundry Company being made prior to November 29, 1912. As is properly said by respondent, the president of the bank gave testimony which furnished an admission as against the bank, if it may be so termed, fully as favorable as that which the expected answer of the cashier could have supplied. The objection that the court erred in refusing to allow the case to be reopened after the parties had rested, in order to permit defendant to introduce further testimony, is addressed to a matter which is regulated by the sound discretion of trial judges, in the exercise of which appellate courts will not interfere. There is noth-

ing shown from which we may conclude in this case that the court abused its discretion.

No other points are presented which call for discussion or consideration.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

33 Cal. App. 28

SCHALLMAN v. HAAS. (Civ. 1624.)

(District Court of Appeal, Third District, California. Feb. 16, 1917. Rehearing Denied by Supreme Court April 16, 1917.)

1. EVIDENCE 🔑43(2)—JUDICIAL NOTICE — COURT RECORDS.

Where a motion to compel defendant to pay plaintiff certain sums for the support of an illegitimate child and for expenses pending an appeal was heard by the judge who tried the case on the merits, the court on the hearing of the motion had a right to take judicial notice of the record in the case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 63.]

2. BASTARDS 🔑92—SUPPORT — POWER OF COURT—SUPPORT PENDING APPEAL.

While a court has inherent power, after granting a divorce where the marriage was admitted for the husband's fault, to compel the husband to pay to the wife money for her expenses in resisting the husband's appeal, and for the support of herself and children pending the appeal, it has no such inherent power in an action under Civ. Code, § 196a, to compel a father to support his illegitimate child, since in the latter case the obligation does not arise until the judgment has established the fact.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 228–239.]

3. BASTARDS 🔑92—SUPPORT — POWER OF COURT—STATUTES.

Civ. Code, § 196a, requiring the father to give a child support and education suitable to his circumstances, and authorizing a civil suit in behalf of a minor child by his mother or guardian to enforce such obligations, in which action the court shall have power to enforce performance thereof the same as under Civ. Code, §§ 138–140, does not, by making sections 138–140, which provide for orders in divorce actions requiring the husband and father to pay the wife's expenses and for the support of the wife and children, a part of that section, impose a similar obligation on defendant in an action to support an illegitimate child, but merely authorizes the obligation already created to support such child after his liability has been determined, to be enforced in the manner in which the other obligations may be enforced, and therefore does not authorize the court to require defendant to pay for the support of the child and the expenses of resisting an appeal from the judgment fixing his liability.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 228–239.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Anna Schallman against Carl F. Haas. From an order requiring defendant to pay plaintiff's attorney's fees and expenses in resisting defendant's appeal from a judgment requiring defendant to support an illegitimate child, and to pay a monthly sum pending the appeal for the support of the child, defendant appeals. Order reversed.

Tum Suden and Tum Suden, of San Francisco, for appellant. J. J. Dunne, of San Francisco, for respondent.

HART, J. This action was commenced for the purpose of obtaining a decree or judgment compelling the defendant to pay a monthly sum reasonably necessary for the support, maintenance, and education of the alleged minor child of the parties.

The complaint, in substance, alleges: That the plaintiff is the mother and the defendant the father of a minor child, who was born in the city and county of San Francisco, on the 26th day of July, 1911; that the defendant has failed, neglected, and refused for several months immediately preceding the time of the commencement of this action to provide for said minor child's support and maintenance; that the plaintiff is wholly without the means to provide for and maintain said minor child, being able only, through her own personal labors and work, and with the assistance of relatives, to provide for herself the common necessaries of life; that "the defendant has and possesses the present means and ability to pay to plaintiff a reasonable sum for the support, maintenance, and education of said minor child, together with a reasonable sum as and for plaintiff's counsel fees and costs of court." The prayer is for judgment requiring the defendant to pay to plaintiff a reasonable sum monthly for the support, etc., of said child, together with a reasonable sum for plaintiff's counsel's fees and cost of court herein.

The answer denies each and every one of the above-stated allegations of the complaint, and avers in paragraph 3 thereof:

> "Defendant alleges that he is under no legal liability or responsibility whatever to provide for the maintenance and support of the said minor child, Albert Schallman; that said Albert Schallman was born out of wedlock."

The court found that the plaintiff and the defendant were the mother and father, respectively, of the minor child referred to in the complaint; that the defendant has failed, neglected, and refused to provide said child with support, maintenance, etc., as alleged in the complaint; that, as likewise alleged, the plaintiff is wholly without the means, and that the defendant possesses sufficient means and ability to provide such support, maintenance, etc., for said child. Finding 6 reads:

> "That all the facts set forth in defendant's answer herein contrary to these findings are untrue."

Within due time the defendant duly served and filed a notice of appeal to the Supreme Court from said judgment, and to stay the execution thereof gave a bond in the sum of $1,600, to which no exception was taken, and which covers a sum which would accrue within a period of approximately three years, should the judgment be affirmed. Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709. Thereafter the plaintiff noticed and filed an application to the trial court for an order allowing her costs and attorney's fees to cover the expense for transcribing the testimony taken at the trial, to be used on the motion of the defendant for a new trial and upon the appeal from the judgment, for the printing of briefs on the appeal, for compensation of her counsel in those proceedings, and further asked for an order requiring the defendant to pay to plaintiff a reasonable sum for the support and maintenance of the said child "pending the determination of defendant's motion for a new trial and decision of defendant's proposed appeal to the Supreme Court herein." Upon hearing the above-mentioned motion the court made an order allowing the same, as follows, briefly: That the defendant immediately deposit with the clerk of the court the sum of $150, to be expended in the payment of such costs, charges, and disbursements "as may be necessary for plaintiff's costs and expenses in preparing her amendments to defendant's bill of exceptions and all of her costs necessary to be expended by her in preparation on her part against defendant's said motion for a new trial herein and defendant's appeal herein"; that defendant pay to plaintiff the sum of $75 as and for her counsel fees on said motion for a new trial and defendant's appeal herein; that, pending the hearing of said motion for a new trial and appeal and the final determination of both, the defendant pay to the plaintiff the sum of $20 per month for the support and maintenance of said minor. The defendant took an appeal from said order, and filed a bond to stay the execution thereof. It is the appeal from said order with which we are here concerned.

[1] The bill of exceptions in the transcript does not contain the judgment roll. It states, however, that, at the hearing of the application for the order from which this appeal is prosecuted, the defendant offered in evidence the judgment roll. It is quite probable that the judgment roll was, as a matter of fact, received in evidence, but that, under the decision in Harron v. Harron, 128 Cal. 303, 60 Pac. 932, it was deemed unnecessary to incorporate it in the bill. The notice of the motion in this case stated that said motion "will be made upon this notice of motion and upon all of the pleadings and papers filed herein, and on all of the proceedings had and taken herein, and upon such oral and documentary evidence as may be produced upon the hearing hereof." The order appealed from here was made by the judge who tried the case upon the merits and rendered the judgment thereon. The record in the case was judicially before the court upon the motion, and, in the hearing thereof, it took, as it had a right to do, judicial notice thereof. Harron v. Harron, supra.

The action purports to be based upon section 196a of the Civil Code, which reads:

> "The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, and in such action the court shall have power to order and enforce performance thereof, the same as under sections 138, 139 and 140 of the Civil Code, in a suit for divorce by a wife."

It is vigorously argued by the defendant that the complaint does not state a cause of action under said section, and that the findings, which follow, substantially, the averments of the complaint, do not support the judgment. It is further claimed that the complaint on its face shows that the minor child therein referred to and not the plaintiff is the real party in interest in this action, and for this reason said pleading fails to state the existence of a right of action in the plaintiff upon the cause of action so stated. We recognize much merit in the first stated of these contentions. As to the second we intimate no opinion, since we do not find it necessary to consider it on this appeal. Indeed, we prefer not to consider either of said points, inasmuch as there is, it appears, an appeal from the judgment pending and supported by some other record which is not here, and it is preferable that the questions suggested should be disposed of on said appeal.

[2] We think the court transcended its power in making the order complained of here. To our minds, the whole question, whether a trial court is legally authorized to make such an order after judgment in an action based upon section 196a of the Civil Code, must be determined upon a consideration of statutory law, conceding that it is within the competence of the Legislature to confer such power upon trial courts in a case like this. In other words, the power of the court to make such an order is not inherent, but, if it exists and can exist at all, it must come from direct legislative authority. The soundness of this proposition cannot well be challenged.

It is doubtless true that, in actions for divorce (and it will be understood that we are now referring to cases of that character wherein there is no contested issue of marriage—that is, wherein the marriage is not denied), even in the absence of statutory regulation of the matter or express legislative authority therefor, the courts having cognizance of such causes have the power to make after judgment suitable and reasonable provision for temporary or permanent alimony or support and provision for the payment by the husband to the wife of such sums as may be found to be requisite to defray the expenses necessary to be incurred by her in prosecuting the action or defending against it at the trial or in prosecuting or resisting the appeal, if one be taken. This power naturally follows from the nature of the marriage relation and the rights and duties of the parties thereupon arising, and from the fact that an action for a divorce is for the purpose of dissolving that relation. The husband upon the marriage becomes the head of the family, and has exclusive control, under certain restrictions as to disposition, of the community property. As a rule, he alone holds the "purse strings," and this is true even where the principal sources of his income are the property or belongings of the community. But, even if there be no community property and the wife is without separate means, the authority of the court to compel the husband after judgment to pay to the wife such sum or sums as may reasonably be required to prosecute or resist an appeal and for the support of their minor children pending the appeal will be recognized. "Natural justice and the policy of the law," says Mr. Bishop, in his work on Marriage and Divorce, volume 2, § 976, "alike demand that in any litigation between husband and wife, they shall have equal facilities for presenting their case before the tribunal. This requires that they should have equal command of funds. So that if she is without means, the law having vested (given control of) the acquisitions of the two in (to) him, he should be compelled to furnish them to her, to an extent rendering her his equal in the suit. This doctrine is a part of the same whereon proceeds temporary alimony. And so the English courts have from the earliest times to the present held without the aid of Parliament, and nearly all of our own have accepted the doctrine as of common law."

Of course, where the matter of costs, attorney's fees, and temporary or permanent support is regulated by statute, then the rules so promulgated must govern, and, undoubtedly, where, in a divorce action, a trial court failed to follow the statute in the matter of awarding costs, etc., or transcended its authority under the statute in that regard, its action therein would be annulled or set at naught upon appeal as being void or beyond the jurisdiction of the court. In this state, as well as in most of the states at the present time, the matter of costs, attorney's fees, and alimony, in divorce actions or suits for maintenance and support, is entirely regulated and governed by statute.

But there is no analogy between divorce suits or any other action between a husband and wife pertaining to or involving their marital relation and obligations and an action founded upon section 196a of the Civil Code. No more than in any other of the various classes of actions has a court the inherent power, if, indeed, it can have or be given any power in that respect at all, to require a litigant in a case of this character to provide his adversary with the means necessary to defray the costs and expenses incident to the prosecution or resisting of an appeal or for the support of such adversary, pending the disposition of the cause on appeal. This proposition necessarily follows from the fact that the essential issue to be determined in an action of this kind is contested. The gist or gravamen of this action is the paternity of the alleged illegitimate child. The defendant entered the court denying that he was the father of the child. His legal liability for its support can therefore only be fixed by proof that he is the father. There is not as to the defendant and the infant, as is true in divorce actions, wherein the marriage is admitted or not denied, a fixed and admitted status upon which the court is authorized to exercise a power whereby a decree affecting the rights of the parties may be made in advance of the trial of the issues of fact or in the absence of proof. Nor is it any less true in this case than in any other action, except in suits for divorce and kindred actions, that a court, after judgment, has no right to require the defendant to provide the plaintiff with the financial means with which to defend the judgment on appeal and to pay a monthly sum for the support of the children pending the determination of the appeal. To recognize such power in the trial court would be to assume that, with the rendition and entry of the judgment, the questions at issue had been definitively determined and settled, a position in direct contradiction to the rule that:

> "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." Code Civ. Proc. § 1049; Naftzzer v. Gregg, 99 Cal. 83, 33 Pac. 757, 37 Am. St. Rep. 23; In re Blythe's Estate, 99 Cal. 472; 34 Pac. 108; Story v. Story & I. Commercial Co., 100 Cal. 41, 34 Pac. 675; Borges v. Hillman, 29 Cal. App. 144, 150, 154 Pac. 1075.

[3] Thus it is very clear that there is no inherent power or authority in a trial court to make, after judgment, such an order as the one here complained of, and, assuming without deciding, but questioning the constitutional right of the Legislature to confer upon trial courts the power of making such an order as the one here after judgment in a case of this kind, we know of no statute investing such courts with such authority, unless, as counsel for the plaintiff contends, it is to be found in sections 138, 139, and 140 of the Civil Code, the provisions of which are by section 196a expressly made applicable to a limited extent to actions based upon the last-mentioned section. The sections named read:

> "Sec. 138. In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same.
>
> "Sec. 139. Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the

children of the marriage, and to make such suitable allowance to the wife for her support, during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects.

"Sec. 140. The court may require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case."

The only section of the above which appears to lend support to the contention of the plaintiff is 138. But when we examine the language of section 196a, which refers to the above sections, it seems to us that the irresistible conclusion is that it was not thereby intended to create any additional rights in favor of the illegitimate child, but that the sole purpose was thus to provide a full and complete remedy for the enforcement of the rights previously given in said section. The language, it will be noted, is that "the court shall have power to order and enforce performance" of what? The obligations which, in the preceding part of the section, are established in favor of the child as against its parents, and this to be attained, as far as a court is authorized to go in a case of this character and no further, in the manner and mode pointed out by sections 138, 139, and 140 as applicable to actions for divorce. Of course, we are not to be understood as saying that, if the present, or a like case, is affirmed on appeal, and thus it is definitively determined and settled that the "obligations" created by section 196a rest upon the parent proceeded against, the trial court, in such case, would not retain jurisdiction of the cause to the extent of requiring the parent, if deemed necessary, to give reasonable security for providing maintenance, etc., for the child and of modifying from time to time, if the circumstances appeared to call for it, the judgment in so far as is concerned the sum to be paid for the child's maintenance and support. This proposition we do not decide, however, it being unnecessary for the purposes of this decision to do so.

But, as declared, we are firmly of the opinion that, in making sections 138, 139, and 140 a part of section 196a, the intention of the Legislature was not to create in behalf of the illegitimate child rights additional to those established for it by the latter section, but merely to provide a remedy for the enforcement of the rights so established or created.

Our conclusion is that the trial court was without jurisdiction to make the order from which this appeal is prosecuted, and it is accordingly reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

33 Cal. App. 45

Ex parte HINES. (Cr. 517.)

(District Court of Appeal, Second District, California. Feb. 20, 1917.)

LICENSES 🔑7(3)—VALIDITY OF STATUTE—CLASS LEGISLATION.

An ordinance of a city of the sixth class established the rate of licenses for certain occupations, and provided for every person, firm, or corporation conducting, managing, or carrying on a laundry $12 per annum, for every person, etc., operating a wagon for the delivery of laundry work to and from any laundry situated outside of the city limits $120 per annum, and for every person, etc., operating an agency for the collection and delivery of laundry work on behalf of any laundry situated outside of the city $120 for each agency. The ordinance also provided that violation of it should constitute a misdemeanor. *Held*, that the provisions relative to laundries outside of the city are void as an attempt to create or enforce a discrimination not based upon differences in the nature of the business being transacted, etc.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 9, 19.]

In the matter of the application of Thomas Hines for writ of habeas corpus. Petitioner discharged from custody.

Hutton, Jensen & Fogel and Chester L. Coffin, all of Los Angeles, for petitioner. Fredericks & Hanna, of Los Angeles, for respondent.

CONREY, P. J. The petitioner is held in custody by the city marshal of the city of Venice, a city of the sixth class. His imprisonment is pursuant to a judgment of conviction of the offense of operating and maintaining a laundry wagon for the soliciting and delivery of laundry work in the city of Venice without having first procured a license therefor as provided by an ordinance of that city; it being charged that the petitioner was operating and maintaining said wagon for the delivery of laundry work to and from a laundry situated outside of the limits of the city of Venice. He was sentenced to pay a fine, with the alternative of one day's imprisonment for each dollar of such fine being unpaid, and he refused to pay the fine; thereupon he was committed to the custody of the marshal to be imprisoned until, at the rate aforesaid, the fine shall be paid.

Ordinance No. 510 of the city of Venice is an ordinance providing for licensing and regulating the carrying on of certain described businesses. Subdivision 34 of section 10 of that ordinance, as amended by Ordinance No. 636, establishes the rate of licenses for certain businesses and occupations; and, so far as applicable to this case, the provisions thereof requiring the payment of license are as follows:

"For every person, firm, or corporation conducting, managing, or carrying on a laundry, $12.00 per annum. For every person, firm, or corporation owning, operating, or maintaining a wagon or other vehicle for the delivery of laundry work to and from any laundry situat-

> ed outside of the limits of the city of Venice, whether such wagon or other vehicle shall be used to collect laundry direct from the customers or from other wagons operated by the same, or some other person, firm, or corporation, for each such wagon or vehicle, $120.00 per annum. For every person, firm, or corporation running, operating, or maintaining an agency for the collection or delivery of laundry work on behalf of any laundry situated outside of the limits of the city of Venice, $120.00 for each such agency so operated or maintained."

Another section of the ordinance declares it to be unlawful to carry on any of the described kinds of business within the corporate limits of the city of Venice without first having procured a license from said city to do so, and provides that violations of the ordinance shall constitute misdemeanors punishable by fine or imprisonment, or both fine and imprisonment.

Petitioner claims that the ordinances above mentioned are void, and that the recorder's court was without jurisdiction to try him upon the alleged offense; that the ordinance requires and imposes no tax upon wagons maintained for delivery of laundry work to and from laundries situated in said city of Venice, and imposes a tax of only $12 per annum on laundries located within said city; that there is nothing in the nature of vehicles delivering laundry to and from laundries outside of the city limits of Venice to require any further regulation than is required of laundry wagons operated to and from laundries inside of said city, or to require or justify a discrimination in the amount of license collected therefrom; that the charge of $120 per annum is discriminatory against him and other owners and operators of vehicles for the delivery of laundry outside of the city of Venice, and in direct violation of the Fourteenth Amendment to the Constitution of the United States, in that it denies to petitioner and other such persons the equal protection of the law and abridges their privileges and immunities, and especially, he claims, that such ordinances are in violation of sections 13 and 21 of article 1 of the Constitution of the state of California. Said section 21 is as follows:

> "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature, nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

We are of the opinion that the provisions of the ordinances under which petitioner has been convicted attempt to create and enforce a discrimination not based upon differences in the nature of the business being transacted or differences in the manner of conducting the same business, or any other difference other than the mere fact of difference in destination of the goods collected and delivered by wagons collecting for laundries located outside of the city and the destination of goods collected for delivery to laundries within the city. The license provisions in question are plainly devised as a protective tariff for the benefit of laundries located in the city of Venice or laundry wagons doing business with laundries located in the city of Venice, and apparently they have no other purpose. The case is similar in principle to that of Ex parte Frank, 52 Cal. 606, 28 Am. Rep. 642. The ordinance under consideration in that case provided that any person who in San Francisco should sell property of sundry kinds defined by the ordinance without at the time having the goods in San Francisco or a bill of lading or receipt of a common carrier showing on its face that the goods named therein had been shipped and were then in transitu to San Francisco should pay licenses in certain stated amounts. The same ordinance provided another set of license fees, much less in amount, payable by persons selling the same kinds of merchandise within the city and having their goods actually within the city or in transitu under bill of lading. It was held that the ordinance was inoperative and void; that it was flagrantly unjust, oppressive, unequal, and partial; that it discriminated between merchants in the same place dealing in the same kind of merchandise for no better reason than that one dealt in goods either actually in the corporate limits or in transitu under a bill of lading, while the other dealt in goods outside of the corporate limits and not in transitu under a bill of lading. The same observations apply to the present instance, and it is our opinion that the provisions of the Venice ordinances to which we have referred are likewise inoperative and void.

The petitioner is discharged from custody.

We concur: JAMES, J.; SHAW, J.

(33 Cal. App. 55)

MERRILL v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 2073.)

(District Court of Appeal, First District, California. Feb. 21, 1917. Rehearing Denied by Supreme Court April 19, 1917.)

1. DEPOSITIONS ⊂⊃57—SUBPŒNA—JURISDICTION OF COURT.

Under Code Civ. Proc. § 1986, subsec. 3, declaring that if a subpœna is issued to require attendance before a commissioner or other officer upon the taking of a deposition, it must be issued by the clerk of the superior court of the county wherein the attendance is required upon order of such court or judge thereof, a subpœna issued by the clerk upon the order of the superior court or a judge thereof, requiring the attendance of a witness before a commissioner or other officer for the purpose of giving his deposition, has the same territorial force and effect as a subpœna issued by the clerk, requiring the attendance before the court, and such subpœna may require the attendance of a witness though he resides outside the county, but within the 50-mile limit.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 125; Witnesses, Cent. Dig. § 9.]

2. DEPOSITIONS 🔑71—ORDERS FOR TAKING—CONTEMPT.

Under Code Civ. Proc. § 1991, declaring that disobedience to a subpœna or refusal to be sworn or answer as a witness, or to subscribe an affidavit or deposition, may be punished as a contempt, that when the subpœna requires the attendance of a witness before an officer or commissioner out of court, such officer or commissioner must report any disobedience or refusal to the court issuing the subpœna, and that the witness must not be punished for any refusal to answer a question, or to subscribe an affidavit of deposition unless after hearing upon notice the court orders him to answer or subscribe, and then only for disobedience to such order, and that any judge or other officer may report such disobedience or refusal to the superior court, and such court has power upon notice to order the witness to perform the omitted act, and any refusal may be punished as a contempt, the superior court cannot punish a witness for contempt in disobeying a subpœna issued to require him to appear before a commissioner for the taking of his deposition without a hearing first upon notice and disobedience of the order made, regardless of any difference between a refusal to answer a question or subscribe to an affidavit or deposition and a refusal to obey a subpœna or to be sworn.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 132.]

Application by E. H. Merrill for a writ of review against the Superior Court of the City and County of San Francisco, State of California, and others, to review an order adjudging petitioner guilty of contempt. Annulled.

R. H. Countryman, of San Francisco, for petitioner. Joseph K. Hutchinson and Walter Slack, both of San Francisco, for respondents.

KERRIGAN, J. This is a petition for a writ of review. The facts are briefly as follows: On November 2, 1916, there was filed in respondent court the affidavit of Joseph K. Hutchinson, one of the attorneys for the plaintiff in the action of California Trona Co. v. Harry E. Lee et al., pending in the superior court of the state of California in and for the county of San Bernardino, showing that summons had issued therein and had been duly served on all the defendants therein; that petitioner E. H. Merrill (one of the defendants) was a necessary and material witness for plaintiff, and that said witness resided out of the county of San Bernardino, and more than 50 miles distant from the place of trial of said action, and in the county of Alameda. Upon the filing of this affidavit an order was made directing subpœna to issue, and the clerk of respondent issued a subpœna as directed, requiring the attendance of petitioner before H. B. Denson, a notary public, on November 9, 1916, at his office in San Francisco. The subpœna was duly served on petitioner, and a witness fee of $2.50 paid him, on November 3, 1916. Petitioner failed to appear at the time specified in the subpœna, or at all. This fact was made to appear to respondent by the certificate of the notary and the affidavit of Joseph K. Hutchinson. From the latter it appeared that petitioner resided within 50 miles of the place where said deposition was noticed for taking. On November 16, 1916, respondent made an order directing the sheriff to attach the petitioner and have him in court on November 29, 1916, to show cause why he should not be punished for contempt for disobeying said subpœna. This order, together with copies of the notary's certificate, affidavit of Joseph K. Hutchinson, and other papers relating to the matter, were served on petitioner on November 16, 1916. On November 29, 1916, petitioner appeared in court with counsel, and after argument respondent made an order, on December 5, 1916, finding and adjudging petitioner guilty of contempt. Judgment on this order was duly entered and recorded on December 6, 1916, and petitioner by this proceeding seeks to have it reviewed and annulled.

[1] But two of the points discussed by petitioner in his brief require detailed notice. It is unquestioned that under the provisions of the second paragraph of subdivision 3 of section 1986 of the Code of Civil Procedure an order to take the deposition of a witness may be made by the superior court of a county other than that in which the action is pending. But the petitioner does question the power of that court to compel the attendance of a witness before an officer for the purpose of taking his deposition, when such witness resides outside of the county in which that court is situated, even though his place of residence be within 50 miles from the place where the deposition is noticed to be taken. In other words, the petitioner contends that since the action was pending in the superior court of San Bernardino the superior court of the city and county of San Francisco had no jurisdiction to require the petitioner, a resident of the county of Alameda, to appear in San Francisco for the purpose of there giving his deposition.

When a subpœna is issued to require the attendance of a witness before the superior court, or at the trial of an issue therein, the subpœna is issued by the clerk of the court as a matter of course, upon the application of the party desiring it. If it is issued to require attendance before a commissioner or other officer for the taking of a deposition, it must be issued by the clerk of the superior court of the county wherein the attendance is required upon an order of such court or of a judge thereof. Code Civ. Proc. § 1986. We can see no good reason why a subpœna issued by the clerk, upon the order of the superior court or a judge thereof, requiring the attendance of a witness before a commissioner or other officer for the purpose of giving his deposition, has not the same territorial force and effect as a subpœna issued by the clerk, requiring the attendance before the court, or at the trial of an issue therein; and accordingly we hold that such a subpœna may require the attendance of a witness for the purpose indicated, even though he resides outside of the county in which it is issued, but within the 50-mile limit.

[2] The remaining objection involves the question of whether or not it was the duty of the superior court, after a hearing upon the report of the officer of the disobedience of the witness, to make an order requiring the petitioner to obey the subpœna before finding him guilty of contempt of court—the solution of which question depends upon the construction and application of provisions of section 1991 of the Code of Civil Procedure. That section reads:

> "Disobedience to a subpœna, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court issuing the subpœna. When the subpœna, in any such case, requires the attendance of the witness before an officer or commissioner out of court, it is the duty of such officer or commissioner to report any such disobedience or refusal to the court issuing the subpœna; and the witness must not be punished for any refusal to answer a question or to subscribe an affidavit or deposition, unless, after a hearing upon notice, the court orders him to so answer or subscribe and then only for disobedience to such order. Any judge, justice, or other officer mentioned in subdivision 3 of section 1986, may report any such disobedience or refusal to the superior court of the county in which such attendance was required; and such court thereupon has power, upon notice, to order the witness to perform the omitted act, and any refusal or neglect to comply with such order may be punished as a contempt of such court."

It is the contention of the petitioner that before the superior court may punish a witness for contempt of court for failure to obey a subpœna commanding him to appear before an officer for the purpose of giving his deposition, there must be a report to the court of such disobedience, and after a hearing thereon a direction to the witness by the court to obey the subpœna.

Counsel for the respondent, on the other hand, contends that such is the method designated by section 1991, only when the witness refuses to answer a question or to subscribe an affidavit or deposition; but that where he refuses to be sworn or disobeys the subpœna he is defying a direct and lawful order of the court, and that upon the establishment of either of these facts he may be punished as for a contempt of court by reason of such disobedience without the court making a further order that he perform the act in question.

A better reason may be conceived in the case of a refusal to answer a question or to subscribe an affidavit or deposition, for the requirement that the court, after a hearing upon the report of the officer concerning such refusal, should order the witness to perform the omitted act before punishing him for a contempt of court, than in the case of a failure to obey the subpœna. In the former case the question may be an improper one, and the witness justified in declining to answer it; and until the contrary has been determined by the court (the officer taking the deposition having no such authority), there has been no disobedience of a lawful command. But in the other case, the subpœna being lawfully issued, a refusal to obey it is a direct disobedience of the command of the court, and hence there would appear to be no logical necessity for the court to specially order the witness to appear before the officer as enjoined by the subpœna; nevertheless the lawmaking power in enacting the section above quoted may have deemed it advisable to provide that before a witness should be punished for disobeying a subpœna commanding him to appear before an officer and give his deposition, there should be an investigation by the court as to the sufficiency of the original showing, made ex parte for the order for the deposition, and of the good faith of the witness in refusing to obey the subpœna. However that may be, it seems to us that the language of the section makes no distinction between a refusal to answer questions or subscribe an affidavit or deposition, and a refusal to obey a subpœna or to be sworn. In each instance the refusal must be reported to the court, and, following the language of the section, upon the report of the "disobedience or refusal" to the superior court, the court has power upon notice "to order the witness to perform the omitted act, and any refusal or neglect to comply with such order, may be punished as a contempt of such court."

In the present case the record discloses that there was no order by the court to the petitioner upon notice "to perform the omitted act." The judgment of the respondent, therefore, finding him guilty of contempt of court in the premises, was beyond its jurisdiction.

The judgment is annulled.

We concur: LENNON, P. J.; RICHARDS, J.

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33 Cal. App. 24

POTTER v. BACK COUNTRY TRANSP. CO. (Civ. 2210.)

(District Court of Appeal, Third District, California. Feb. 16, 1917.)

1. MUNICIPAL CORPORATIONS ⚷706(6, 7)—AUTOMOBILE ACCIDENT—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

In an action for injuries when struck by defendant's automobile, question of defendant's negligence and also the question of plaintiff's contributory negligence *held* for the jury under the evidence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.]

2. APPEAL AND ERROR ⚷1002—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

The appellate court is bound by the jury's determination of the facts, where the testimony of plaintiff and his witnesses was in conflict with the testimony of defendant's witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937.]

3. Appeal and Error ⚷216(1)—Reservation of Grounds of Review—Presentation of Instructions.

Appellant may not in the appellate court for the first time take advantage of the trial court's failure to give some specific instruction, if he presented no such instruction to the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627, 630–641, 662–676.]

4. Municipal Corporations ⚷706(8)—Injuries from Automobile—Instruction.

In an action for injuries when struck by an automobile, where there was testimony tending to show that by change of direction of the automobile plaintiff was suddenly placed in peril, the trial court was authorized to give an instruction as to plaintiff's duty under circumstances of sudden and unexpected danger.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.]

5. Appeal and Error ⚷1064(1)—Harmless Error—Instruction.

In an action for injuries when struck by an automobile, an uncertain and confusing instruction on the doctrine of last clear chance, finally stating that if the jury saw fit to apply the last clear chance to plaintiff's actions, if they believed that plaintiff discovered the automobile was in danger of being run into by him or put in a place of danger where it might suddenly be called upon to swerve and cause danger to itself or its driver, and that plaintiff discovered that the danger was not apprehended or understood by the driver, and that he could by the exercise of ordinary care avoid it or by the exercise of a high degree of care avoid it, it was his duty to do so, and that the same rule applied to both parties, was harmless to defendant; there being no injury to the automobile or its driver.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Trial, Cent. Dig. §§ 475, 525, 528, 553.]

6. Negligence ⚷83—Last Clear Chance—Application of Doctrine.

Strictly considered, the doctrine of last clear chance can be invoked only in favor of the person who is injured.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115.]

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Jay H. Potter against the Back Country Transportation Company, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

Doolittle & Morrison and Morganstern, McGee, Henning & Hendee, all of San Diego, for appellant. Kirk & Kirk, of San Diego, and E. E. Kirk, of Los Angeles, for respondent.

CONREY, P. J. The action is one to recover compensation for personal injuries which resulted from a collision between plaintiff and an automobile driven by a servant of the defendant. Pursuant to the verdict of a jury, judgment was entered in favor of the plaintiff, and the defendant appeals therefrom.

[1, 2] There is evidence tending to show the following facts: Late in the afternoon of November 16, 1913, the plaintiff was walking across and toward the west side of Fourth street in the city of San Diego. After passing the middle of the street he saw defendant's car coming toward him at a distance of not more than 150 feet and at the rate of about 12 miles per hour. Observing that the automobile was changing its direction, the plaintiff took a step backward, checked himself, and then started backward again. Thereupon the automobile turned again toward the plaintiff and struck him. It knocked him about 8 feet, ran upon his leg and broke it, then reversed and backed away. If these were the facts, they were sufficient to authorize the jury to find in favor of the plaintiff upon his charge that the defendant wrongfully, unlawfully, carelessly, and negligently struck the plaintiff with its automobile, whereby the plaintiff was injured. This is so, notwithstanding testimony tending to show that the plaintiff was intoxicated and that the plaintiff ran back into the path of the automobile after he had gotten across and out of danger. These were disputed facts, and the question of negligence of the defendant and also the question of contributory negligence of the plaintiff were questions of fact to be determined by the jury in accordance with their belief derived from the testimony presented. The testimony of the plaintiff and his witnesses as to these matters was in conflict with the testimony of the witnesses produced by the defendant, and we are bound by the jury's determination of the facts. It may be noted, by the way, that the driver of the automobile was not a witness at the trial, although there is evidence indicating that his testimony could have been obtained. Appellant insists that it should not be held liable for the injury which plaintiff "sustained by suddenly stepping in front of defendant's automobile." The difficulty with this proposition is that, according to the testimony which the jury had a right to believe and did believe, the injury was not thus sustained.

Numerous objections are urged with respect to the instructions given by the court to the jury. These criticisms refer to an instruction defining negligence; to alleged failure of the court to give direction to the jury to find the circumstances surrounding the occasion under consideration, or the measure of care owed by the defendant to the plaintiff under those circumstances; to the alleged failure to instruct the jury that, if the plaintiff stepped in front of the automobile so close to it that there was not sufficient time in which the appellant could have prevented it from striking plaintiff, there was no duty on the defendant to avoid the accident, the failure to perform which duty is legal negligence; to alleged comments on the evidence, which appellant claims were charges to the jury upon matters of fact; to alleged errors of instructions to the jury upon the duty and obligation of the defendant towards plaintiff upon the theory that plaintiff had been placed in a position of emergency and of sudden and unexpected danger; to an alleged erroneous instruction upon the doctrine of "last clear chance"; to ambiguity and confusion in the instructions as a whole; to alleged errors in instructions upon the measure of damages.

[3] The record shows that the court refused to give instructions which were offered by the respective parties, but does not show what these instructions were. And we do not know how far the instructions given by the court on its own motion were inconsistent, or that they were inconsistent at all, with those requested by the appellant. With regard to omissions to give instructions, we need say no more than that an appellant may not here for the first time take advantage of the trial court's failure to give some specific instruction, if he presented no such instruction to that court. Henderson v. Los Angeles Traction Co., 150 Cal. 689, 697, 89 Pac. 976; Hardy v. Schirmer, 163 Cal. 272, 275, 124 Pac. 993.

[4] We find no prejudicial error in the instructions as given. Since a recital of those instructions would not raise any novel question of law or deal with any unusual application thereof, we shall not prolong the discussion very much beyond a general statement of our conclusions upon the objections presented, or set forth in detail our concurrence with appellant as to various inaccurate words and phrases which do not in any important sense affect the court's statement as a substantially correct exposition of the law. Notwithstanding these inaccuracies, the instructions contain a fair statement of the doctrine of negligence; of the rule requiring ordinary care on the part of the defendant to avoid injuring the plaintiff and requiring ordinary care on the part of the plaintiff to avoid exposing himself to injury; and of the rules governing the measure of damages. The language of the court in referring to the testimony did not in any instance amount to a statement of the judge's opinion upon any disputed fact; but, on the contrary, he directed the jury that in determining the facts they were not even to draw any hints or inferences from any statement made by him. There was testimony tending to show that by the change of direction of the automobile the plaintiff was suddenly placed in peril, and therefore the court was authorized to give the jury an instruction as to the duty of plaintiff under circumstances of sudden and unexpected danger.

[5] Complaint is made that the court stated that the doctrine of the last clear chance "has no application to the acts of the plaintiff in this case, so far as the circumstances involved in this case are concerned," and then proceeded to instruct on the subject on the contrary theory. The instruction as a whole is uncertain and confusing in its terms, and finally states that:

> "If you see fit to apply the last clear chance to plaintiff's actions, if you should believe that the plaintiff discovered that the automobile was in danger of being run into by him, or put in a place of danger, where it might suddenly be called upon to swerve and cause danger to itself or its driver, and that the plaintiff discovered that that danger was not apprehended or understood by the driver, and that he could by the exercise of ordinary care avoid it, or by the exercise of a high degree of care, avoid it, it was his duty to avoid it. I suppose the same rule does apply to both parties."

[6] It does not seem that appellant could have been injured by this instruction. As there was no injury to the automobile or to its driver, the last foregoing quoted statement hit only the viewless air, so far as this case is concerned. And there was no error in the court's earlier statement that the doctrine of last clear chance had no application to the acts of the plaintiff in this case. For, "strictly considered, this doctrine can be invoked only in favor of the person who is injured." Spear v. United Railroads, 16 Cal. App. 637, 659, 117 Pac. 956.

Counsel for appellant state in their brief that the defendant has appealed from the judgment and from an order denying its motion for a new trial. The transcript does not show that there is any appeal, other than from the judgment.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

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32 Cal. App. 538

CARLSON v. FARM LAND INV. CO.

(Civ. 1631.)

(District Court of Appeal, Third District, California. Jan. 20, 1917. Rehearing Denied by Supreme Court March 21, 1917.)

1. Cancellation of Instruments ⊂⇒37(6)—Fraud—Sufficiency of Complaint.

Complaint, charging false representations by letter from a minister alleged to be agent of an investment company, concerning value of land in a missionary colony *held* demurrable in not alleging knowledge of falsity, fraudulent purpose, or actual untruth of statements made, the letter being largely an expression of opinion as to values, and only showing a desire to colonize for religious purposes.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 68, 78.]

2. Cancellation of Instruments ⊂⇒37(6)—Pleading Fraudulent Representations.

The simple statement that representations relied upon were false and fraudulent is insufficient, in the absence of statements of the real facts, since otherwise such allegations are mere conclusions of law.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 68, 78.]

3. Vendor and Purchaser 🔑33—Misrepresentation by Vendor — Statement of Opinion.

Mere expressions of opinion by a vendor are not false representations although not warranted by the facts, unless they were not honestly given and made with knowledge of falsity.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 38, 40–43, 66.]

4. Cancellation of Instruments 🔑37(6)—Pleading Fraudulent Intent.

Merely alleging the making of false representations by agent of vendor was not sufficient, where no fraudulent intent to induce the purchaser to act upon them is shown.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 68, 78.]

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action to rescind land contract by Edward Carlson against the Farm Land Investment Company. Judgment dismissing complaint, and plaintiff appeals. Affirmed.

For petition for rehearing in Supreme Court, see 164 Pac. 348.

Curtis Hillyer, of San Francisco, and Wetmore & Davies, of Marysville, for appellant. A. A. De Ligne, of Sacramento, and W. H. Carlin, of Marysville, for respondent.

PLUMMER, Judge pro tem. Plaintiff appeals from a judgment entered in the lower court dismissing the action herein for failure to file an amended complaint as allowed by the order of the trial court after sustaining a demurrer to the plaintiff's first amended complaint. The action was begun by the plaintiff to secure a decree rescinding, on the grounds of fraud and deceit, a contract of purchase for a tract of land comprising between eight and nine acres situated in Arboga Colony, county of Yuba, state of California, entered into between the plaintiff and defendant on or about the 15th day of October, 1912, and for the recovery of damages alleged to have been suffered by the plaintiff. The demurrer to the complaint was both special and general, and was sustained by the lower court with leave to amend, which was not done.

[1] The complaint shows that the plaintiff, a Swede by birth, a farmer by occupation, was prior to the 10th day of October, 1912, a resident of the state of Michigan, of the same religious faith as one Hallner, living in Sacramento, in the state of California, a pastor of a church of the same faith as plaintiff; that on or about the 1st day of October, 1912, a letter was received by the plaintiff from said Hallner in reference to the Arboga Colony and its desirability as a place of residence. As this letter is made the foundation of the complaint, is annexed thereto and made a part thereof by proper references, the sufficiency of the complaint must, in large measure, be determined by the contents of the letter. The letter is as follows:

"Concerning Arboga Colony.

"Dear Brother in the Lord: Grace and Peace. It seems to be my duty to say a few words regarding Arboga Colony. I have myself looked over the ground and have myself made inquiries about it. Therefore I know what it contains. When I 9 years ago wrote up Turlock, I was abused, criticized by a great many. But they now must all acknowledge that I understood the case better and that I had a clear view of the future than those of my belligerent friends who criticized me at the time. My sole purpose at the time was to get together a great Swedish colony and a strong missionary movement. And I believe it must be admitted that we succeeded therein. I have now allowed myself to be persuaded to participate in the foundation and development of the Arboga Colony. And I am positive that it will succeed just the same as it succeeded in Turlock, sandstorms, grasshoppers and criticisms notwithstanding. It will succeed because God the Creator has ordained that the earth shall be filled and inhabited of people who will overcome and rule her (1 Mos. 1, 28). It must succeed because our purpose is the preservation of God's children in the faith and upbringing of the children in Christ and the faith of the fathers, and a vigorous missionary activity, which cannot be attained if our people are divided into small groups here and there. Think beside how costly missionary work is.

"Other conditions are much better in Arboga than they were in Turlock. A great quantity of potatoes was recently harvested, the largest and finest I have ever seen. All bearing witness to its extraordinary fertility.

"There we also find water transportation, lakes and fishing, for business as well as pleasure, in the neighborhood and also a good market and splendid communications. Our good land company has by means of restricting clauses in contract and deed shut out the liquor traffic and saloon keeping, as well as 'nuisances,' or in other words all that contend to degrade or lower the morals of the community.

"Just think what a great advantage this is; where have such opportunities ever been given to our people before? Can one imagine a place more fitted for homes for families and raising children? Moreover good milk cows are furnished free to new settlers who cultivate and live in their homes in such a way that half of their income from the cream is credited toward the payment of the cows. Mr. J. M. Henderson, Jr., cashier of the Sacramento Bank (which has 11,000 depositors with a combined capital of $6,210,539.97), is one of the largest owners. I have been acquainted with him for 17 years. No father or brother could have done more for our Swedish folk in and around Kingsburg and Riverside than he has done. He has been tried and found to be a true friend. It is therefore quite natural that I feel safe because I know that our people will be well treated and taken care of in Arboga. As far as the price of the land is concerned, it is cheap in proportion to the fertility of the soil and location.

"It is cheaper here at from $75 to $150 per acre than Turlock property was at from $25 to $32.50 per acre. I also believe that one can begin with the same capital here as there, but the prospect for himself and family for the future is far pleasanter.

"Finally, let me assure you that I have no connection with nor interest in the land company, nor have I received any allowance on the land I have bought, for which I have paid the same price as all others, but I do this out of pure interest for the Swedish people and for our mission.

"I believe in systematic colonizing by gathering our Swedish people in large Swedish communities, because it is better for them and better for the missionary activities, but not only that, our people will be protected against exploiters and schemers who will not stop extolling poor land for the sake of personal gain without the slightest possible care for the buyer's loss or ruin.

"I have already been requested to prepare plans as well as to produce drawings and the estimate for our meeting house or church, if one would so call it, and the building of which will take place in the near future.

"Preparations have accordingly been made to take care of both the colonists' temporal and spiritual welfare, which we, as Swedes and friends of the mission ought to duly appreciate.

"[Signed] A. Hallner.

"Sacramento Bank Bldg., Sacramento, Cal.

"March 1st, 1912."

The complaint then alleges:

"That in and by said letter said Hallner falsely pretended and represented to plaintiff:

"(A) That said land so offered for sale to plaintiff was of a character greatly superior to the land about Turlock, California.

"(B) That said land was a better bargain at $75.00 to $150.00 an acre than similar land at Turlock at $25.00 to $32.50 per acre.

"(C) That said land was of extraordinary fertility.

"(D) That a great quantity of potatoes had been recently harvested on said land, which were the choicest and finest ever seen by said representatives.

"(E) That said Hallner was not in any way financially interested in the sale of said land, and that the interest of said Hallner arose from his desire to get together a great Swedish colony, and promote a strong missionary movement."

That at the time said representations were made by said Hallner in said letter, said Hallner was an agent and employé of said defendant; that in said letter said Hallner fraudulently concealed from plaintiff the fact that said land was worthless and of no value, and that it was known as overflow land; and that there was present in it certain "hard pan," located at such distance from the surface that it was impracticable to drain the same of water so as to permit the profitable growth of plants and trees.

It is further alleged that the defendant, by means of advertising circulars sent by defendant to plaintiff—

"falsely pretended and represented that there was no hardpan in any of defendant's land so offered for sale; that said defendant in said circulars likewise fraudulently concealed from the plaintiff the fact that there was hardpan on said lands at such distance from the surface that it was impracticable to drain the same so as to permit profitable growth and culture of plants and trees; that an advertising circular was sent by defendant to plaintiff and received by plaintiff, reproducing as a part of said circular a photograph of a hop ranch, located near Wheatland in the county of Yuba, containing a picture of said Hallner in the foreground thereof, and said defendant falsely pretended and represented in said circular that said hop ranch was located in Arboga Colony; that another advertising circular was also sent by defendant to plaintiff, reproducing a photograph of an alfalfa field located near to the tract of land offered for sale by defendant, but not a part of said tract of land; and said defendant falsely pretended and represented to plaintiff in said circular that said alfalfa field was located in Arboga Colony."

It is further alleged that the plaintiff closed up his business in the state of Michigan, came to the state of California on or about the 15th day of October, 1912, was met by the said Hallner, who took charge of him and acted as friend and adviser, both business and spiritual. That the plaintiff relied implicitly upon said Hallner as such adviser, and believed him to be entirely actuated by spiritual motives, etc.

It is further alleged that upon the plaintiff's arrival at Arboga, defendant, through its representatives, exhibited the land referred to, while the same was free from overflow and during the dry season, and repeated the representations previously made by defendant, as aforesaid, prior to plaintiff's arrival, and continued to conceal the existence of the facts so concealed, and such false representations and such fraudulent concealments then and there made by defendant and its representatives were as heretofore stated, repeating in substance and with almost identical language the allegations hereinbefore set forth; and further alleging "that plaintiff was totally ignorant of the existence of the facts and entirely unfamiliar with swamp and overflow lands; that said representations so made by the defendant and its representatives both before and after the arrival of the plaintiff at Arboga, were false, as defendant and its representatives then and there well knew."

It is further alleged that the plaintiff did not discover the falsity of the alleged representations until during the winter of 1913–1914, when the lands referred to were flooded by the high waters of that season, whether by breaking the levees referred to in the complaint, or otherwise, does not appear; and by reason of the flooding great damage was suffered and the lands rendered entirely unfit for the purposes for which they were falsely represented to be fit. It will be seen by the allegations of the complaint that reliance was placed by the plaintiff upon the representations made by Hallner, and not upon anything said or done by any other representative of the defendant. While it is alleged that other representatives made similar statements, and that circulars were sent by the defendant to the plaintiff, the complaint is entirely silent as to any confidence being placed therein by the plaintiff, or that he made any purchases on account of any such representations. The complaint is also silent as to whether the representations made by Hallner in his letter were actually known by him to be false, or were in truth and in fact false, other than by way of mere recital. The language of the complaint is, "That in and by said letter said Hallner falsely pretended and represented to plaintiff," etc. The pleader, by paragraph 8 of his complaint, after stating that different representatives of the company had made certain representations, uses the following language:

> "That said representations so made by defendant and its representatives, both before and after the arrival of the plaintiff at Arboga, were false, as defendant and its representatives then and there well knew."

This is not a direct allegation that anything said or written by Hallner was either false, or known by him to be false. The special demurrer calls direct attention to this defect. An analysis of the letter shows that the principal purpose of the writer was the building up or founding of a Swedish colony of his own religious faith. This is not alleged to be either false or fraudulent. After speaking of the conditions in Arboga, the letter states:

> "A great quantity of potatoes was recently harvested, the largest and finest I have ever seen, all bearing witness to its extraordinary fertility."

From all that appears in the complaint, Arboga Colony may have produced a large quantity of potatoes, and of a quality asserted by Hallner. The language of the complaint is, "that a great quantity of potatoes had been recently harvested on said land." This is not an allegation that such potatoes were not raised in Arboga Colony; it is, at most, only an allegation that they were not raised on the small tract bargained for by the plaintiff. The letter further states: That market communications are good; this is not denied. That the deeds to the different tracts in Arboga Colony contain stringent clauses restricting the liquor traffic. The truth of this statement is not questioned. Then follows a reference to what one J. M. Henderson, of Sacramento, has done for the Swedish people. Upon this question the complaint is also silent. A comparison is then drawn as to the respective values of land in Turlock, Cal., and lands situate in the Arboga Colony. There is nothing in the complaint showing that this statement was not made in good faith, and, when carefully analyzed, whether such statement is not in fact true. The letter then concludes with the statement of the writer's belief in the advisability of colonizing and gathering the Swedish people together in large communities; that the writer had been requested to prepare plans for a Swedish meetinghouse or church. There is nothing in the letter, nor is there anything in the complaint, from which the trial court could infer that Hallner knew anything about any hardpan underneath the lands in Arboga Colony, or from which it can be inferred that Hallner was fraudulently or otherwise concealing such fact, if it be a fact. Nor is there anything in the complaint, or in the letter, from which the trial court could infer that Hallner was concealing from the plaintiff that the lands involved are worthless or of no value, if such be the fact. The language of the complaint in this particular, in the first instance, is as follows:

> "That in said letter said Hallner fraudulently concealed from plaintiff the fact that said land was worthless and of no value."

And further on, as a basis for charging the valuelessness of the lands, the complaint alleges:

> "That said land was inundated from flood waters to the plaintiff's great damage, rendering the same entirely unfit for the purposes for which it was falsely represented to be fit, as aforesaid."

This is not an allegation that the lands were otherwise than as represented by Hallner, or that they are not, in fact, both valuable and fertile; nor is there any allegation in the complaint alleging the actual existence of hardpan underneath the lands described therein, the nearest approach being the statement that said Hallner concealed from plaintiff that there was present in it certain hardpan located at such distance from the surface that it was impracticable to drain the same. If such were, in fact, the case, there might be "certain hardpan" in the land, and yet the tract, as a whole, still fertile and valuable.

Much time and space has been occupied by counsel in their briefs touching the question as to when an expression of opinion may be regarded as equivalent to a statement of a fact and rescission granted, but from the analysis of the complaint and the letter upon which it is based, as hereinbefore set forth, it does not seem to the court necessary to review a long list of authorities on questions which are not disputed.

[2, 3] The real point involved in this action is decided in the case of Baker-Boyer National Bank v. Hughson, 5 Wash. 100, 31 Pac. 423. The court there says:

> "The simple statement that such representations were false and fraudulent, in the absence of any statement of what the real facts were, is a simple conclusion of law, and no issue of fact could be made upon it."

That the mere expression of opinions by a vendor is not such a misrepresentation as might avoid a sale, even although such opinions are not warranted by the facts, is too well established to require the citation of authority. The allegation in that case was as follows:

> "That it was falsely and fraudulently represented that said real estate was situated," etc.

Here, it is not pretended that Hallner fraudulently represented anything, it being alleged only that he falsely represented and pretended. This language does not include any element of willfulness or lack of good faith on the part of the person making the representation, or that the truth is actually different from such representations.

In the case of Spreckels v. Gorrill, 152 Cal. 383, 386, 92 Pac. 1013, the language of the complaint was, "falsely and fraudulently," but the court points out that no special demurrer was interposed, and says:

> "If the objection had been raised by special demurrer for uncertainty, perhaps it might have been held fatal, but no demurrer was filed to the complaint. The defendant answered, denying practically all the substantial allegations of the complaint, and the case was tried upon

the theory that the complaint was sufficiently direct and positive."

The court further says:

> "The lack of a direct allegation that the statements were untrue, conceding it to be a defect, is one of that character which, in the absence of a special demurrer, is cured by the verdict of the jury or the finding of the court, and which cannot be taken advantage of when urged for the first time on appeal."

And, further:

> "The same rule applies to the defect of allegation of fraudulent intent on the part of Gorrill. While the allegation that he made the statements 'falsely and fraudulently' to induce Spreckels to buy, might not, in the face of proper special demurrer, supply the place of a direct allegation that Gorrill knew them to be untrue, or made them in a manner not warranted by his own information, although he believed them to be true, nevertheless it implies all this; and, where no special demurrer is interposed, it will be held sufficient after the verdict or decision upon the merits."

[4] In that case it was alleged that the representations were made falsely and fraudulently and with intent to deceive. In the case at bar, it is only when Hallner falsely pretended and represented without any fraudulent intent; and, so far as the complaint goes, without any purpose to deceive or mislead the plaintiff in any particular. The trial court upon demurrer held:

> "That it was not alleged in the complaint that the false statements were made with intent to deceive the plaintiff or induce him to make the purchase to his injury" (citing Sutherland Code Pleading, § 6886; Barber v. Morgan, 51 Barb. [N. Y.] 116; Heller v. Dyerville, 116 Cal. 133, 47 Pac. 1016).

And, further, that there was no allegation in the complaint that the plaintiff had, in fact, been injured by reason of his purchase, citing Truett v. Onderdonk, 120 Cal. 588, 53 Pac. 26. This defect in the complaint further appears by reference to 12 R. C. L. § 167, where it is stated:

> "Fraudulent intent must be alleged in all cases where it is a material ingredient of a fraud relied on. In an action of deceit, it is proper to allege facts showing knowledge on the part of the defendant that his representations were false, and generally in such an action scienter must be alleged either expressly or by alleged facts which are tantamount thereto. It must also be alleged that the representations were made with a fraudulent intent, and for the purpose of inducing the other party to act on them. In all cases where the representations relied on relate to matters of opinion, it must be alleged that they were knowingly false, and were not honestly given."

Nothing of this kind appears in plaintiff's amended complaint. If the necessary facts existed to constitute a cause of action, the trial court, allowing 20 days within which to file a second amended complaint, provided ample time.

We are of the opinion that the defendant's demurrer to plaintiff's amended complaint was properly sustained, and that the judgment of the lower court should be affirmed. It is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

32 Cal. App. 538

CARLSON v. FARM LAND INV. CO.

(Sac. 2342.)

(Supreme Court of California. March 21, 1917.)

CANCELLATION OF INSTRUMENTS 🔑37(6)—ALLEGATION OF FRAUDULENT INTENT.

A complaint was demurrable where it failed to allege that false statements relied upon in inducing plaintiff to purchase land, were made with intent to deceive plaintiff and induce him to purchase land.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 68, 78.]

In Bank. Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

On petition for hearing in Supreme Court. Petition denied, and judgment sustained.

For opinion, of District Court of Appeal, see 164 Pac. 344.

Curtis Hillyer, of San Francisco, and Wetmore & Davies, of Marysville, for appellant. A. A. De Ligne, of Sacramento, and W. H. Carlin, of Marysville, for respondent.

PER CURIAM. In denying the petition for a hearing in this court after decision by the District Court of Appeal of the Third Appellate District, we deem it proper to say that we do not desire to be understood as approving everything stated in the opinion of that court.

It seems to us that there can be no question of the correctness of the action of the trial court in sustaining the demurrer on the ground, among others, that it was not alleged in the complaint that the false statements were made with intention to deceive the plaintiff or induce him to make the purchase to his injury.

This being so, the judgment of that court would have to be affirmed in any event.

174 Cal. 693

Ex parte MADALINA. (Cr. 2032.)

(Supreme Court of California. March 23, 1917.)

1. BASTARDS 🔑1—NONSUPPORT—LIABILITY OF FATHER OF ILLEGITIMATE CHILD—STATUTE.

Civ. Code, § 195, provides that the presumption of legitimacy can be disputed only by the husband or wife or the descendants of one or both of them. Pen. Code, § 270, provides that the parent of either a legitimate or illegitimate minor child shall be liable to a criminal prosecution, as each parent is liable under Civ. Code, § 196a, to a civil action, for its nonsupport. *Held*, that while under Pen. Code, § 270, the father of an illegitimate child may be prosecuted criminally for its nonsupport, a criminal proceeding will lie against the father only where the child is the illegitimate offspring of an unmarried woman, and will not lie in the case of a child which was born in wedlock, though in fact illegitimate, since the state cannot raise the question of legitimacy.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 1-3.]

2. **Bastards 🔑1—Nonsupport—Authority of State to Raise Question of Legitimacy—Statute.**

Authority in the state to raise the question of legitimacy where a child is born in wedlock is not to be implied from the enactment of Pen. Code, § 270, authorizing criminal proceeding for nonsupport of legitimate or illegitimate child, since the provision applies to cases where the question of the legitimacy of the child will not arise or will be a proper subject of inquiry at the suit of the state.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 1-3.]

In Bank. Petition for habeas corpus by Andrew Madalina. Writ granted, and petitioner ordered discharged from custody.

E. J. Dole, of Petaluma, for petitioner. Clarence F. Lea, Dist. Atty., and C. W. Hoyle, Asst. Dist. Atty., both of Santa Rosa, for respondent.

LORIGAN, J. Petitioner seeks his release in this habeas corpus proceeding from the custody of the sheriff of Sonoma county, who holds him under a commitment by a magistrate to answer before the superior court of that county for failure to provide for his alleged illegitimate child. The facts presented on the hearing before the magistrate and upon which the commitment was based, but which are claimed to be legally insufficient to warrant his detention, are stipulated by the attorney for petitioner and the district attorney of Sonoma county.

The petitioner was prosecuted under section 270 of the Penal Code as amended in 1915 (St. 1915, p. 572), which reads as follows:

> "A parent of either a legitimate or illegitimate minor child who willfully omits, without lawful excuse, to furnish necessary food, clothing, shelter, or medical attendance for his child, is punishable by imprisonment in the state prison, or in the county jail, not exceeding two years, or by fine not exceeding one thousand dollars, or by both."

The facts as stipulated are that the minor child referred to in the complaint is about eight months old; that it was born in lawful wedlock to a woman whose husband was alive when said child was born to her and between whom there had been no judgment of divorce. At the preliminary examination, so it is stipulated, the mother testified to the nonaccess of her husband or of any person other than said petitioner for a period of two years next prior to the birth of the child. It was further stipulated that no action had ever been begun by the said mother or by any other person under section 196a of the Civil Code to determine the parentage of said child or to obtain a judgment against the petitioner or any other person for the support of said child and that there is no such judgment.

In disposing of this petition, several sections of the Codes are to be taken into consideration.

Section 196a of the Civil Code, a moment ago referred to, provides:

> "The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, and in such action the court shall have power to order and enforce performance thereof, the same as under sections 138, 139, and 140 of the Civil Code, in a suit for divorce by a wife."

By section 193 of the Civil Code it is provided that "all children born in wedlock are presumed to be legitimate."

Section 195 of the same Code declares:

> "*Who May Dispute the Legitimacy of a Child.*—The presumption of legitimacy can be disputed only by the husband or wife, or the descendant of one or both of them. Illegitimacy, in such case, may be proved like any other fact."

The sections quoted are all the sections of the Code, criminal or civil, which bear directly upon the principal, and in our opinion the sole question involved here, namely, whether the state of California in a criminal prosecution of this character brought in its name is authorized to question the legitimacy of a child born in wedlock.

The first legislation in this state of the nature involved here was enacted in 1913, when section 196a, heretofore quoted, was passed providing for a civil suit at the instance of the mother of an illegitimate child, or its guardian, against its father for its support and education. In 1914, one Gambetta was prosecuted under section 270 of the Penal Code as it then stood; it being claimed that the said section 270, aided by section 196a, provided for the criminal prosecution of the father of an illegitimate child for its nonsupport. This court on habeas corpus (In re Gambetta, 169 Cal. 100, 145 Pac. 1005) held that section 270 of the Penal Code as it then stood had no application to the father of an illegitimate child, and that section 196a of the Civil Code, adopted in 1913, imposing an obligation on a father to support his illegitimate child, had not changed the application of said section 270 of the Penal Code in any way. Subsequent to this decision, and in 1915, the Legislature amended section 270 of the Penal Code to provide as it does now that the parent of either a legitimate or illegitimate minor child shall be liable to criminal prosecution, as each still remains, under section 196a of the Civil Code, liable to a civil action for its nonsupport. While it thus appears that under the amendment to section 270 of the Penal Code the father of an illegitimate child may be prosecuted criminally for its nonsupport, it is contended by counsel for petitioner that a criminal proceeding will lie, under said section, against the father only in a case where the child is the illegitimate offspring of his intercourse with an unmarried woman and that it will not lie, and was not intended to lie, against him in the case of a child which had been born in wedlock. The last portion of the contention of petitioner is the only point in the case which we deem it necessary to consider. As amplified by him in his argument, his position respecting it is this: That it being conceded that this child, of which the petitioner is alleged to be the father, was born in wedlock, the presumption is that it is legitimate; that the declared policy of this state as expressed in its legislation is that the presumption of such legitimacy can be disputed only by the husband or wife or the descendants of one of them; that no one else may do so; that the state having thus by express legislation inhibited any question as to the legitimacy of a child born in wedlock being raised except as above indicated cannot itself raise it in a criminal prosecution or other proceeding. It is, of course, to be understood that, when it is said that the state cannot itself raise the question of the legitimacy of a child born in wedlock, it is not meant that it has no power to enact legislation authorizing such inquiry in a proceeding in its name, but only that it has not so far done so; that, on the contrary, it has denied itself this right by expressly declaring who of others alone may do so.

[1] We are satisfied that the position of counsel for petitioner is correct, and that any claim to the contrary is answered by a consideration simply of section 195 of the Civil Code, which declares that the presumption of the legitimacy of a child born in wedlock can only be raised by the husband or wife or the descendants of one of them. This is the declared policy of this state and is simply the adoption of a rule prevailing generally in all civilized communities. If the state has decided to depart from that policy, it certainly has not declared that intent by any express language found in or any reasonable inference to be deduced from the terms of section 270 itself, or considered in connection with section 196a. Counsel for respondent strenuously contends that section 195 of the Civil Code is inapplicable, because the criminal proceeding under section 270 is found in the Penal Code which as to all criminal procedure governs. But this contention is not sound. A mere place in the Codes is not decisive of the effect or the application of Code provisions. The Civil Code by section 195 was laying down a rule of public policy in a matter which the state deemed vital to society; it was following the civilized rule and made it applicable under all circumstances where the question of legitimacy of children born in wedlock was sought to be raised, prescribing a limitation as to the persons who might raise the question by expressly enumerating those who might do so; it eliminated itself from doing it under an application of the familiar rule that an enumeration of persons to be affected by a Code provision is an implied exclusion of all others. By the Civil Code section the inquiry was expressly limited on behalf of certain persons. When it came to providing for proceedings under section 270, the Legislature did not in any language found therein, or anywhere else, abrogate what it had laid down in section 195 as to questioning the legitimacy of a child born in wedlock. This section 195 is to be considered with section 270 as in pari materia with the latter and must be construed as a part of it. Pol. Code, § 4480 et seq.

[2] But it is said by counsel for respondent that authority to raise the question of legitimacy where the child is born in wedlock must be implied from the enactment of section 270 authorizing the criminal proceeding; that such a proceeding can only be brought in the name of the state. True, the criminal proceeding must be in the name of the state —the people—and is authorized to punish the parent of an illegitimate or legitimate child for an omission without excuse to support it. Parents of legitimate children may be prosecuted at the suit of the state; parents of illegitimates born out of wedlock may also be prosecuted. So that the Code provision is not without cases for its application where the question of the legitimacy of the child will not arise or where it will be a proper subject of inquiry at the suit of the state. But when it is attempted to bring within its terms in a criminal prosecution a question of the legitimacy of children born in wedlock, there is nothing directly or inferentially in the language of section 270 which authorizes the state to raise that question. To the contrary, the expressly declared policy of the state as found in section 195 precludes it from doing so, and in the interests of public policy, decency, morality, and the protection of innocent children this commends itself. Public policy and common decency are opposed to the bastardizing of children born in wedlock against the wishes and perhaps against the protest of their putative parents. If neither the husband nor the wife to an existing marriage desires to raise any question of the legitimacy of a child born during its existence, the best interests and welfare of society will be promoted if the state likewise declines to intervene in raising that question. It will appear, too, that the welfare, comfort, and happiness of innocent children are, under this policy of the state, best conserved, as they are protected against the stigma of illegitimacy, or aspersions cast upon their birth being raised by third persons, either through excessive zeal or actuated by sinister motives in criminal proceedings brought in the name of the state.

The writ is granted, and the petitioner ordered discharged from custody.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; HENSHAW, J.; SLOSS, J.; LAWLOR, J.

174 Cal. 737

BRYANT v. PACIFIC ELECTRIC RY. CO.

(L. A. 3778.)

(Supreme Court of California. April 4, 1917. Rehearing Denied May 3, 1917.)

1. NEGLIGENCE 🔑93(3)—IMPUTED NEGLIGENCE—DRIVER AND PASSENGER.

The mere fact that plaintiff was riding in an automobile driven by his 29 year old son does not impute to the plaintiff the negligence of his son.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 150.]

2. NEGLIGENCE 🔑93(3)—IMPUTED NEGLIGENCE—DRIVER AND PASSENGER.

Nor does the added circumstance that both persons were employed by or interested in the same corporation necessarily impute the son's negligence to the plaintiff.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 150.]

3. NEGLIGENCE 🔑93(1)—IMPUTED NEGLIGENCE—DRIVER AND PASSENGER.

If the occupant of an automobile exercises control over the driver or possesses power of control, the negligence of the driver is imputable to him.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147, 148.]

4. NEGLIGENCE 🔑93(1) — IMPUTED NEGLIGENCE.

In order that there be such joint undertaking, it is not sufficient merely that the passenger or occupant indicate the route or destination, and the circumstances must show that the occupant and the driver together had such control and direction over the automobile as to be practically in the joint or common possession thereof.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147, 148.]

5. NEGLIGENCE 🔑90—IMPUTED NEGLIGENCE.

Under Civ. Code, § 1714, providing that every one is responsible for an injury occasioned to another by his want of ordinary care except so far as the latter has brought the injury upon himself, in order that the negligence of one person may be imputed to another, they must stand in such relation of privity that the maxim, "Qui facit per alium facit per se," applies.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 138–140.]

6. NEGLIGENCE 🔑136(30)—IMPUTED NEGLIGENCE—QUESTION FOR JURY.

Evidence *held* to make it a jury question whether plaintiff, riding an automobile driven by his 29 year old son, was chargeable with imputed negligence of the son.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 350–352.]

Department 1. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by G. L. Bryant against the Pacific Electric Railway Company. Judgment for defendant, and plaintiff was granted a new trial, and defendant appeals. Affirmed.

J. W. McKinley, Frank Karr, R. C. Gortner, E. E. Morris, and A. W. Ashburn, all of Los Angeles, for appellant. E. B. Drake, of Los Angeles, for respondent.

LAWLOR, J. G. L. Bryant brought this action to recover damages for personal injuries alleged to have been caused by one of the defendant's electric cars colliding with an automobile in which he was riding. At the time of the accident the plaintiff's son was driving the machine. A trial was held before a jury which resulted in a verdict for the defendant, but, on motion by the plaintiff, a new trial was granted "solely on the ground that the court erred in instructing the jury that negligence of the driver of the automobile, if any, was to be imputed to the plaintiff." The defendant appeals from this order.

That the court did so instruct the jury is not questioned. One of the pertinent instructions, for instance, reads:

> "The actions of the said driver of the said automobile, the son of the plaintiff herein, are in law the actions of the plaintiff in this case; that is to say, if the said driver of said automobile, the son of plaintiff, was guilty of negligence, such negligence is imputable to the said plaintiff, and is a bar to this case, if it contributed directly or proximately to the collision between the said car and the said automobile."

Again:

> "If you find from the evidence that the said driver of said automobile was guilty of negligence in swerving upon or entering upon the said railroad tracks, * * * then no recovery can be had in this action."

These and other instructions of like effect were given to the jury at the request of the defendant, and indicate the theory upon which it based its defense and upon which the court tried the case. In addition, the following special interrogatory was submitted to the jury wherein all distinction between the independent contributory negligence of the plaintiff and that of the driver is wholly ignored:

> "Was the plaintiff or his son driving the automobile guilty of negligence, which contributed proximately, in any degree, to the collision between the street car and the automobile?"

The answer was "Yes." Clearly, if under the evidence adduced at the trial the negligence of the son is not to be imputed to the plaintiff as a matter of law, the order granting the new trial was proper and must be affirmed.

The automobile in which the plaintiff was riding at the time of the accident was owned by the Bryant Upholstery & Furniture Company, "a close corporation, consisting of the Bryant family, father, mother, and son, mostly, which held the controlling interest." The plaintiff was president of the corporation, and his son the secretary and manager. The corporation used the automobile in its business in delivering goods and going to various houses in the city and collecting furniture to be upholstered. According to the evidence, "instead of having the expense of keeping the automobile up town," it was always kept in the barn at the plaintiff's residence. At this residence the plaintiff lived with his wife and son. On the day of the accident, at closing time, it became neces-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

sary to make a delivery for the corporation on the east side of the city, which was on a detour and not a direct line to the garage where the machine was kept. The plaintiff and his wife were at the place of business, and, together with the son driving the automobile, made the delivery. On their way home the plaintiff rode on a box placed on the rear of the automobile and steadied himself by turning a little to the side and holding to the back of the front seat. His wife rode on the front seat at the left of the son. There was evidence submitted by the plaintiff:

> "That the plaintiff had no control or direction mechanically in the driving or management of said automobile at the time of said accident, but the same was under the full control and direction mechanically of the plaintiff's son, the said Leslie G. Bryant, who was 29 years of age and an experienced driver of automobiles."

Other evidence was to the effect:

> "That the father, mother, and son were driving home to supper; that the father was not paying any fare; that the father and mother and son were simply going toward home as a family, and the son was driving wherever the father, mother, and son wanted to go."

While thus driving south on Moneta avenue in the city of Los Angeles, and approaching West Fortieth place, the car was driven on to the south-going track of the defendant's railroad, where it was suddenly overtaken from the rear by a "beach car," a car larger than an ordinary street car, which was traveling "at a tremendous rate of speed." In the collision which resulted plaintiff received the injuries complained of.

[1] This court has but recently reiterated the well-settled rule that a guest or passenger in a vehicle driven or operated by another is not ordinarily bound by the negligence of the driver or operator. Parmenter v. McDougall, 172 Cal. 306, 156 Pac. 460. In that case the negligence of a person operating a motorcycle was held not to be imputed as matter of law to his brother, who was riding as his guest on the rear seat. The case at bar presents a somewhat different question. But first it may be observed that the mere relationship of the plaintiff and his son cannot, as suggested, take the case out of the rule. Board of Commissioners v. Mutchler, 137 Ind. 140, 36 N. E. 534.

[2] Nor does the added circumstance that both persons were employed by or interested in the same corporation necessarily alter the situation. In Siever v. Pittsburgh, etc., Ry. Co., 252 Pa. 1, 97 Atl. 116, it was held that the negligence of a street car conductor in causing a collision with a railroad train could not be imputed to the motorman "merely because they were working together on the same car" so as to prevent his recovery in an action brought against the railroad company. In McBride v. Des Moines City Ry. Co., 134 Iowa, 398, 109 N. W. 618, the negligence of a driver of a hose wagon was held not to be imputable to another member of the fire department who was riding with him at the time of a collision with the defendant's street car. In Baxter v. St. Louis Transit Co., 103 Mo. App. 597, 78 S. W. 70, the fact that plaintiff's son was engaged in helping to deliver ice along with the driver of an ice wagon at the time of the accident was held not to constitute such a relation as to make the negligence of the driver the negligence of the son. This is further illustrated by Johnston v. Delano (Iowa) 154 N. W. 1013. In that case it was held that, even though the plaintiff's employé negligently drove a team into collision with one of the defendant's trains, it constituted no defense to an action brought by plaintiff to recover for the death of his minor son, who was riding with the employé as a helper at the time of the accident. These authorities are in accord with the cases in this state, and to this extent the reasoning of Thorogood v. Bryan, 8 C. B. 115, does not apply. See Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652. The family relation, or the business association, therefore, does not of itself identify the plaintiff with the driver so as to impute to him the latter's alleged contributory negligence.

[3, 4] The rule is otherwise, however, if the occupant of the machine exercised control over the driver thereof, or, in the eyes of the law, may be said to possess such power of control. Illustrations of the application of this doctrine are found in cases where the parties are engaged in a common or joint enterprise. Ruling Case Law, after referring to the different rules as to whether negligence may be imputed to a guest or passenger in an automobile, says:

> "There seems to be no difference of opinion as to the rule that, when two persons are engaged in a joint enterprise in the use of an automobile, the contributory negligence of one will bar a recovery by either, if it is in a matter within the scope of the joint undertaking." Volume 2, p. 1208, § 43.

But in order that there be such a joint undertaking it is not sufficient merely that the passenger or occupant of the machine indicate to the driver or chauffeur the route he may wish to travel, or the places to which he wishes to go, even though in this respect there exists between them a common enterprise of riding together. The circumstances must be such as to show that the occupant and the driver together had such control and direction over the automobile as to be practically in the joint or common possession of it.

> "Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management." St. Louis, etc., Ry. Co. v. Bell (Okl.) 159 Pac. 336; Atwood v. Utah Light, etc., Ry. Co., 44 Utah, 366, 140 Pac. 137; Cotton v. Willmar, etc., Ry. Co., 99 Minn. 366, 109 N. W. 835, 8 L. R. A. (N. S.) 643, 116 Am. St. Rep. 422, 9 Ann. Cas. 935.

In the case first cited, which arose out of a collision of a street car with an automobile in which the deceased was riding with a number of lady friends, the court, upon a careful consideration of the authorities, said:

> "Assuming that the trip was a 'joy ride,' as contended, it was not a joint or common undertaking."

Martindale v. Oregon Short Line Ry. Co. (Utah) 160 Pac. 275, and Lawrence v. Sioux City, 172 Iowa, 320, 154 N. W. 494, are recent cases of similar import. A case of a joint or common undertaking, however, is Van Horn v. Simpson, 35 S. D. 640, 153 N. W. 883. In that case the court held that, where the evidence showed that the occupant of an automobile was a partner of the driver and owner thereof, and was at the time of the accident engaged with his partner, the driver, in the prosecution of copartnership business, both parties were joint participants in the alleged negligence. Likewise in Washington & C. O. Ry. v. Zell's Adm'x, 118 Va. 755, 88 S. E. 309, the deceased and another person took an automobile trip in a machine which the deceased, according to his custom, put in readiness for the trip, and both participated in running it. The machine was owned by the deceased's companion. It was properly held that the parties were engaged in a joint enterprise or adventure; for the right of control of either person over the other is readily apparent.

That all the authorities do not require evidence of the exercise of such control to establish a joint enterprise is quite true. Thus Berry's Law of Automobiles (2d Ed.) § 322, points out that in many cases where the doctrine of imputed negligence has been applied the relation between such persons, while somewhat similar to that of master and servant, as a matter of fact "lacks the essential element of that relation of control."

> "Neither," he continues, "has control of the details by means of which the common purpose is executed. Hence the only theory on which one may be charged with the negligence of another is that each is engaged in the performance of the plans which all have agreed upon and which are as personal to one as to another. It is a sort of partnership, as it were."

Such a case is Wentworth v. Town of Waterbury (Vt.) 96 Atl. 334, where apparently the only basis for the imputation of the negligence of the driver of the automobile to the plaintiff was the circumstance that they were both engaged in the common purpose of taking two ladies for an afternoon's drive to view a lake.

[5] In our opinion, the doctrine of imputable negligence should not be so loosely applied. To do so leaves the law in an uncertain state. The better view is expressed by Nonn v. Chicago City Ry. Co., 232 Ill. 378, 83 N. E. 924, 122 Am. St. Rep. 114:

> "There can be no such thing as imputable negligence, except in those cases where such a relation exists as that of master and servant or of principal and agent. In order that the negligence of one person may be properly imputed to another, they must stand in such relation of privity that the maxim qui facit per alium facit per se directly applies."

Indeed, no other rule is consistent with section 1714 of the Civil Code, wherein it is declared that every one is responsible for an injury occasioned to another by his want of ordinary care "except so far as the latter has, willfully or by want of ordinary care, *brought the injury upon himself.*" (Italics ours.)

[6] It is clear, therefore, that the jury should have been permitted to pass upon the question of fact as to whether the plaintiff exercised or had the right of exercising control over the son in driving the automobile home at the time of the collision. Had it been properly instructed, it may have found that the son, as manager of the Bryant Upholstery & Furniture Company, had full and absolute control over the movements of the machine and recognized as his superior only the corporation, and then only such orders as might be given by its officers when acting in their official capacity. This, of course, is not a case where the corporate entity may be disregarded. As far as the plaintiff's right of control existed at the time of the accident, the jury may have concluded that it, in fact, extended no further than that control common to guests or passengers for hire. There was evidence that the son was an adult person and an experienced driver of automobiles, and the jury may have found the fact to be that he was in all respects an independent agent. The machine, it should be repeated, belonged to the corporation. It may be conceded that the plaintiff and his son were jointly interested in the conduct of the business of the corporation. But it does not necessarily follow that they possessed a joint or community interest in the matter of driving the automobile. These and other questions of similar import involve matters of fact for the jury to determine in the light of the principles of law we have enunciated.

The order granting the new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

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174 Cal. 698

McDOUGALD, City and County Treasurer, v. LILIENTHAL et al. (S. F. 6790.)

(Supreme Court of California. March 26, 1917. Rehearing Denied April 23, 1917.)

1. TAXATION ⚿864 — INHERITANCE TAX — STATUTE.

Inheritance Tax Law 1905 (St. 1905, p. 341) § 1, defining the property for whose transfer by act or by operation of law a tax is imposed, imposes a tax (1) upon all property passing by will or by the intestate laws of the state, and (2) upon all property of a nonresident, which, regardless of its mode of transfer or succession, shall be within the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1679.]

2. Taxation 🔑867(1) — Inheritance Tax — Property Within State — Probate Proceedings.

The imposition, under Inheritance Tax Law 1905, § 1, of an inheritance tax upon all property of a nonresident, which, regardless of its mode of transfer or succession, shall be within the state, is not dependent upon any proceedings in probate, ancillary or otherwise, had within the state; the state having exercised its unquestioned power to tax property within its territorial limits and jurisdiction without regard to such proceedings.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1681.]

3. Taxation 🔑867(2) — Inheritance Tax — Ownership of Property in State—Corporate Stock.

Ownership by a New York decedent of a portion of the capital stock of a California corporation, which ownership was evidenced by certificates of stock located in the state of New York, was ownership of property within California within the Inheritance Tax Law, since stock in a domestic corporation is subject to the tax at the corporation's domicile, though decedent was a nonresident, regardless of the place where the certificates may be kept.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1682.]

4. Descent and Distribution 🔑5—Law of Domicile—Personalty.

The law of a decedent's domicile controls the disposition of his personal property, where the law at the location of the property is not in conflict.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 19–22.]

5. Judgment 🔑822(3)—Effect of Decree of Distribution in Other State.

Under the full faith and credit clause of the Constitution of the United States (U. S. Const. art. 4, § 1), the decree of distribution of a New York decedent's property in the probate court of New York does not preclude the right of the state of California to levy an inheritance tax on shares of stock in a California corporation owned by decedent, since the full faith and credit clause does not impose any limitation on the sovereign right of a state to tax property within it, including the right to impose an inheritance tax.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1500.]

Department 2. Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Petition by John E. McDougald, as Treasurer of the City and County of San Francisco, State of California, against Alice M. Lilienthal and another, for the exaction of an inheritance tax. From a judgment for defendants, plaintiff appeals. Reversed.

Hartley F. Peart and Gus L. Baraty, both of San Francisco (U. S. Webb and Albert H. Elliott, both of San Francisco, of counsel), for appellant. Lilienthal, McKinstry & Raymond, of San Francisco, for respondents.

HENSHAW, J. Albert Lilienthal, a nonresident of this state and a resident of the state of New York, died intestate in the city and state of New York. At the time of his death he was the owner of 1,386 shares of the capital stock of the Lilienthal Company, a California corporation, having its principal place of business in the city and county of San Francisco. The certificates representing his ownership in the capital stock of the corporation were, at the time of the decedent's death, in the city of New York. This property was distributed in probate proceedings by the courts of the state of New York, and these shares were distributed to the respondents upon this appeal, who are, respectively, one the widow, the other the son, of the deceased. The inheritance tax imposed through the succession of ownership of this stock under the laws of the state of New York was duly paid. No probate proceedings upon the estate of the deceased have been had in the state of California. The inheritance tax law of 1905 (Stats. 1905, p. 341) is the California law which was in force at the time of the death of the decedent. The treasurer of the city and county of San Francisco, appellant herein, filed a petition as contemplated by the law looking to the exaction of a tax upon this personal property under our law. The respondents herein answered, hearing was had, and the court gave judgment against the treasurer's contention. From that judgment this appeal is taken.

Section 1 of the act of 1905 is the section defining the property for whose transfer by act or by operation of law a tax is imposed. The construction of this section gives rise to the principal controversy between these parties. The section, in so far as it is here necessary to quote it, provides as follows:

> "All property which shall pass, by will or by the intestate laws of this state, from any person who may die seised or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state * * * shall be and is subject to a tax hereinafter provided for. * * *"

Respondents' interpretation of this language, which was adopted by the trial court, is that the state has imposed this tax only on "all property which shall pass, by will or by the intestate laws of this state"; that in the succeeding part of the sentence, grammatically and by necessary construction (since this tax proceeding is admittedly one in invitum), the words "which property" have direct reference to and in their meaning are limited by the opening words of the act; that, consequently, the state has declared its intention to tax only property which shall pass by will or by the intestate laws of this state, which property, if the property of a resident, shall be taxed wherever situated, but which property, if the property of a nonresident, shall not be taxed unless situated in this state. As the property here under consideration is unquestionably personal property, and as it did not pass to these respondents either by will or by the intestate laws of this state (propositions which may not be controverted), it is not subject to the tax here sought to be imposed. Such is respondents' position.

[1, 2] Indisputably, if respondents' construction of the section is sound, the conclusion drawn from that construction is unanswerable. But with that construction we cannot agree. It may be at once conceded that the language lacks the clearness which should be found in every law, and especially in a law imposing the burden of a tax. But it is taken bodily from the statute of New York, and had been construed by the highest court of that state before its adoption into the law of this state, and the meaning given to it was, in effect, that the grammatical construction of the sentence was faulty and that it meant to impose a tax, first, upon all property passing by will or by the intestate laws of this state, and, second, upon all property of a nonresident, which, regardless of its mode of transfer or succession, shall be within the state. Such is not only the interpretation of the highest court of New York, but is likewise the interpretation of the highest court of Illinois under its statute identical in this respect with our own. People v. Griffith, 245 Ill. 532, 92 N. E. 313. The declaration of this court in Estate of Kennedy, 157 Cal. 517, 108 Pac. 280, 29 L. R. A. (N. S.) 428, to the effect that the language in the first lines of the section "pass by will or by the intestate laws of this state" means to pass by virtue and effect of the law of this state governing testacy or intestacy, is, of course, perfectly sound. But this court was not there called upon to review the language of the whole section. It was dealing with the much narrower question, namely, whether a homestead set apart by the probate court constituted property passing by will or by the intestate laws. The unescapable conclusion that our law designs to tax all of the property of a nonresident deceased, which is within the state, carries with it the additional determination that the imposition of this tax is in no wise dependent upon any proceedings in probate, ancillary or otherwise, had within the state. Without regard to such proceedings, the state has exercised its unquestioned power to tax property, within its territorial limits and jurisdiction, over which it has extended the protection of its laws.

We are thus brought to the second and subordinate question, namely: is the property, within the meaning of our inheritance tax law, within the state? The familiar maxim mobilia sequuntur personam is one, it may not be questioned, which the state in its taxing laws may modify or reverse. In the case of the statute under consideration it is declared that all the property of a nonresident within the state shall be subject to the tax. It has (section 28) defined property very broadly to include real and personal property and interests therein.

[3] Our next consideration is whether this ownership by the deceased of a portion of the capital stock of a California corporation, which ownership was evidenced by printed and written certificates, which certificates in turn were in the state of New York, is of property within this state. Of this our own decisions as well as those of other jurisdictions remove all doubt. The proposition is thus stated in 37 Cyc. 1562, subd. "b":

> "Shares of stock in a domestic corporation are subject to the tax at the domicile of the corporation on their transfer by will or under the intestate laws, although the decedent was a nonresident and this without regard to the place where the certificate may be kept."

To the same effect are our own cases of Murphy v. Crouse, 135 Cal. 14, 66 Pac. 971, 87 Am. St. Rep. 90; McDougald v. Low, 164 Cal. 107, 127 Pac. 1027; Matter of James, 144 N. Y. 6, 38 N. E. 961; Estate of Bronson, 150 N. Y. 1, 44 N. E. 707, 34 L. R. A. 238, 55 Am. St. Rep. 632; Estate of Fitch, 160 N. Y. 87, 54 N. E. 701; Palmer's Estate, 183 N. Y. 238, 76 N. E. 16; Greves v. Shaw, 173 Mass. 205, 53 N. E. 372; Gardiner v. Carter, 74 N. H. 507; Douglas County v. Kountze, 84 Neb. 506, 121 N. W. 593; Morrow v. Gould, 145 Iowa, 1, 123 N. W. 743, 25 L. R. A. (N. S.) 384.

[4, 5] It is finally contended that under the full faith and credit clause of the Constitution of the United States the decree of distribution in the probate court of New York precludes the right of the state to tax this property, and in support thereof is cited Tilt v. Kelsey, 207 U. S. 43, 28 Sup. Ct. 1, 52 L. Ed. 95. It may be conceded that the law of the domicile controls the disposition of personal property, where the law of the place of the location of the property is not in conflict therewith. But we do not understand that the full faith and credit clause imposes any limitation upon the sovereign right of a state to tax any and all property within it, nor is this right we think for a moment denied by respondents. This general right to tax includes the right to impose a tax on succession known as an inheritance tax, and the effect of our law is that those to whom the property has gone by virtue of the distribution awarded by the courts of New York cannot take full title to and enjoyment of their property until payment of the tax imposed by the state of California, in which state the property is located.

The judgment appealed from is therefore reversed.

We concur: LORIGAN, J.; MELVIN, J.

174 Cal. 718

HALL v. HALL et ux. (S. F. 7135.)

(Supreme Court of California. March 29, 1917.)

1. Husband and Wife 🔑333(9)—Alienating Husband's Affections—Sufficiency of Evidence.

Plaintiff's testimony regarding minor differences with her husband's parents *held* not to sustain a verdict against them for alienating the husband's affections, where plaintiff had abandoned her husband and it did not appear his affection for her had ceased.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1124.]

2. Husband and Wife 🔑333(9)—Alienating Husband's Affections—Sufficiency of Evidence

To establish willful alienation of a husband's affections by his parents, the proof must be extremely high, since it is not lightly inferred that a parent's conduct toward a child is prompted by malicious motives.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1124.]

3. Husband and Wife 🔑333(1)—Alienating Husband's Affections.

In action against parents for alienating a son's affections from his wife, it is presumed the parents acted for the best interest of their child.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1124.]

Department 2. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Cecile B. Hall against William Hall and Lucy Hall, his wife. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Judgment and order reversed.

Chas. M. Cassin and James L. Atteridge, both of San Jose, for appellants. Beggs & McComish and H. C. Jones, all of San Jose, and C. C. Houck, of Santa Cruz, for respondent.

HENSHAW, J. Plaintiff sued defendants, who are respectively the father and mother of her husband, to recover damages for the alienation by them of her husband's affections from her. The charge was that:

> "The defendants willfully, wrongfully, wickedly, unjustly and maliciously contriving and intending to injure plaintiff and deprive her of the affection, support, comfort, fellowship, society, aid and assistance of plaintiff's husband, * * * alienated and destroyed the affection of said Robert Hall, the husband of this plaintiff, for this plaintiff, * * * and did willfully, illegally and maliciously entice, abduct and persuade said Robert Hall from plaintiff, whereby plaintiff has wholly lost and has been deprived of the assistance, comfort, fellowship, society, aid and support of said Robert Hall."

Trial was had before a jury, which returned its verdict in favor of plaintiff in the sum of $10,000. From the judgment and from the order of the court denying their motion for a new trial, defendants appeal.

[1-3] Upon appeal their principal effort is directed to the contention that the evidence is wholly insufficient to justify the verdict, and this effort, it may be said at the outset, is wholly successful. Seldom, indeed, is it that a reviewing court is called upon to consider a verdict such as this, whose evidentiary foundation is airy nothingness, not even the baseless fabric of a vision.

Plaintiff and her husband, Robert Hall, were married in Los Gatos, Santa Clara county, in November, 1906. At the time of their marriage the husband was about 26 years of age, the wife a few years younger. Her parents were living in Los Gatos, so were his. He seems to have been an only child. His father and mother had been married more than 50 years, and at the time of the trial of this action the father was 75 years of age and the mother 68 years of age. They owned their own home. They had some property. They were frugal, and the old wife did all of the household work. The narration which follows is that of the plaintiff. Following their marriage in the latter part of November, she and her husband went to San Jose. Her husband's parents came to them and begged them to come and live with them in Los Gatos, Mr. Hall saying that his wife would teach the bride economy. Apparently the wife had no means; the husband was earning about $75 a month. The newly married couple went to Los Gatos and began housekeeping in rooms not far from the home of the elder Halls. They were visited quite frequently by the latter; old Mrs. Hall urging that the young people come and live with them, saying that the cost of living was high and they could live more cheaply together. They did not comply with the Halls' request, however, but continued to live as they had been doing until the husband went into the nearby mountains under employment as a wood chopper and the wife went to live at her parents' home. During this time, when the husband was free from his mountain labors, he returned to and lived with his wife. One painful incident occurred during this time. The husband and wife were making a call upon his parents. The mother was urging that they should come there to live. Robert said that he did not think they would.

> "Then she began screaming and raving about me; that I was trying to keep Robert away from her. They put her to bed and worked with her for some three hours. She insisted that Robert stay all night with her, and as I was not wanted I started home, and after I started I discovered I had not the key, and I came back to get the key, and Robert came on home with me."

Plaintiff is a school teacher, and obtained a position as such to teach a country school distant from the city of San Luis Obispo about 30 miles. Her school term began in July and ended in November. Her husband went with her to the city of San Luis Obispo, and for his own improvement took a course in a polytechnical school there situated, while his wife went to the country to teach. Every week, usually on Friday afternoon, he rode his bicycle 30 miles to be with her over the week's end. While there she took from her husband's suit case and read certain letters written to him by his father. She was permitted to give secondary evidence as to the contents of these letters. She said that in them her husband's father accused her of being "wasteful and extravagant" and "a hindrance to Robert's spiritual development"; that he ought to separate from her; that the letters often contained the quotation, "Be not unequally yoked with unbelievers." He urged his son to "take the paper route by all means for $20 a month, but do not let Cecile know how much you are getting, and once in a while in case of absolute necessity I will slip in a little." The letters told her husband to keep her there teaching, "that would be a good lesson in economy for her." Another letter said:

> "Let Cecile come on home, and I will meet you in San Luis, and together we will take a trip in Madera county; but don't let Cecile know I am coming. You will know how to manage that."

It is pertinent here to add that the father denies having written, and the son denies having received, letters of such import. Certain trips made by father and son together are complained of by plaintiff, as for example she persistently calls a trip which her husband and his father made to Los Angeles as their "wedding trip." The explanation of these trips is that the father was earnestly seeking to establish the son in some profitable business, and his wife was unwilling to go on these trips with them. In December, 1907, they returned from San Luis Obispo to Los Gatos and took up their abode in the home of defendants. Plaintiff was pregnant. As the date of her confinement approached, she told her mother-in-law that she expected the arrival of the little grandchild, and the mother-in-law "sat back in her chair with utter scorn and disgust on her face and never said one word." She asked her mother-in-law if she might stay in her home during the period of her confinement and convalescence, and her mother-in-law replied, "Yes; you may stay here, but you must not be a trouble to me." The aged mother-in-law's account of this interview was that she looked forward to the birth of her grandchild with great interest; that she told her daughter-in-law that she could stay there if she desired, "but there are some things I cannot do for you." So the daughter-in-law went to a sanitarium where she was confined. On leaving the sanitarium, about the middle of July, 1908, she did not return to the Halls, where her husband still was, but went to her mother's, where she remained until in August, 1908, she and her husband moved to San Jose. There they resided until June, 1909. The defendants visited them not infrequently, and her father-in-law paid at least in part for the furniture in their San Jose home. In June, 1909, they returned to Los Gatos, moved by considerations of the baby's health. The husband continued in his employment in San Jose and went back and forth on the interurban cars. They lived in their own home. The principal complaint of the conduct of the husband during this time is that, returning to Los Gatos from San Jose, he usually went first and directly to the home of his parents and spent some time there before returning to his own. Sometimes he took his supper there. The explanation is that the son spent his time helping his aged father and mother in the work about the place, and that when he took supper with them it was because he preferred to do this rather than to get his own supper at home, as frequently he was obliged to do because of his wife's absence at her mother's home. Their residence in Los Gatos continued until January, 1911. During that period of time between 1909 and 1911 plaintiff asked the Halls at sundry times many questions. She asked Mr. Hall, Sr.:

> "Why two months after we were married he suggested to my husband that I married him for his money, thus poisoning his mind against me. Mr. Hall's reply was, 'Well, what do you think we thought you married him for? People call me a millionaire and people are after my money. What else do you think I thought you married him for?'"

But elsewhere she testifies that the elder Halls hailed her marriage to their son with great delight. Again she asked Mr. Hall:

> "Why he suggested to Robert that we were not mated constantly by suggesting to him we were not mated? He said he didn't think we were mated and he considered it his duty to separate two people who were not mated. Again I asked Mr. Hall why he was a party to offering me $1,000 in March, 1907, to leave my husband and telling me I could go as a missionary if I wanted to. Mr. Hall's answer was —coolly sat back and said he supposed it was because they wanted me to go, and Mrs. Hall said, 'Do you think we wanted you to go without anything?'"

There is more to like effect, all of equal inconsequence, and the defendants deny that such conversations ever were had.

The separation between the plaintiff and her husband came as indicated in January, 1911. During all of their married life, as the evidence discloses, he had neither neglected his wife nor been unkind to her in any way. He did not drink. His absences from home were only those upon the short business trips made with his father, or when his labors called him away, or when he stopped at his parents' home to help them before returning to his own. He contributed all of his earnings to the support of his wife and child. He seems to have indulged his wife in every way, and when the separation came, which was in fact her abandonment of him, he "told her to take her own way. I let her have her own way all the time." In January, 1911, she sold the furniture in their home, took this money, and with her child departed, leaving her husband weeping in the house. To the sum which she received from the furniture he added $20. He went to his parents' home. She stayed two weeks in the nearby town of Campbells and then went to Capitola, a summer resort on Monterey bay, and remained there until the middle of the summer. She returned from Capitola to Los Gatos, and in September secured a position as school teacher in the county of Fresno. She went there and taught until the following May. While at Capitola she wrote to her husband, telling him where she was, and he came down to see her for the purpose of effecting a reconciliation. He met with no success. Upon another occasion he asked her to join him and his father in the town of Morgan Hill, where it was proposed to look at ranch property with a view to settling the young people. She went, remained with her husband one or two nights, but soon left, as "I wanted to get back to Capitola to attend a meeting of the Young Women's Christian Association that was shortly to convene down there." A second time her husband visited her at Capitola, but left when she told him that her father was coming to the house. Her parents disliked her husband very much, and she did not want them to know that she communicated with him. She went to Fresno and did not let her husband know where she had gone, nor for many months was he able to learn, notwithstanding his efforts to locate her. She testifies that she did not want him to know, and for explanation justifying her conduct says that it was because her husband "said he would shoot the county full of holes. Now, do you wonder that I didn't want him to know?" She wrote to her husband but once while she was in Fresno, and returned from there to Los Gatos in May, 1912. She immediately began to take steps looking to a divorce and to securing money from her husband, which money, of course, would come from his parents, as it is not asserted that he had anything other than his earning capacity. She planned to use this money to build a home. Some sort of tentative arrangement seems to have been entered into by which she was to receive a thousand dollars. In one of these letters she writes to her husband as follows:

> "These are my terms: (1) The guardianship of Lawrence; (2) the payment to me of the thousand dollars you once offered me, not for my own use this time, but for Lawrence's care. Has it ever occurred to you that you could be arrested for felony for not having given anything for Lawrence's support for over a year?"

The greater part of the year to which reference is here made was the period when she had taken the child, had abandoned her husband, and had even concealed from him her whereabouts. The Halls seemingly thought that this thousand dollars, as under the mother's declaration it was to go for the maintenance of the child, would better be paid in monthly installments, and this called forth from the wife a letter, from which the following extracts are taken:

> "You seem to think you have the power to make or unmake terms as you see fit, and I have nothing to say, but only accept. Let me say right here that I am not going to do anything of the kind. * * * Those days when I took Lawrence on the beach (at Santa Cruz) to see you were the most miserable days I ever put in, and so was the whole time. If you hadn't spent so much time crying, and if I hadn't felt sorry, I should never have stood it for a minute. Then you would keep saying there was no other way but a divorce, so you could start all over again, and if I didn't start proceedings you would. To support what I previously said about the stay in Santa Cruz being a most unpleasant vacation, Lawrence and I did not go home, but we went to Capitola and had a real vacation. * * * My sister-in-law got $5.000 damages, and didn't half try, and the $1,000 is beginning to look mighty little to me. I might just tell you that a prominent business man in this town has hired the best lawyer in San Jose for me, and he is now consulting with Mr. Jones. * * * I said to them this afternoon that if you would live up to your part of the agreement and pay $1.000 in addition to the $500 already paid, I would live up to mine. That $1.000 was not to be paid in monthly pay'ts. Nothing was said about such an arrangement. If you feel free to go back on your word I shall feel free to act accordingly. Furthermore, it was to be in my name."

Certain other facts here merit notice. She charges that the malign influence of her husband's parents was exercised upon him immediately after the marriage and continuously from that time on. Yet she had no differences, no wordy quarrels with the senior Halls during the six months that she lived in their house. Before she went there to live, it will be remembered, she had been teaching school in San Luis Obispo county, and it was while there she read the letters from Mr. Hall, her versions of which have been given. Yet she writes to "Dear Mother Hall" a chatty and affectionate letter which closes with, "Lovingly yours." When she abandoned her husband in 1911, she wrote to him that:

> "I want to love you again, but it just seems as though I am groping blindly in the dark trying to find something on which to base that love."

In no one of her letters is there even a suggestion that the unhappiness which darkened their marital relations was occasioned either because of the loss of the husband's love for her or by reason of the pernicious activities of these defendants directed to that end. One of these letters to her husband, dated October, 1912, contains this sentence:

> "Robert, I believe just between you and me that our folks, while not meaning to be, are hindering rather than helping us. I say this with all regard to them for they do not realize it, but we ought to realize it and rise above it."

Her explanation of this sentence, written after all of these difficulties, is neither satisfactory nor illuminating. Notwithstanding the fact that she testifies that her parents disliked her husband, she insists that the language "our folks" had exclusive reference to his parents. For the rest, she asserts that this declaration had nothing to do with the "willful, wrongful, wicked and malicious" efforts which her parents-in-law were, she charges, persistently making in their effort to destroy her husband's affection for her. One other episode calls for narration. In 1912 the senior Halls with their son Robert had gone to Santa Cruz and were there living together. This plaintiff, returning from Fresno county to Los Gatos, discovered this fact. She filed her complaint for a divorce in Santa Cruz county. After so filing it, she herself went to Santa Cruz county. She accepted her husband's invitation to come to his home, which was also the home of his parents, and there spent one or more nights with him. While they were at the dinner table, her husband was served with the complaint and summons in her suit for divorce. After that she again visited her husband at his parents' home, upon this occasion Mrs. Hall, Sr., being present. She was not at home on the occasion of the dinner table episode. Mrs. Hall saw her son with his arm around the plaintiff's waist. According to plaintiff, her mother-in-law screamed and said, "They will be reconciled again and my troubles will all begin over." The senior Mrs. Hall's explanation is that she thought and declared that such conduct upon the part of a woman was not proper in contemplation of the fact that she was prosecuting an action for divorce against the man who was embracing her.

This ends a fairly complete résumé of the evidence in the case, saving that it should be added that upon its trial, while the wife admitted her loss of affection for her husband, he declared his continued love and devotion to her. It is quite plain that if plaintiff had brought this action because of the alienation of her affections from her husband it would stand, so far as the evidence at least goes, upon a much firmer basis than does the one which actually she did bring. For here is a case where, without hesitation, it may be said that the evidence fails to show either an attempt to alienate the husband's affections or any success for that attempt, if it were actually made. It would be a work of supererogation to dwell at length upon the governing law of cases such as this. It is sufficient to state it briefly, with due reference to the authorities, when at once the utter inadequacy of this evidence will be apparent, if it has not already become so. Actions for damages against parents for the alienation of the affections of their married child from his or her spouse are frequent in the law, and the principles governing the introduction of evidence and the weight to be given it are equally well settled. Having in contemplation the natural solicitude of the parent for its child, and the well-nigh universal experience of mankind that parents in their conduct toward their children are actuated by high and disinterested motives, involving the sacrifice of their own interests for the welfare of the child, it is not to be lightly inferred that the language or conduct of such a parent toward a child is prompted by evil and malicious motives. Therefore to establish such willful and malicious alienation "the measure of proof must be extremely high." Beisel v. Gerlach, 221 Pa. 232, 70 Atl. 721, 18 L. R. A. (N. S.) 516. Says Chief Justice Kent in Hutcheson v. Peck, 5 Johns. (N. Y.) 196:

> "If the defendant did not stand in the relation of father to the plaintiff's wife, I should not, perhaps, be inclined to interfere with the verdict. But that relationship gives the case a new and peculiar interest. * * * A father's house is always open to his children; and, whether they be married or unmarried, it is still to them a refuge from evil, and a consolation in distress. Natural affection establishes and consecrates this asylum, * * * and, according to Lord Coke, it is 'nature's profession to assist, maintain, and console the child.' I should require, therefore, more proof to sustain the action against the father, than against a stranger."

But "every legal presumption is that the parent acted for the best interest of the child." Leavell v. Leavell, 122 Mo. App. 654, 99 S. W. 460; Reed v. Reed, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. Rep. 310. Quite like the present case in its facts is that of Busenbark v. Busenbark, 150 Iowa, 7, 129 N. W. 332, where, after setting forth at great length, as has been done here, the annoying interference of the parents-in-law, the court said:

> "The incidents which are described as above set forth in plaintiff's testimony appear to us as very commonplace. They may have been unwise and lacking in delicacy and tenderness, but there is nothing to indicate that they were otherwise than the natural expressions of solicitude of this mother-in-law. Parents often annoy their children with advice, good and bad. The good is often quite as annoying as the bad. This mother-in-law seems to have fought the battle of thrift in a certain way, and she was quite sure that it was the only safe way."

And without amplifying these quotations reference may be made to Codoni v. Donati, 6 Cal. App. 83, 91 Pac. 423; Cripe v. Cripe, 170 Cal. 91, 148 Pac. 520; White v. Ross, 47 Mich. 172, 10 N. W. 188; Brown v. Brown, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574; Rice v. Rice, 104 Mich. 371, 62 N. W. 836; Pollock v. Pollock, 9 Misc. Rep. 82, 29 N. Y. Supp. 37; Fronk v. Fronk, 159 Mo. App. 543, 141 S. W. 697; Park v. Park, 40 Colo. 354, 91 Pac. 830.

The jury after it retired to deliberate upon its verdict came into court seeking further light upon the law, as shown by the following questions asked of the judge:

> "Question by a juror: The question is, Judge, in the event we should award damages, will that be protecting the child; should we award damages would there be compensation, protection for the child; would the child be sure of protection? That may be entirely foreign to what we are expected to do, but the argument came up."
>
> "Another juror: That may be foreign to what we are asked to come here for, but we seem to want to know about it."
>
> "Another juror: There has been considerable argument. Some of the jurors argue one way, some another, and the question came up, provided any damages were awarded to the plain-

tiff, would the boy be protected by the court in any respect? The supposition was that probably the plaintiff might marry and the boy would lose any protection which we might accord him."

This transcript from the record affords the only understandable reason for the verdict given. It is but another exemplification of the power which some juries assume of adjusting, without regard to the evidence or issues, the finances of the litigants in accordance with their views. It is another case like that of Driscoll v. Market St. Cable Ry. Co., 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203, where, as this court said:

"A jury catches at a mere semblance or pretense of evidence for the purpose of simply equalizing financial conditions by taking money from one party and giving it to the other without legal cause."

But in this case, no more than in that, has this great, and to the jurors most inexpensive, generosity the sanction of the law.

The judgment and order appealed from are therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

(174 Cal. 708)

JACOBI et al. v. BUILDERS' REALTY CO.

(S. F. 7127.)

(Supreme Court of California. March 27, 1917. Rehearing Denied April 26, 1917.)

1. Carriers ⚷288—Elevators.

The use in an apartment house, without warning and protection against the attending perils, of an automatic elevator for the transportation of passengers, when it is in the experimental stage of development and not suitable for such purpose, constitutes negligence, though the appliance is the latest achievement of mechanical and scientific skill, particularly where the owner was chargeable with knowledge of the defects in the construction and operation of the elevator.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1188.]

2. Carriers ⚷328(1)—Elevator Accident—Contributory Negligence.

That a person using a defective automatic elevator installed in an apartment house opened the door or stepped through the open doorway into the elevator shaft without looking to see that the cage was in place, did not constitute contributory negligence precluding recovery for her death, where the customary use of the elevator warranted her in believing that the door could not be opened unless the cage was in place.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1367.]

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Mignon Jacobi and others against the Builders' Realty Company. Verdict for defendant, new trial granted, and defendant appeals. Affirmed.

Denson, Cooley & Denson, Stanley Moore, and Geo. K. Ford, all of San Francisco, for appellant. Joseph Bien and Abram M. Marks, both of San Francisco, for respondents.

HENSHAW, J. Plaintiffs as heirs at law of Annie Jacobson, deceased, brought their action to recover damages for her death, alleged to have been occasioned through the defendant's negligence. Trial was had before a jury, which returned its verdict for the defendant. Plaintiffs moved for a new trial, which motion the court granted. This appeal is taken from the order so doing.

Appellant urges two propositions: The first, that the court erred in granting the motion because the evidence conclusively shows that defendant was not negligent; second, that the court erred because the evidence conclusively establishes that the deceased met her death through her own negligence; that the negligence of the deceased was either the sole negligence established in the case, or at the least was contributory negligence, barring the right of recovery.

The unquestioned facts are that the defendant owned and maintained an apartment house in the city and county of San Francisco. The deceased frequently visited friends residing in this apartment house. For the use of the tenants, their visitors and guests the defendant maintained an elevator in this house of a type known as a "full automatic elevator." This elevator was without attendant, and was operated exclusively by the passengers. One desiring to use the elevator stood in front of a closed door opening on the elevator shaft and pressed a button in the door casing. This pressure made an electrical connection, causing the elevator cage to ascend or descend and stop at the given floor. Its presence there unlocked the door, which the intending passenger then opened and stepped into the cage; closing the door behind him he pressed a button corresponding to the floor to which he desired to go, and, through a second electrical connection, thus made the cage move to the indicated floor. As it started on its journey the door of the floor upon which it was departing again was automatically locked. The door at any floor could not be opened unless the cage was present at that floor, nor, upon the other hand, would the cage when at a floor move unless the door fronting it was closed. Such in theory was the operation of this elevator, and in theory, therefore, it was an extremely safe appliance. In practice, however, it failed to measure up to this. In point of operation it not infrequently happened that the cage would move when a door was opened or on the jar. The evidence in the case went to show that at least a part of this trouble was due to an inherent structural defect in the appliance; that another part of the trouble resulted from the fact that the elevator frequently got out of order

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

and repair, it being in evidence that this occurred as often as once or twice a week.

[1] There was no eyewitness to the immediate circumstances attending the death of Mrs. Jacobson. Mrs. Harris, the housekeeper, who was in the office on the ground floor of the building, saw Mrs. Jacobson pass in front of her toward the elevator. Subsequently she heard a slight scream. Mrs. Jacobson had fallen down the elevator shaft, and was found dead in the basement. The elevator cage was several floors above. Touching the absence of negligence on its part, appellant argues that the elevator which it had installed and was maintaining was as perfect an elevator as could be constructed under the then condition of electrical knowledge and science; that it was not an insurer of the safety of the passengers using the elevator, and having furnished the best possible appliance it had completely fulfilled its legal duty, and it is said that "it will certainly not be contended that the use of an automatic elevator is negligence." But the contrary of this is the well-established law. If the appliance, though it be the last achievement of mechanical and scientific skill, is not a suitable appliance to be used in the transportation of passengers, to employ it for that purpose is negligence. The law does not contemplate that such appliances, in the experimental stage of their development, may be used to the peril of the life and limb of those who may be invited to employ them, at least without adequate warning and protection against the perils attending such employment. Specifically, as to this elevator, there was no attendant, nor even any sign to warn a passenger of this defect either in its construction or operation, or both. No person using it was informed that a door which was presumed to be tightly locked unless the cage was at its floor could be opened when it was not there. Ignorant of this, persons intending to use the elevator came to rely, and to a certain extent were entitled to rely, upon the fact that if they could open the door at all it would be because the cage was there. The evidence leaves no doubt but that this was the precise situation upon the occasion of this fatal accident. Mrs. Jacobson, familiar with the use of the elevator, in all probability found the door wholly closed or ajar. It opened to her touch, and assuming, by virtue of this fact, that the cage was there, she stepped forward and met her death. Since knowledge of the defects in construction or in operation, or both, was not only chargeable against this defendant, but was actually possessed by it, it is too plain for discussion that in inviting tenants and their guests to use such a contrivance it was sheer negligence not at the same time to have adequately warned and protected them against dangers necessarily attendant upon the use of the elevator under this defective faulty construction or lack of repair. Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175.

[2] Under its second proposition appellant contends that the negligence of the deceased is established by virtue of the fact that if on opening the door she had used her eyesight, as she was in duty bound to do, she would have perceived that the cage was not there, and that it was therefore contributory negligence upon her part to have made the fatal step. We have hereinbefore sufficiently outlined the course of conduct which the deceased doubtless pursued, and also the conditions which prompted her to that course of conduct. It has thus been made to appear, and indeed the positive evidence is to that effect, that people, using such an elevator and finding that in general practice when such an elevator was operating properly a door could not be opened unless the cage was at that floor, had come to rely, in determining the presence or absence of the cage, upon their ability or inability to open the door. The deceased unquestionably opened this door or found it open. In either case (there being no attendant to warn or any other kind of warning given) it was not at least unnatural that she should have placed reliance upon the conditions which she found. Whether under these circumstances she should also have looked or be convicted of negligence, presents a question of reasonable argument before a jury, but one which cannot be resolved against plaintiffs as matter of law. The language of the Supreme Court of New York is here appropriate:

> "An elevator for the carriage of persons is not, like a railroad crossing at a highway, supposed to be a place of danger to be approached with great caution; but, on the contrary, it may be assumed, when the door is thrown open by an attendant, to be a place which may be safely entered without stopping to look, listen, or make a special examination." Tousey v. Roberts, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. Rep. 656.

The order appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

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174 Cal. 712

HICKS v. CHRISTESON. (S. F. 7894.)

(Supreme Court of California. March 28. 1917.
Rehearing Denied April 26, 1917.)

1. Brokers ⚿41 — Principal's Ratification of Acts—What Constitutes.

Where a broker authorized to sell land wrote his principal that he had made a tentative contract on different terms regarding deferred payments, a reply accepting the change did not ratify the broker's act in making an option, instead of a sale, contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 41.]

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

2. VENDOR AND PURCHASER 🔑18(1) — "OPTION"—DEFINITION.

An option is a sale, not of property, but of a right to purchase.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23.

For other definitions, see Words and Phrases, First and Second Series, Option.]

3. VENDOR AND PURCHASER 🔑18(3) — EXERCISE OF OPTION—WHAT CONSTITUTES.

An optionee's letter to the owner's broker, requesting that he have deeds ready for delivery upon part payment of the purchase price and execution of notes for the remainder, is not an exercise of the option where no promise to pay the purchase price is made.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23.]

4. BROKERS 🔑52 — COMPENSATION — SUFFICIENCY OF SERVICES.

An owner's broker has not earned his commission unless an intending purchaser has made a binding contract, or has offered to the owner, and not merely to the broker, to make such an agreement.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 73.]

In Bank. Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by E. G. Hicks, doing business under the name and style of the Texas Coast Land Company, against A. Christeson. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Judgment and order reversed.

Knight & Heggerty and Wm. M. Madden, all of San Francisco, for appellant. Byrne & Lamson, of San Francisco, for respondent.

MELVIN, J. Defendant appeals from the judgment and from an order denying his motion for a new trial.

The action was one by which plaintiff sought to recover $893.90 as damages for defendant's failure to carry into effect an alleged agreement for the sale of real property located in Texas. It was the contention of respondent that defendant was bound under the terms of a written contract of employment to pay to him the amount sued for, by reason of Christeson's failure to carry out an arrangement negotiated by plaintiff for the sale of the property to one McCrory. The date of the original contract between the parties to this action was December 4, 1907. On that day defendant signed a writing, by the terms of which he appointed plaintiff his agent to procure a purchaser, and to enter into a contract to sell 1,365 acres of land in the "Edward Beaty League" in the state of Texas. The agreement was mailed to plaintiff at Victoria, Tex., and was delivered, accepted, and signed by him there. By this writing defendant appointed plaintiff his exclusive agent for 12 months to sell the land at $4 per acre net to the vendor, and (to quote directly from the instrument)—

"thereafter until said agency is by me terminated in writing with full authority to execute a contract for the sale of said land in accordance herewith in my name and behalf. 1/3 of the amounts to be received by us for said land shall be paid in cash, and the balance 2/3 within 1, 2 and 3 years shall be secured by the vendor's lien 7% interest in the warranty deed to said land to be executed as soon as purchaser is found and to recite as consideration therein such amount as said agent shall designate."

The other parts of the contract had reference to the furnishing of an abstract of title, and to other matters which need not be discussed here.

After entering into the said contract, the plaintiff, on May 23, 1908, executed an agreement signed by himself and one W. W. McCrory, wherein it was provided that in consideration of $333⅓ paid by McCrory to plaintiff the former should have the option from the date of the agreement to November 1, 1908, to purchase the property upon the following terms: $1.50 cash per acre and notes in the sum of $3 per acre, bearing interest at 7 per cent. and secured by a vendor's lien. These notes were to provide for the payment of the balance of the purchase price in three equal sums two, three, and four years after date. The amount paid on the execution of the option agreement was to apply on the purchase price if the option should be exercised, and plaintiff as the agent of Christeson promised to convey the land to McCrory, or to whomsoever he might name by a good and sufficient deed of warranty in the event of the exercise of the option. This contract also provided for the tender of a deed or deeds from Christeson to McCrory upon compliance with the terms of the sale. The writing itself was not sent to Mr. Christeson, but he was notified by a letter dated May 27, 1908, that Mr. Hicks had made a "tentative" contract with some person. The letter contained the following sentence:

"He is to pay one-third cash, and give vendor lien notes for the balance, payable in equal payments on the deferred in 2, 3 and 4 years. That is, you will receive $1 per acre cash, and $3 per acre in notes."

On June 10, 1908, a letter was written by Christeson to Hicks informing him that Sarah A. Christeson had owned a half interest in the land for 3 years, but undertaking to get her agreement, signature, and acknowledgment to the deed at the proper time if the sale were made. Answering the part of the letter from Hicks to the effect that the latter's commission would be 50 cents per acre, the defendant wrote:

"I observe, in this connection, you indicate that the warranty deed is to recite a consideration of $5 per acre, which I take to mean that you are selling the land for $5. If so and your commission being 50 cents, while of course I agreed to accept $4 to me net, but under the circumstances don't you think it would be about fair to divide the other half dollar, giving me 25 cents, or rather $4.25 per acre, and you retaining the balance? The payment of $1 down of course is satisfactory, and is in accordance with previous understanding, the balance to be covered by vendor lien notes, payable in two, three and four years, and if sale is made you can have deed drawn, and send to me for signature and execution."

On September 21, 1908, A. Christeson wrote advising Mr. Hicks that he had transferred all of his interest in the land to Sarah A. Christeson, formerly his wife. "Of course," wrote defendant, "any further negotiations in regard to this land will have to be carried on with her."

[1, 2] Appellant calls attention to the fact that the contract of option itself was never sent to him for his inspection, and he attacks the court's finding that there had been a ratification of the optional agreement. We agree with appellant that no such ratification ever took place. There was nothing in the letter of respondent to Christeson dated June 10, 1908 (upon which the court based its conclusion that Christeson had consented to a modification of the original contract), by which Christeson authorized or ratified any option by which the land might be held out of the market and subjected to the whim of any prospective purchaser. The only effect of that letter was to enlarge the authority of the agent with reference to the deferred payments. The writer did not give him further power to accept an agreement different in its essence from the contract for the sale of Christeson's land which he was empowered to execute. He was not informed by the agent regarding the name of the other party to the "tentative contract," or the payment for the option, or the arrangement that, upon default of the option holder, such sum should be forfeited not to Christeson, but to Hicks, and unless we can say that these were matters which, under the original contract of agency, were left to the discretion of Hicks, we must hold that the option was not binding upon Christeson. The agreement which is the fountain head of any authority possessed by plaintiff gave him the right to contract for a sale. An option is by no means a sale of property, but is the sale of a right to purchase. Dreyfus v. Richardson, 20 Cal. App. 800–805, 130 Pac. 161; Pehl v. Fanton, 17 Cal. App. 247, 119 Pac. 400—cases which this court approved by declining to review the decisions. Therefore, if we seek to justify the court's finding upon the letter written by the vendor to his agent, we see that there was no meeting of the minds of Hicks and Christeson except upon the one question of the modification of the terms of the sale.

[3, 4] But respondent insists that he furnished a buyer who was able, ready, and willing to purchase the land on the terms proposed, and that he is therefore entitled to his commission. The most complete answer to this contention is found in the fact that so far as the evidence shows McCrory never agreed to purchase the property upon the terms of the option. Since a contract for the sale of real property must be in writing (section 1624, subd. 5, Civ. Code), it must follow, says appellant, that McCrory's election to purchase, if of any value, must have been expressed in writing. The writing upon which reliance is placed by respondent is a letter by McCrory to him. This was undated, but according to the writer's testimony was mailed about the month of September, 1908. There was no pretense that McCrory ever dealt directly with Christeson, and although the former testified that he had orally informed Hicks that he intended to exercise his option, he did not give the details of any conversation; therefore, even if we were to hold that the court might have based the finding of election to purchase upon oral testimony, the strongest evidence which was offered on that subject was in the language of the letter of McCrory to Hicks, and that language did not bind McCrory to take the land. The pertinent parts of the letter are as follows:

> "I am inclosing you herein deed to be signed by A. Christeson and Sarah Christeson also the notes to be signed by me. * * * Under our agreement I have until November 1st to close up the deal, but as Mr. Christeson is sometimes away from home, hard to hear from, etc., I will I think be able to get the matter closed up before that time. I am sending the deed and notes along now with the idea that they will be back here by October 1st. You can instruct Mr. Christeson to send the deed properly executed by himself and Sarah Christeson to the Allen National Bank of Edna, Edna, Texas, with instructions to deliver same to me upon my signing the inclosed notes and paying to his credit the sum of $1,355, and to your credit the sum of $677.50, less the forfeit money already deposited with you. * * * I have had the abstract made, and it runs about 35 pages of typewritten matter. The affair that you sent me was no abstract at all. * * * I have dropped the matter of having the line through the brush run out, as it is about two miles long, and all very thick timber, and the fact is that you can hardly get help to do this work among the ticks and in the heat, so I have drawn the deed for the acreage shown by the old surveys, to wit, 1,355 acres. I think Mr. Christeson is under his contract with you to furnish an abstract, so I will expect him to pay for the abstract, as the matter he sent was no abstract at all, and would be of no use at all to me in case of sale, and I have to furnish abstract."

This letter still leaves the matter within the option and caprice of McCrory. He does not say in this letter that he elects to exercise his option, nor that he will purchase, nor that he will sign the notes and pay the money. The deed was not drawn for 1,365 acres, the area specified in the contract between Hicks and Christeson, but for a smaller tract of land, and he seeks to charge Christeson with the expense of preparing an abstract which the latter had never ordered. There was nothing in the option requiring the deposit of a deed in escrow in Texas or elsewhere, and the prospective vendee could not arbitrarily read such a requirement into the contract, select the place or escrow, and then complain that the other party to the option had violated the agreement. It is evident that if Christeson had complied with all of the terms of the letter of McCrory to his agent, and McCrory had failed to complete the transaction by signing the notes and paying the money, Christeson would have been without a cause of action for specific performance of a contract of sale. His only recourse would have been against Hicks for the amount which McCrory had deposited with the latter as a consideration for the option. Unless an intending purchaser has entered into a contract binding him to buy the property, or has offered to the vendor and not merely to the broker to make such an agreement, the broker has not earned his commission. Gunn v. Bank of California, 99 Cal. 349, 33 Pac. 1105; Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 200; Mott v. Minor, 11 Cal. App. 774–779, 106 Pac. 244; Douglas v. Spangenberg, 23 Cal. App. 294–296, 137 Pac. 1103; Massie v. Chatom, 163 Cal. 772–776, 127 Pac. 56. It is not pretended that an offer of any sort was made to Christeson personally, and the letter to Hicks was nothing more than a proposal for a change in the terms of the option. It follows that even if we give to the optional agreement all of the force accorded to it by the learned superior court, we must reverse the judgment because the proof fails to show any binding contract for the sale of Christeson's land. This conclusion makes it unnecessary to consider any of the other assignments of error, except the plea of the statute of limitations.

Appellant contended that the cause of action was barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure. The original complaint concededly was filed within the statutory time, and although the amended complaint was prepared after the expiration of the period limited by the statute, we are satisfied that both pleadings relate to the same cause of action.

The judgment and order are reversed.

We concur: HENSHAW, J.; SLOSS, J.; SHAW, J.; LORIGAN, J.; LAWLOR, J.

(174 Cal. 729)

LANGFORD et al. v. SAN DIEGO ELECTRIC RY. CO. (L. A. 3805.)

(Supreme Court of California. March 31, 1917. Rehearing Denied April 30, 1917.)

1. Appeal and Error 🔑1064(1)—Review—Prejudicial Error.

Where on the whole record the evidence is in such conflict as to have supported a verdict for either party, any substantial error in the trial or in the instructions defining the relative rights of the parties must be regarded as prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219.]

2. Trial 🔑251(8)—Instructions—Issues—Operation of Street Railroads.

In action for injuries to automobile passengers when struck by a street car, instruction that it was the duty of the street railway to employ competent and careful persons and of the motorman to exercise proper care to avoid accidents, and defendant would be liable for any injuries proximately caused by its failure in such respects, and refusal of instructions that the plaintiff did not complain that the motorman was incompetent, and the only question was his due care on the premises, were error; the competency of the motorman not being an issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 593.]

3. Trial 🔑296(3)—Instructions—Error Cured by Other Instructions.

The vice of the instruction given was not remedied by the concluding words that "defendant would be liable for any injury proximately caused by its failure in such respects."

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709.]

4. Street Railroads 🔑118(1)—Operation—Personal Injuries—Scope of Inquiry.

In action for personal injuries when defendant's street car collided with an automobile, defendant was entitled to have inquiry limited to conduct of motorman at the time, and not his general capacity.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258, 259.]

5. Appeal and Error 🔑1170(1)—Reversal—Disregard of Error.

Where the court on appeal cannot say that in the absence of the errors committed the verdict would have been the same, it cannot, even under Const. art. 6, § 4½, disregard the error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4454, 4540.]

6. Street Railroads 🔑81(1)—Operation—Collision—Duties of Motorman.

It is the duty of the motorman on a street car to exercise ordinary care.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172, 173.]

7. Street Railroads 🔑85(3)—Operation—Collisions—Rights of Drivers.

An automobile driver, when the street is impassable, has the right to drive upon the street car track.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 193, 195.]

8. Municipal Corporations 🔑703(1) — Streets—Use for Travel.

San Diego ordinance requiring every driver of a vehicle to travel on the right side of the street as near the right-hand curb as possible does not prohibit the use of the left-hand side of the street under all circumstances.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1509.]

9. Street Railroads 🔑117(26)—Collisions—Questions for Jury.

Evidence *held* to present question for jury whether automobile driver was negligent in attempting to pass on left of street car when the street was undergoing repairs.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 250, 255.]

10. Street Railroads 🔑110(2)—Operation — Collisions — Last Clear Chance Doctrine—Pleading.

The facts showing the applicability of the last clear chance rule need not be alleged in the complaint.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 224.]

11. Street Railroads 🔑118(2)—Trial 🔑194(16)—Collisions—Injuries to Persons—Instruction—Charge on Facts.

In action for injuries to passengers in an automobile when struck by a street car, an instruction, that street cars with proper appliances are easily stopped, was misleading, indefinite in using the words "easily stopped," and objectionable as a charge on a fact.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 260, 261; Trial, Cent. Dig. § 451.]

Department 1. Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Ada Cooper Langford and husband against the San Diego Electric Railway Company. Judgment for plaintiffs and order denying new trial, and defendant appeals. Reversed.

Read G. Dillworth, of Coronado, and E. Swift Torrance, of San Diego, for appellant. Adam Thompson, of San Diego, for respondents.

SLOSS, J. The plaintiffs are husband and wife. They brought this action to recover damages for injuries received by the wife in a collision between an automobile in which the plaintiffs were riding and a street car belonging to the defendant company. There was a trial by jury, resulting in a verdict and judgment for $5,000 in favor of the plaintiffs. The defendant appeals from the judgment, and from an order denying its motion for a new trial.

The points raised by the appellant turn principally upon the court's instructions to the jury. To understand these questions, their discussion should be preceded by a brief statement of the facts.

The defendant operates a double-track line of electric street railway on Washington street and other streets in the city of San Diego. Washington street runs east and west. Among the streets intersecting it are Falcon, Goldfinch, and Hawk streets. Falcon street is the most easterly of these, the next street to the west being Goldfinch street, and Hawk street the one next beyond. The accident resulting in Mrs. Langford's injury occurred on the evening of March 13, 1913, at the intersection of Washington and Goldfinch streets. The pavement of Washington street was being repaired, and the only part of the street that was passable was that occupied by the tracks of the railroad company, including a space of two feet in width on either side, beyond the outer rails. The automobile was driven by Norton Langford, the husband. He was coming easterly on Washington street. As Langford crossed Hawk street, an east-bound car of the defendant was running on the southerly track, a short distance ahead of him. He followed on the southerly track, until the car came to a stop at or near the intersection of Goldfinch street. There is a sharp conflict over what took place then. Langford's testimony was, in effect, that the street car stopped some distance west of Goldfinch street to take on passengers; that in order to avoid the delays which would be imposed upon him by the frequent stops of the street car, if he remained behind it, he turned out to the left or north track, with the intention of passing around the east-bound car, and getting in front of it. The street car started again as he got abreast of it, and, as Langford drew up, the motorman increased the speed of the street car. About this time Langford saw a west-bound car ahead of him on the northerly track, at a distance of one or two blocks. Concluding that he would not be able to get ahead of the east-bound car, and cross to the southerly track in front of it before the approaching west-bound car would be upon him, Langford stopped his automobile with the intention of falling in to the right behind the east-bound car. This brought his automobile to a standstill upon the north track, about the middle of the intersection of Goldfinch and Washington streets. Before he was able to get his machine out of that position, the west-bound street car ran into him.

[1] The complaint charged that the collision was caused by the careless, negligent, and unskillful running of the car by the defendant's servants. The answer denied negligence, and alleged that the collision was caused by the negligence of Langford in turning onto the northerly track at a time when the west-bound car was so close that a collision was inevitable. The evidence offered by the defendant tended to support these claims. There was ample and substantial testimony from which the jury might well have concluded that the west-bound car was very near the intersection of Goldfinch street when Langford drove his automobile onto the northerly track, and that the motorman driving said car was not, and could not have been, aware of Langford's presence on the north track in time to enable him to stop the street car. The appellant does not claim, and we do not suggest, that the evidence was not sufficient to support the verdict of the jury. Upon the whole record, however, there is room for serious doubt whether responsibility for the accident in reality rested upon Langford or upon the defendant. Under these circumstances, any substantial error, if such there was, in the instructions defining the relative rights and obligations of the driver of the automobile and the person in charge of the street car, must be regarded as prejudicial.

[2] Among other instructions, the court gave the following:

> "You are further instructed that it is and was the duty of the defendant corporation to employ competent and careful persons to manage its street cars, and that it was and is the duty of the motorman in charge of the street cars of the defendant to exercise proper care, and keep a proper lookout, in order to avoid, if possible, all accidents and injury, and the defendant would be liable for any injury proximately caused by its failure in these respects."

The court refused to comply with the defendant's request to instruct the jury:

> "Plaintiffs do not here complain that the motorman on defendant's west-bound street car was incompetent or inexperienced, and the only question for you to consider with reference to

him is whether on the occasion of the accident he acted with the care and prudence which a reasonably prudent man under the circumstances would have exercised."

The appellant assigns as error the giving of the one and the refusal to give the other instruction. These assignments are well taken. The question of the competency or incompetency of the motorman was not an issue, nor could it have been made an issue, in the case. The great weight of authority supports the rule that in actions of this kind the competency of the person claimed to have acted negligently, or his reputation for care, is not a subject of inquiry. The decisions in this state are definitely in accord with this view. In Cunningham v. Los Angeles Ry. Co., 115 Cal. 561, 564, 47 Pac. 452, the court said, in dealing with this question:

> "Defendant was responsible to plaintiff for a want of ordinary care only, and whether it was in the exercise of such care was to be determined from a consideration of what actually occurred at the time of the alleged negligent act, regardless of any fact affecting the general character of the servant for skill or proficiency in the discharge of his duty. The question was: Did the servant exercise ordinary care to avoid the injury? If he did, the plaintiff could not recover, no matter how wanting the servant may have been in general competency; while, if he did not exercise such care, plaintiff was entitled to recover, even if the servant possessed the utmost degree of efficiency and skill in the performance of his duty. The sole question therefore was: What was the conduct of the servant at the time? And this was to be unembarrassed by any consideration of his general qualifications."

In the earlier case of Towle v. Pacific Improvement Co., 98 Cal. 342, 33 Pac. 207, the court had declared the same rule, although it was there applied to a somewhat different state of facts. Quoting from 2 Thompson on Negligence, p. 804, the court said, in the Towle Case, that:

> "The principle is that the question whether a person was at a given time in the exercise of due care is to be resolved upon evidence of what took place at the time, and not upon evidence of the general character he may sustain."

See, also, Spear v. United Railroads, 16 Cal. App. 637, 117 Pac. 956; Carr v. Stern, 17 Cal. App. 397, 120 Pac. 35; Minot v. Snavely, 172 Fed. 212, 97 C. C. A. 30, 19 Ann. Cas. 996.

[3, 4] Under instruction 13, the jury was authorized to hold the defendant liable because it had employed an incompetent motorman, even though the evidence of the facts surrounding the accident may not have been sufficient, in and of itself, to show that the motorman had failed to exercise due care. The vice of the instruction is not remedied by the concluding words that "defendant would be liable for any injury proximately caused by its failure in these respects." The argument is that the mere employment of an incompetent motorman could not proximately cause the injury, if the motorman was not negligent on the particular occasion. But the answer to this suggestion is that the natural effect of testimony of incompetency is to lead the jury to infer that the person whose conduct is in question failed to act properly at the time and in the very matter under investigation. Wigmore on Evidence, § 65. The error is emphasized by the court's refusal to give the instruction requested by the appellant. The requested charge was designed to limit the jury, on the question of the defendant's negligence, to an examination of the conduct of the motorman at the very time in controversy. As we have seen, the defendant was entitled to have the inquiry so limited.

[5] If there had been no evidence bearing upon the question of the motorman's competency, these errors might, perhaps, be regarded as of little moment. But the bill of exceptions contains an explicit statement that the motorman, when testifying as a witness, was dull, slow, and hesitating; that he showed a lack of knowledge of the appliances used on the car; and that "the jury might readily have drawn the conclusion from his manner of testifying, and his appearance on the witness stand, that he was incompetent to serve as a motorman at the time of the collision." As we have already said, the evidence left the true cause of the accident in great doubt. We cannot say that, if this instruction had not been given, the jury ought, nevertheless, to have found in favor of the plaintiffs. We cannot even, after a careful review of the evidence, say that the jury, under proper instructions, would probably have reached a conclusion in favor of the plaintiffs. Under these circumstances, we would not be justified, even under the liberal provisions of section 4½ of article 6 of the Constitution, in disregarding the error and denying a new trial.

[6] As a guide to the further proceedings which must be had, we may refer briefly to some criticisms directed by the appellant against the remaining instructions of the court. We are not, in this, to be understood to hold that the objections which we find to be good would alone justify a reversal. Instruction 14 states that it is the duty of drivers of street cars to have their power under control, and so use the control "as to avoid injury whenever possible." The words "whenever possible" put too stringent an obligation upon the operator of the car. His duty is to exercise ordinary care, and the court so instructed the jury, in other parts of its charge. It would be well, upon another trial, to obviate possible confusion by modifying instruction 14.

[7] We think there was no substantial error in instructions 12, 15, and 17, regarding the right of the driver of the automobile to drive upon the part of the street occupied by the street car track. It is true, generally, and more especially where, as here, the portion of the street beyond the tracks is not passable, that the driver of any vehicle has the right (always subject to the duty to exercise due care) to drive on the part

of the street occupied by the street car rails. The appellant's complaint seems to be based on the proposition that it was negligent for the plaintiff to drive onto the left-hand track. But this subject was covered by other instructions, and was not involved in the instructions now under consideration.

[8, 9] A point is made of an ordinance of the city of San Diego, providing that every person driving a vehicle on any street shall "on all occasions when it is practicable so to do, travel on the right side of such street, and as near the right-hand curb thereof as possible." The ordinance was not intended to prohibit the use of the left-hand side of the street under all circumstances. The only part of the street that was passable was that occupied by the tracks. There was no way for the plaintiffs to pass the east-bound car except by going to the left of it. In a certain sense it was "practicable" for them to remain behind that car, stopping whenever it stopped, and being delayed by it as long as it remained upon the portion of Washington street that was undergoing repairs. But we do not think that the ordinance should be given so strict an interpretation. Whether it was reasonable, under the circumstances, to hold the driver of an automobile to this inconvenient mode of travel, was, we think, a question for the jury. They may well have concluded that it was not "practicable" for Langford to keep on the right of the road where, by so doing, he would be unduly blocked in his progress.

[10] Complaint is made of the action of the court in instructing the jury upon the last clear chance doctrine. It is exceedingly doubtful whether there was any evidence to which these instructions were applicable. We do not, however, express any definite view on this point, as the evidence may be different upon another trial. We do not agree with the appellant's contention that facts showing the applicability of the "last clear chance" rule must be alleged in the complaint. The appellant relies upon Esrey v. Southern Pacific Co., 88 Cal. 399, 406, 26 Pac. 211. The decision did not turn upon the question of pleading, and what is said in the opinion on this point is little more than a passing intimation. On the second appeal in the same case (Esrey v. Southern Pacific Co., 103 Cal. 541, 546, 37 Pac. 500), the court seemed to view with doubt the suggestion, made on the first appeal, that the complaint should have charged that the defendant acted willfully and wantonly, but was compelled to accept it as binding under the "law of the case" rule. Well-considered cases in other jurisdictions hold that the plaintiff may rely upon the last clear chance doctrine where he has made proper allegation that his injury was caused by the defendant's want of reasonable care, and the defendant has denied this allegation. Nathan v. Railway, 118 N. C. 1066, 24 S. E. 511; Crowley v. B. C., etc., Ry. Co., 65 Iowa, 658, 20 N. W. 467, 22 N. W. 918. As was said in the North Carolina case:

> "In contemplation of law, the injury is not attributed to the wrongful act unless it is shown to be the immediate and proximate cause. So that the allegation by the plaintiff that the injury was due to the defendant's carelessness, and the denial of that, coupled with the averment by defendant that the contributory negligence of the plaintiff was the cause, necessarily involves the question whether the defendant negligently omitted to avail itself of the last clear chance to avoid the accident by the performance of a legal duty."

[11] Instruction No. 19, given at the request of the plaintiffs, contained the statement that "street cars with proper appliances are easily stopped." This declaration should have been omitted. In the first place, it involves a charge upon a matter of fact. Next, it was misleading, in that it suggested to the jury that the sufficiency of the appliances on defendant's cars was involved, whereas no such question was presented by the pleadings or the evidence. Still further, the words "easily stopped" are too uncertain to furnish a standard of any value. One person might think that a car was "easily stopped" if it could be stopped within 40 feet, while another might think it could not be easily stopped unless brought to a standstill after running 10 or 15 feet.

Some other instructions are criticized; but we think that, on a reading of the charge as a whole, the objectionable matter pointed out by the appellant is not such as to have caused any material misunderstanding on the part of the jury.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; LAWLOR, J.

174 Cal. 498

In re SEILER'S ESTATE. (S. F. 8189.)

(Supreme Court of California. March 5, 1917.)

APPEAL AND ERROR ⚷345(1)—TIMELY APPEAL.

Although Code Civ. Proc. § 1715, provides that an appeal must be taken within 60 days, an appeal from an order admitting a will to probate is timely if taken within 30 days after determination of a motion for a new trial in view of section 939 as amended in 1915 (St. 1915, p. 205), providing that if proceedings are pending for a new trial the time for appeal from the judgment shall not expire until 30 days after entry of the order for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1895.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the Estate of Paul Seiler, deceased. Motion to dismiss an appeal from an order admitting a will to probate. Motion denied.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

J. E. Pemberton and A. G. Kazebeer, both of San Francisco, for appellant Louise Malone. Cullinan & Hickey, Wilson & Haines, Hugh K. McKevitt, and Theo. Bell, all of San Francisco, for respondent.

PER CURIAM. This is a motion to dismiss an appeal from an order admitting a will to probate on the ground that the appeal was not taken within the time allowed by law. It was not taken within 60 days after the date of the entry of the order (section 1715, Code Civ. Proc.), but it was taken within 30 days after a motion for a new trial duly made was determined (section 939, Code Civ. Proc.).

The court is of the opinion that the provision of section 939, Code of Civil Procedure, as amended in 1915 (St. 1915, p. 205), providing that if proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until 30 days after entry in the trial court of the order determining the motion for a new trial or other termination in the trial court of the proceedings upon such motion, is applicable in the matter of an appeal from an order admitting a will to probate, and for that reason the motion to dismiss the appeal is denied.

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33 Cal. App. 100

KLOSTER v. HAWN. (Civ. 1905.)

(District Court of Appeal, First District, California. Feb. 27, 1917.)

1. LANDLORD AND TENANT ⟹322—CROPPING CONTRACTS — CONSTRUCTION — ACTS OF PARTIES.

Regardless of exact terms of a cropping contract, the trial court will not be put in error for interpreting it in accordance with the acts of the parties in making a number of partial settlements.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1353, 1354, 1357.]

2. APPEAL AND ERROR ⟹1032(2)—BURDEN OF SHOWING ERROR—REJECTION OF EVIDENCE.

Plaintiff and defendant were landlord and tenant on share-cropping lease. The landlord sued in unlawful entry and detainer and later for recovery of money received by the tenant for the crops. The actions were tried together, and the tenant cross-complained for money and labor in cropping the land. Plaintiff sought to show that he had ordered a surveyor to check over the land and determine what work defendant did, and also to introduce testimony of the surveyor as to what he found. The surveyor's maps were admitted, but his testimony and that of plaintiff were excluded in rebuttal, plaintiff having gone into the matter on direct examination. The record fails to show that the evidence rejected would have added anything shown by the maps, nor does it show the issues in the unlawful detainer action. *Held*, that such showing does not sustain plaintiff's burden of proving error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4048, 4049.]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by Jules Kloster against C. W. Hawn, wherein defendant filed a cross-complaint. Judgment for defendant, and plaintiff appeals. Affirmed.

L. N. Barber and F. W. Docker, both of Fresno, for appellant. W. D. Crichton and C. K. Bonestell, both of Fresno, for respondent.

LENNON, P. J. This is an appeal by the plaintiff from a judgment in the defendant's favor for the sum of $340 and costs upon his answer and cross-complaint.

The record discloses the following facts: During the years from 1913 to 1915, inclusive, the plaintiff and defendant stood in the relation of landlord and tenant with respect to a certain tract of land in Fresno county, which the defendant was to work on shares under a cropping lease. During the close of the latter year the plaintiff commenced an action in unlawful detainer for the ouster of the defendant from the land. The defendant apparently appeared and answered in that action, and, issues being thus made up, the cause was ready for trial. In the meantime the plaintiff commenced the present action against the defendant for the recovery of money alleged to have been received by the latter for the plaintiff's use and benefit from the sale of certain crops raised upon the land. The defendant appeared in that action with an answer and cross-complaint for money expended in plowing and checking the land in question upon an oral agreement with the defendant providing for the extent and compensation of such work. Plaintiff answered said cross-complaint, admitting the making of an oral agreement with the defendant for the leveling, checking, plowing, and seeding of certain portions of the land in question, but denying that its terms were those alleged by the defendant, and averring that the defendant had not performed or completed the performance of his part of said agreement. The issues in this action having been thus made up, both of said causes came on for trial, whereupon it was stipulated by counsel for the respective parties that the two causes should be tried together. The court permitted this to be done, and upon such dual trial the plaintiff apparently took the laboring oar, and undertook to testify upon his examination with respect to the amount of leveling and checking of the land which the defendant had done during the years in question, and also as to the various transactions between the defendant and himself relating to said agreement and its performance, and also as to the settlements made from time to time as the products of the land were sold and their proceeds divided. The defendant also testified as to the terms of the oral agreement between the parties, with respect to the leveling, checking, and cultivation of the land, and the application from time to time of the moneys realized from the disposition of its crops.

The court found from the evidence before it that there was a balance due the defendant of $340, and rendered its judgment accordingly. Plaintiff appeals.

Appellant's first contention is that the evidence is insufficient to sustain the findings of the court in the particular respect that it fails to show that the defendant had so far completed the work of leveling and checking the land in question, according to the terms of the oral agreement between the parties, as to be entitled to recover the amount awarded him, and that in respect to his cross-complaint for the value of such work, his action was prematurely brought.

[1] From a reading of the whole record we are unable to say, however, that the court was in error in reaching the conclusion arrived at by it. Whatever may have been the precise terms of the original oral understanding between the parties as to the extent to which the work of the defendant in leveling and checking the whole of the land, or even the whole or any part of one or more of its several lots, should proceed before he was entitled to be paid for such work, the record does show that the parties by their conduct in making their settlements from time to time, as the products of the land were sold, placed their own construction upon the contract in suit, which in effect was that the defendant was to be paid from time to time a specified sum per acre for the work actually done by him, regardless of whether or not the whole or any part of said work had been completed. We are not, therefore, prepared to say that the trial court was in error in interpreting the contract in suit in keeping with the conduct of the parties thereto. Nor can we say from the record before us that the sum awarded to the defendant was not justified by the evidence adduced upon the whole case.

[2] The next and final contention of the plaintiff is that the court erred in its refusal to permit him to testify in rebuttal as to his having ordered a surveyor to make a survey of the land for the purpose of showing the amount of leveling and checking done by the defendant, and was also in error in refusing to permit the surveyor to testify as to what work his survey showed to have been done by the defendant. Had this case been tried alone there could be no doubt that the ruling of the trial court in refusing to permit the introduction of this offered evidence upon the objection that it was not rebuttal would be error. It was clearly in proper rebuttal of the defendant's evidence in support of his cross-complaint in this action; but whether it was prejudicial error sufficient to require a reversal of the judgment is another question. The only matter to which the plaintiff was called in rebuttal was as to his having ordered the survey. This would seem to be rather immaterial, for whether or not the plaintiff had ordered the survey would not affect the integrity or value of the survey or of the surveyor's testimony regarding it had he been allowed to so testify. The material error, if any, lay in the refusal of the court to permit the testimony of the surveyor to be given; but in this respect the record shows that the surveyor, when called as a witness by plaintiff, did testify without objection to the extent of identifying the maps which he had made purporting to show the amount of leveling and checking which had been done by the defendant upon the land. These maps were then offered and admitted in evidence; and it was after these were before the court that the objection was for the first time made and sustained to the questions asked of the surveyor as to the leveling and checking of the land. The maps are not before us; and we are therefore unable to say that the evidence of the surveyor, if presented, would have added anything to what had already been shown upon the face of his map. The burden was upon the appellant to affirmatively show reversible error of the court in its ruling in respect to this matter; and we cannot say that such error appears in the absence of some affirmative showing or claim that the testimony of the surveyor would have added anything to that which had been already exemplified on the face of his maps. Aside from this, however, there is no record here as to what the issues were in the action for unlawful detainer, and in which it may well be that the evidence above offered would not have been proper rebuttal. It does appear, however, that upon the trial the plaintiff did assume to testify in chief as to the deficiencies in the defendant's work. The trial court, with the record of both cases before it, held that the plaintiff, having gone into the matter in chief, should have exhausted his proofs. In view of the state of the record we are unable to say that in so doing the court abused the discretion with which by the Code it is invested as to the order of proof in the dual trial before it.

Judgment affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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33 Cal. App. 98

PIERCE v. EMPLOYERS' INDEMNITY EXCH. et al. (Civ. 2303.)

(District Court of Appeal, Second District, California. Feb. 27, 1917.)

1. Courts ⟹212 — District Court of Appeal—Jurisdiction.

In an action at law wherein the amount of the demand was less than $2,000, the appeal should have been taken to District Court of Appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 511, 513–515.]

2. COURTS ⚷212—COURT WITHOUT JURISDICTION—POWER TO MAKE ORDERS—STATUTE.

Const. art. 6, § 4, defining the appellate jurisdiction of the Supreme Court and of the District Courts of Appeal, and providing that no appeal to either of such courts shall be dismissed because not taken to the proper court, but the cause shall be transferred to the proper court on just terms, does not give to the court to which an appeal has been wrongly taken any jurisdiction to make orders extending time, or any other orders except the order of transfer, and, though the Supreme Court may transfer any case from a District Court of Appeal to the Supreme Court, until it has made such order of transfer it is without jurisdiction over cases in which the Constitution provides that appeal shall be taken to a District Court of Appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 511, 513–515.]

3. APPEAL AND ERROR ⚷773(2)—FAILURE TO FILE OPENING BRIEF—DISMISSAL.

Where the time for filing appellant's opening brief had expired when notice of motion to dismiss was served and filed, respondent is entitled to dismissal as called for by her motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108.]

Action by Ita Pierce against the Employers' Indemnity Exchange and another. From a judgment for plaintiff, the named defendant appealed to the Supreme Court, which transferred to the District Court of Appeal, and plaintiff moves to dismiss. Motion to dismiss granted.

Oliver O. Clark, George M. Pierson, and Claud B. Andrews, all of Los Angeles, for appellant. Ingall W. Bull and Fleming & Woodard, all of Los Angeles, for respondents.

PER CURIAM. [1] This was an action at law in which the amount of the demand was less than $2,000, and the appeal should have been taken to this court. Nevertheless the defendant Employers' Indemnity Exchange appealed to the Supreme Court, and filed its transcript with the clerk of that court on the 19th day of December, 1916. By order of February 6, 1917, the Supreme Court transferred the case to this court; the transfer being made on jurisdictional grounds. No brief having been filed on behalf of the appellant, the respondent Pierce, on February 8, 1917, served and filed notice of motion to dismiss, stating, among other grounds of motion, that appellant had not filed its brief or points and authorities within 30 days from the time of filing the transcript. More than 30 days after the transcript was filed, and before the transfer of the case to this court, the Chief Justice of the Supreme Court signed an order extending appellant's time for filing points and authorities until the 19th day of February, 1917; and on the 19th day of February, 1917, the presiding justice of this court signed an order which was entered in the minutes, extending appellant's time for the same purpose for a further period of fifteen days. Without doubt the order obtained from the Chief Justice of the Supreme Court was inadvertently made by him without having his attention called to the fact that the appeals had been taken to the wrong court. Section 4 of article 6 of the Constitution, after defining the appellate jurisdiction of the Supreme Court and of the District Courts of Appeal, states that no appeal to either of those courts shall be dismissed for the reason only that the same was not taken to the proper court, "but the cause shall be transferred to the proper court upon such terms as to costs or otherwise as may be just, and shall be proceeded with therein as if regularly appealed thereto."

[2] It has never been held that this saving clause of the Constitution gives to the court to which the appeal has been wrongly taken any jurisdiction to make orders extending time, or any other orders, in such a case, except the order of transfer. It is true that the Supreme Court may transfer any case from a District Court of Appeal to the Supreme Court; but, until it has made such order of transfer, it is without jurisdiction over cases in which the Constitution provides that the appeals shall be taken to a District Court of Appeal. The appellant cannot by its own mistake confer jurisdiction contrary to the Constitution. The order made by the presiding justice of this court extending the time of appellant for filing its opening brief was made without knowledge that respondent had served and filed a notice of motion to dismiss the appeals, and would not have been made if that fact had been called to his attention. That order, therefore, is revoked.

[3] As the time for filing appellant's opening brief had expired on the 8th day of February, when the notice of motion to dismiss was served and filed, respondent is entitled to a dismissal as called for by her motion. The rule to this effect has been settled by several decisions, among which are Barnhart v. Conley, 17 Cal. App. 230, 119 Pac. 200; McCabe v. Healey, 139 Cal. 30, 72 Pac. 359; Coats v. Coats, 146 Cal. 443, 80 Pac. 694.

Respondent's motion to dismiss the appeals is granted.

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33 Cal. App. 78

CHAMBERS et al. v. BELMORE LAND & WATER CO. (Civ. 2215.)

(District Court of Appeal, Second District, California. Feb. 24, 1917.)

1. LANDLORD AND TENANT ⚷159(2)—LEASES—BREACH OF CONTRACT—EVIDENCE.

In an action against a landlord for breach of an agreement in a lease contract to construct headgates to enable the tenant to irrigate the land, evidence *held* to warrant a finding that the landlord's failure to construct such headgates was the proximate cause of the damage sustained by the tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 611.]

2. LANDLORD AND TENANT 🔑159(2)—DEFENSES—DILIGENCE.

Where the failure of the landlord to construct headgates enabling lessees to irrigate land caused a crop failure on a large portion of the land planted, the lessees cannot be denied recovery on the ground that they should have constructed the headgates themselves, it appearing that such gates would have cost upwards of $2,000, for in such case the lessees had the right to rely on the landlord's agreement, and the case does not fall within the rule warranting denial of damages where one injured might have prevented the injury by reasonable diligence and slight expense.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 611.]

3. NEW TRIAL 🔑102(2)—RIGHT TO—NEWLY DISCOVERED EVIDENCE.

A new trial will not be granted on the ground of newly discovered evidence which was almost wholly cumulative, particularly where it appeared that the unsuccessful party by the exercise of reasonable diligence could have procured such evidence at trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 211.]

4. COURTS 🔑91(1)—DECISIONS—PRECEDENTS.

The last decision of a court of last resort, though inconsistent with an earlier decision, is deemed to establish the law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313, 325.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by B. L. Chambers and another against the Belmore Land & Water Company, a corporation. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. Affirmed.

Barstow, Beach & Rohe, of Los Angeles, for appellant. Drew Pruitt and H. G. Redwine, both of Los Angeles, for respondents.

SHAW, J. The subject of this action is defendant's alleged liability for damages due to its breach of the terms of a contract of lease made to plaintiffs. Upon trial judgment was entered in favor of plaintiffs, from which, and an order denying its motion for a new trial, defendant appeals.

[1] The evidence tended to establish the following facts: Defendant was the owner of a large tract of land in Fresno county, which it leased, for the growing of grain thereon, to plaintiffs, who agreed to pay defendant as rental therefor one-fifth of the crop grown thereon during the season of 1912. The land was located in an arid zone, by reason of which fact it was necessary in the growing of crops thereon to irrigate the same. The source of supply of water for such irrigation was two streams known as Silver creek and Panoche creek, having their sources in the mountains, and which as a rule during the rain and flood seasons afforded a supply of water, which, however, varied from year to year, depending upon the precipitation of moisture upon the watershed tributary to said creeks. In order to utilize the waters of the creeks for irrigating the land, it was necessary to construct a dam across the streams whereby to divert the water therefrom into a main canal, by means whereof and lateral ditches connected with said main canal, it was distributed over the land. The lease contained provisions as follows:

"It is agreed by party of the first part (defendant), that he shall construct a dam across the Silver creek and Panoche creek on or before December 20, 1911, and to place headgates at different points of turnouts. It is agreed by party of the second part (plaintiffs), that he shall use all water from Silver creek and Panoche creek diligently, which means, as long as water can be had in heads of one hundred inches or more, and that it shall be turned either upon the land farmed by said second party, or upon other land owned by party of the first part. It is further agreed on part of party of the second part (plaintiffs), that he shall keep said dam and gates in repair and that he will attend said dam in person or by reliable party during heavy rains."

Plaintiffs entered upon the land and in the winter of 1911 and 1912 plowed and prepared about 800 acres thereof for grain, which they seeded to barley, and also reconstructed and cleaned the lateral ditches extending throughout the tract for use in irrigating the grain. Defendant constructed the dam across said streams, completing the same some time in February and prior to there being sufficient rainfall to affect the flow of water in the creeks, but at all times neglected and refused to construct the headgates which it agreed to install in the main canal for the purpose of diverting water therefrom into the lateral ditches, the cost of which would have been about $2,000. It appears there was little rainfall upon the watershed tributary to said creeks during the winter, but that about March 1st there was a storm as a result of which the creeks were filled with water for a period of about 50 hours, during which time plaintiffs, as best they could without the headgates, and with a sufficient force of men and by means of dirt dams constructed in the main canal, irrigated about 100 acres of the barley which they had planted. It further appears that, had defendant complied with its agreement to put in the headgates in the main canal as promised, the flow of waters in said creek during said 50 hours could have been used to properly irrigate at least 400 acres of said barley, and that for want of the headgates it was impossible for plaintiffs to control the water and conduct it upon the land, as a result of which at least three-fourths of the water which might have been used for irrigation with the headgates installed was lost and dissipated. The conclusion of the court was that, notwithstanding the light seasonal rainfall, the flow of water in said creeks, had headgates been put in as agreed upon, would have enabled plaintiffs to irrigate 400 acres of the barley instead of 100, and that the 100 acres produced 15 sacks of 110 pounds each per acre, which, after paying the rent reserved in said lease, gave plaintiffs 12 sacks of barley per acre; and that said 300 acres additional, had they been irrigated, would have produced a like number of sacks per acre, the market value of which, after paying all expenses connected therewith, would have been $8,378.55.

While admitting its breach of the contract to install the headgates, appellant insists that such breach of the contract was not the proximate cause of the damage found to have been sustained by plaintiffs. Says appellant:

> "The record shows there were many steps between the headgates and the actual securing of a crop of barley."

It appears, however, that plaintiffs, relying upon defendant's promise, took every step required of them in the plowing, seeding, use of the water available for irrigation, and growing of a crop upon the land, and that, owing to the fact that the flow of water in said streams during the season of 1912 continued for only 50 hours, it was impossible by the use of dirt dams to irrigate more than 100 acres of land, whereas with the headgates installed, which would have permitted control of the flow of water, 400 acres could have been irrigated during said time. Nor is there any ground for claiming that the lack of irrigation of the crop was due to plaintiffs' failure to care for the irrigating system, since there is ample evidence to the contrary. The situation is explained by the testimony of one of plaintiffs' witnesses who, in referring to extra work done, stated:

> "If we had had the headgates and the turnouts, we would not need to have done this extra work. We made some of the dams before the water started and some afterwards; we had one in when the water first came, and we had to go up the ditch and turn it out into No. 6, and we had to turn it also to get it in No. 7. We had to go to the dam (a distance of four miles) and turn the water out of the main canal, go back down, put this mud dam in, and go up to the canal again and turn the water in there again and let it come down. A large part of the time during that 50 hours the water ran we had to turn it down the creek in order to put in the mud dams."

In our opinion, it is apparent from the evidence that, whatever might have been done in preceding years when for a long period of time the streams afforded a continuous flow of flood waters, the flow of water therein for a period of 50 hours only during the month of March, 1912, was insufficient to irrigate more than 100 acres of the land without the headgates called for by the contract; and that, had these gates been installed, the flow of water, as found by the court, was adequate to irrigate 400 acres. Hence the proximate cause of failure of the crop on the 300 acres of land was want of irrigation, due directly and solely to defendant's neglect to install headgates in the main canal by means of which the water diverted from the creeks could, with the force of men employed, have been controlled, and, through the lateral ditches constructed therefor by plaintiffs, properly distributed over the land.

[2] Conceding the damage sustained to have been due to defendant's breach of the contract, appellant nevertheless insists that plaintiffs should themselves have constructed and installed the headgates; in support of which contention it cites the case of Mabb v. Stewart, 147 Cal. 413, 81 Pac. 1073, to the effect that in a case of this character, where the party injured could with reasonable diligence and slight expense have prevented the injury, the measure of damage sustained is limited to the reasonable cost of doing that which would have prevented the injury. To the same effect is 1 Sutherland on Damages (3d Ed.) § 88, where it is said:

> "Where the damages that would otherwise result from a wrong of this sort can be reduced by reasonable diligence and at slight expense upon the part of the party injured, the measure of damages, in case the injured party willfully and negligently fails to use the diligence or incur the expense, is not the serious consequences which actually and naturally result from the deprivation, but is limited to the reasonable expense which would be necessary to prevent further loss."

In the Mabb Case, plaintiffs could have prevented damage to the extent of nearly $3,000 by the payment of $30 wrongfully exacted by the defendant therein as a condition of supplying water for irrigation. While applicable to the facts in that case, the rule has no application to the circumstances in the case at bar. Plaintiffs had the right to assume that defendant would, prior to the need therefor, construct the headgates in accordance with its agreement. Moreover, if there was a slight rainfall only, the headgates would have been useless and of no avail to plaintiffs. The cost was not slight, but, as shown by the evidence, the expense of installing the same would have been some $2,000. The conditions existing and cost of the improvement render the rule to which we have referred inapplicable to the case.

[3] One of the grounds for a new trial was newly discovered evidence, in support of which defendant filed several affidavits. An examination of these not only shows that the alleged newly discovered evidence was touching issues presented by the pleadings, but almost wholly cumulative. Moreover, it appears that defendant by the exercise of reasonable diligence could have obtained the testimony of such witnesses for use at the trial. The issues being tendered by the pleadings, it was the duty of defendant to make such preparation to meet the same as it deemed advisable; and the fact that it expected plaintiffs to produce said witnesses is no excuse for its failure to have produced them.

There is no merit in the contention that the court failed to find upon material issues; and the claim that there was a settlement between the parties which, as to plaintiffs' claim for damages, constituted an accord and satisfaction, is groundless.

[4] The court in ascertaining and determining the damages sustained by plaintiffs followed the rule laid down in Teller v. Bay & River Dredging Co., 151 Cal. 209, 90 Pac. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779, which conceding it to be in conflict with that of Crow v. San Joaquin, etc., Co., 130 Cal. 314, 62 Pac. 562, 1058, cited by appellant, must nevertheless, since it is later in point of time, be deemed the law upon the subject.

In our opinion, the appeal is without merit, and the judgment and order are therefore affirmed.

We concur: CONREY, P. J.; JAMES, J.

(33 Cal. App. 97)

RICHMOND DREDGING CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 2095.)

(District Court of Appeal, First District, California. Feb. 26, 1917.)

Master and Servant 🔑417(7)—Workmen's Compensation Act — Award on Conflicting Evidence.

Where the Industrial Accident Commission made its award of compensation to an injured servant on a fairly substantial conflict in circumstantial evidence, the appellate court cannot interfere with the award, though the circumstantial evidence affords strong reasons in support of a conclusion contrary to that which the commission reached.

Petition for certiorari, by the Richmond Dredging Company against the Industrial Accident Commission and Resto Sulaver, to annul an award of the commission. Writ dismissed, and award affirmed.

Redman & Alexander, of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondent Industrial Accident Commission. C. Harold Caulfield, for respondent Sulaver.

PER CURIAM. The petitioner, in support of its contention that the award made by the Industrial Accident Commission in this case should be annulled, argues that the evidence points all one way, viz. against the conclusion arrived at by the commission, and that there is no evidence in the record upon which its award can be based.

We are of the opinion, however, that there is a conflict in the circumstantial evidence upon which this award is founded; and while we feel that the commission might with propriety have reached a conclusion diametrically opposed to the one arrived at by it, and probably would have found stronger reasons in support thereof in the circumstantial evidence relied upon by the petitioner, nevertheless, having made its finding upon what we conceive to be a fairly substantial conflict in such evidence, we do not see how we can interfere with the award, and for that reason the writ is dismissed and the award affirmed.

(33 Cal. App. 59)

SUHR v. METCALFE et al. (Civ. 1621.)

(District Court of Appeal, Third District, California. Feb. 21, 1917. Rehearing Denied March 23, 1917. Denied by Supreme Court April 19, 1917.)

1. Assignments 🔑94—Rights of Assignee — Notice of Defenses — Payment under Building Contract.

The assignment of the last payment due a building contractor puts the assignee, independently of any statute, on inquiry as to the condition on which the payment was to be made to the contractor, and gives the assignee no rights against the owner greater than the contractor himself would have had, especially where the assignee consented in writing that a portion of such payment might be withheld to meet claims against the contractor.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 162-165.]

2. Set-Off and Counterclaim 🔑49(1) — "Thing in Action" — Statute — Right to Set Off.

An assignment of the last payment due under a building contract made before the payment was due is an assignment of a "thing in action" within Code Civ. Proc. § 368, providing that an action by the assignee of a thing in action is without prejudice to any set-off or other defense existing at the time of or before notice of the assignment.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 107.

For other definitions, see Words and Phrases, First and Second Series, Thing in Action.]

3. Evidence 🔑450(7) — Parol Evidence — Explanation of Contract—Unambiguous Provisions.

Under Civ. Code, § 1638, providing that the language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity, and section 1639, providing that, when a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible, parol evidence is inadmissible to show that a supplementary contract whereby a building contractor, in consideration of the owner's note acknowledged satisfaction in full for all extras due and agreed to deliver the building on completion, clear of any charge of any character whatever, including architect's charges, referred only to charges for the extras, since the provision clearly includes charges for work done under the original contract as well as the extras, and that provision is not an absurdity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2071.]

4. Evidence 🔑384 — Parol Evidence — Construction of Contract — Extrinsic Circumstances.

Civ. Code, § 1647, permitting explanation of a contract by reference to the circumstances under which it was executed and the matter to which it relates does not permit parol testimony to vary the express terms of a written instrument.

5. Appeal and Error 🔑1050(1)—Prejudicial Error—Admission of Evidence.

In an action by an assignee to recover the last payment for a building which the owner claimed the right to withhold to pay certain charges against the building, including architect's fees, error in admitting parol testimony that the builder's agreement to deliver free of charges was limited to charges for extras was prejudicial where the architect made no charge in connection with the extras.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157.]

6. Novation 🔑6—Building Contract—Order by Contractor—Acceptance by Owner.

Where a building contractor gave a subcontractor an order on the owner which the latter accepted, there was a novation by which the liability of both the original contractor and the owner became fixed so that neither the contractor nor his assignee could recover that amount from the owner.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 6.]

7. Assignments 🔑57—Building Contract—Withholding Payment—Notice of Adverse Claims.

An order on the owner given by the contractor to a subcontractor and by the latter presented to the owner for acceptance is sufficient notice to the owner within Code Civ. Proc. § 1184, to entitle the owner to withhold the amount of the order from the contractor.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 116–120.]

8. Principal and Agent 🔑170(2)—Unauthorized Acts of Agent—Ratification by Principal.

Where the agent for an owner accepted for her an order drawn by the principal contractor in favor of a subcontractor, that acceptance, if unauthorized, was ratified where the owner was advised of the agent's action and accepted it thinking it all right.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 639, 640.]

9. Contracts 🔑300(2)—Delay in Performance — Excuse — Building Contract — Statute.

Civ. Code, § 1511, providing that the want of performance or any delay therein is excused when performance is prevented or delayed by the act of the creditor or by operation of law, by an irresistible human cause or public enemy, or when the debtor is induced to make it by any act of the creditor naturally intending to have that effect, does not excuse the delay in performance of a building contract because of an agreement between the contractor and owner for extra work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1376, 1380, 1381.]

10. Contracts 🔑300(1) — Delay in Performance — Excuse — Acts of Owner — Storm.

Where a building contract provided that the time during which work was delayed by the owner or by stormy weather should be added to the time fixed for completion, but that no allowance should be made unless a written demand for additional time was presented to the owners by the contractor within 24 hours after the cause for such delay has accrued, delay is not excused by acts of the owner or his architect or by a storm where no demand for additional time was made by the contractor.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1372, 1373, 1376, 1379–1381.]

11. Contracts 🔑300(1) — Delay in Performance—Excuse—Street Improvements.

Street improvements by municipal authorities do not excuse delay in completing a building unless it rendered performance of the contract practically impossible; mere difficulty or unexpected expense not being sufficient.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1372, 1373, 1376, 1379–1381.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by H. F. Suhr, Jr., against the Western Mortgage & Guaranty Company to recover certain mortgage certificates, in which Eva Metcalfe and another were substituted as defendants after the original defendant delivered the certificates into court. Judgment for the plaintiff, and the substituted defendants appeal. Reversed.

Luther Elkins and R. P. Henshall, both of San Francisco, for appellants. Louis H. Brownstone and J. J. Lermen, both of San Francisco, for respondent.

BURNETT, J. The action was in claim and delivery for the recovery of certain first mortgage 6 per cent. certificates of the face value of $11,500. The original defendant was the Western Mortgage & Guaranty Company, a corporation. Upon affidavit of the president of said company that the Metcalfes claimed to be the owners of said property and had made a demand for its possession, the court made an order directing the guaranty company to deliver said certificates to the clerk of the court, and that Eva and George Metcalfe be substituted as parties defendant in the place of said company.

The answer of said defendants sets forth the considerations which we are called upon to determine. Therein by suitable averment it appears: (1) That on or about the 2d day of April, 1912, the defendants entered into a building contract with the Mutual Construction Company for the construction by the latter of a hotel upon the lot of defendants on Geary street between Mason and Taylor, in San Francisco, for the sum of $141,350. It was agreed that $90,000 of that sum should be payable in certificates of the Western Mortgage & Guaranty Company, which were to be secured by a first lien upon said real property, and that $22,500 of the face value of said certificates should be retained by the defendants and not delivered to the contractor until 35 days after the completion of the building; (2) that Righetti & Headman, architects, were employed by the defendants to draw the plans and specifications for the building and to superintend its erection for the customary fee of 5 per cent. of the contract price, and that it was agreed between the Mutual Construction Company and defendants that said company would pay said fee; (3) it was stipulated that the building should be completed within ten calendar months from and after March 1, 1912, and that if the same should not be so completed the defendants should be entitled to damages from said construction company, not as a penalty, but as liquidated damages, the sum of $50 for each day the building remained uncompleted, and that on or about December 12, 1912, the contractor further agreed to deliver the said building free and clear of all charges and liens whatever, including any liens for architects' fees.

Then follows the specification of the particulars in which the contractor failed to keep its agreement: (a) It failed to pay the balance of the fee of the architects in the sum of $4,567.50, and it is averred that said Righetti & Headman claimed and asserted and have in fact a valid and subsisting mechanics' lien against said real property for this sum; (b) on June 9, 1913, the Mutual Construction Company was indebted to the Citizens' Construction Company for work and labor performed and materials furnished on said building as subcontractor in the sum of $2,124.80 and that said contractors gave an order on said defendants for said sum, which order was accepted on or about June 9, 1913, and that defendants are now indebted to said subcontractor in said sum; (c) the contractor failed to complete said building until four months after the time fixed in the contract, and that thereby defendants suffered a loss of rent and were damaged in the sum of $8,000; (d) at the time of the acceptance of the building it was uncompleted, and that for the purpose of securing its completion it was agreed that the defendants should retain the sum of $500 until the completion thereof.

It further appears that the $11,500 in face value of said certificates referred to in the complaint were part of the $22,500 final payment due 35 days after the completion of the building, and that the plaintiff at the time he acquired his alleged ownership of the certificates had full knowledge and notice of these rights, counterclaims, and offsets, and, furthermore, that on or about August 2, 1913, and after a knowledge and notice of all these facts, the plaintiff agreed to the retention by the Western Mortgage & Guaranty Company, the original defendant, of all these certificates until the performance by the Mutual Construction Company of all its covenants and agreements, including the payment of the demands above set forth.

The general findings and the judgment were in favor of plaintiff. As to the special defenses the court found that the Mutual Construction Company did not agree to deliver the hotel building to the defendants Metcalfe free and clear of all liens and charges, including a lien for architects' fees; that said company had not failed to carry out its contract with the exception that certain work on the ground floor of the building had been omitted pursuant to agreement, and for this work $500 of the $22,500 worth of certificates was ordered to be retained by the clerk until the building was finally completed. As to the claim of the Citizens' Construction Company it was found that at the time said order of June 9, 1913, was given there was nothing due to the Mutual Construction Company from the defendants Metcalfe, for the reason that said company had previously assigned and transferred to plaintiff all sums of money due to it from the defendants, and that at the time of the presentation of this order to defendants they had notice of this prior assignment, and as to the acceptance of said order it was found that the attorneys who had indorsed upon the order the acceptance had no authority to accept the same for the defendants.

[1] It can hardly be disputed that the rights of plaintiff as assignee of the Mutual Construction Company are no other or greater than those of said company, the contractor, and that, if the aforesaid defenses are sound and decisive as against said company, they may be urged with equal propriety and effectiveness against the claim of plaintiff. In other words, it seems plain that plaintiff by reason of the assignment is entitled to all the rights and is subject to all the liabilities of the Mutual Construction Company growing out of and based upon said building contract.

[2] Indeed, the assignment, as far as the present controversy is concerned, related to "a thing in action," since the last payment was not due when plaintiff succeeded to the rights of the contractor, and section 368 of the Code of Civil Procedure is in point:

> "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before maturity."

Besides, it is clear from the record that plaintiff had notice, or at least was put upon inquiry, as to the conditional liability of the contractor, and therefore he cannot shield himself from the obligations of the contract. Again, on August 2, 1913, plaintiff consented in writing that the Western Mortgage & Guaranty Company should hold $12,500 of the said final payment under the contract for the protection of the defendants against these claims, and he cannot now repudiate his agreement.

In dismissing this point it may be said, indeed, that if the final payment supposed to be reserved for the protection of the owner can be so readily disposed of regardless of his rights, a building contract affords no obstacle to the facile and convenient perpetration of fraud against the property holder. But the fact must be, independent of any statutory provision, that the assignment itself of such claim demands an inquiry upon the part of the assignee to determine the conditions of future payments. To these alleged defenses, applicable to plaintiff as to the contractor, we therefore devote some attention.

[3] It is admitted that, on December 12, 1913, an agreement was entered into by the contractor and the defendants in the form of a letter as follows (letter head of Mutual Construction Company):

"San Francisco, Cal. Dec. 12/12.

"Mr. George Metcalfe and Mrs. Eva Metcalfe, San Francisco—Dear Sir and Madam:

In consideration of the execution and delivery to us this day of your note for the sum of fourteen thousand six hundred and eighty-six (14686) dollars, secured by a third mortgage on your property on Geary street we hereby acknowledge satisfaction in full for all extras due us upon the building constructed upon the lot on Geary street *and we further agree to deliver said building to you upon the completion thereof clear of any charge of any character whatever, also including architect.* * * *

"Yours very truly,
"Mutual Construction Co.,
"[Corporate Seal.]
"Per [Signed] S. L. Hansbrough, Secretary."

The question in dispute is as to the force and effect of the clause we have italicized. It is not claimed that by reason of fraud, accident, or mistake there was any failure to express the intention of either of the parties, but upon the contention that said terms are ambiguous parol evidence was admitted to show what was understood by the adopted form of expression. In that respect we feel entirely satisfied that error was committed. The language appears to us plain and unequivocal, and in this case if it is to be varied by parol no reason can be advanced why the same practice should not be permitted in any instance where parties have reduced their agreements to writing. How in concise phraseology it could be more clearly declared that the building when complete should be free from such a burden as the lien in question we are at a loss to understand. It was to be clear of any charge of any character whatever. This comprehensive language would necessarily include a lien for the architects' fees, but the company was not satisfied to let it rest at that, but has shown conclusively by specific mention that it had particularly in view a burden that might be imposed by reason of the architects' charge. The familiar sections of the Code cited by respondent do not, in our opinion, lend any support to his contention. The language herein seems to be clear and explicit and not to involve an absurdity, and therefore, within the purview of section 1638 of the Civil Code, said language should govern the interpretation of the agreement. Manifestly the agreement to turn over the building free from any liens does not involve an absurdity or even anything unusual or extraordinary, and, since the said conditions concur, the succeeding section of the Code (1639) would limit and confine to the writing itself the inquiry as to the intention of the parties.

[4] Section 1647, permitting explanation of a contract by reference to the circumstances under which it is executed and the matter to which it relates, may be of aid in many instances where it is apparent something needs explanation, but it cannot be extended to the point of permitting parol testimony to vary the express terms of a written instrument.

[5] If we are right in this position it would not be disputed that the error was prejudicial, for the reason that the parol evidence was offered and received for the purpose of showing that the intention was to relieve the building and the owners of any lien or burden for the possible charge of the architects for the extra work put upon the building, and the proof is that there was no charge whatever for said services.

While the said provision seems to us so certain as to preclude parol testimony to determine its meaning, there is force in the other consideration suggested by appellants that, if there be any uncertainty in the language, it should be interpreted most strongly against the party who caused the uncertainty to exist, that is, the contractor, who fits the position both of promisor and the person who prepared the contract. Section 1654, Civ. Code.

[6] We agree with appellants in their contention as to the claim of the Citizens' Construction Company. There is no dispute that the order for their payment was given by the Mutual Construction Company. We think it equally plain that it was accepted by appellants. If so, there was, in effect, a new contract, a novation, the substitution of one creditor for another. By that order the Mutual Construction Company authorized appellants to pay to said Citizens' Company, out of said 35 days' payment, the sum of $2,124.80, and when the order was accepted the liability and obligation of both became fixed. Neither could thereafter question it, and if the Mutual Construction Company were the plaintiff herein, there could be no doubt that defendants could set up said amount as an offset to the claim made to the said deferred payment. For reasons already stated, we think respondent, as assignee, is equally bound with the contractor, and that said offset may be urged against him.

[7] If we are right in the view that the assignee occupies the same position as would his assignor, then, of course, there is no force in the claim that it was necessary to have a notice to withhold given to the architect or owner as provided in section 1184 of the Code of Civil Procedure. But as to that appellants point out sufficient facts to show a substantial compliance with the requirement of that provision. The written recognition by the Mutual Construction Company of its obligation to the Citizens' Construction Company as made and directed to the owners on June 9, 1913, should be held equivalent to the notice provided by said statute, and the record shows that at that time the said Citizens' Company had a right to file a lien for the amount of its claim. The statute itself provides that:

> "No such notice shall be invalid by reason of any defect in form provided it is sufficient to inform the owner of the substantial matter herein provided."

As stated by appellants:

> "In the present case the Citizens' Construction Company notified the owner of its claim, for it presented the contractor's recognition of its validity and its amount, vouched for by the contractor and itself. It presented this claim

to the owner and asked him to accept and pay it."

This was probably even more than the statute requires. It was at least equivalent to the notice contemplated by the law.

[8] It is contended that the court was justified in finding that this order was not accepted by Eva Metcalfe, the owner. There is no doubt, however, that Mr. Brandon, who was the attorney for Mrs. Metcalfe, accepted this order for her on June 9, 1913. He seems to have been representing her in all these matters, and although he had no express authority to sign the acceptance, it would not seem unreasonable to conclude that his authority was broad enough to cover such act. As to this also it may be suggested that respondent, standing in the shoes of the Mutual Construction Company, assumes rather a questionable attitude in denying the authority of the attorney who was recognized and treated by said company as the qualified agent of appellants. If the owner were disputing the authority of the attorney a very different situation would be presented. However, granting the want of authority, as claimed, it cannot be disputed that the unauthorized act of the attorney might be ratified by the principal and in this case there can be no doubt that it was so ratified. Mrs. Metcalfe's testimony was:

> "I was advised of the execution of this paper, Defendant's Exhibit F, by Mr. Brandon on or about June or July. I accepted it and thought it was all right."

This was a sufficient ratification within the teaching of Ralphs v. Hensler, 97 Cal. 296, 32 Pac. 243, and Porter v. Lassen County, etc., Co., 127 Cal. 261, 59 Pac. 563.

Besides, as before indicated, this particular claim was covered by the letter of plaintiff of August 2, 1913, which was agreed to by Mrs. Metcalfe and the Mutual Construction Company. This appears clear enough from the testimony in the record, and we see no reason why the contract of these parties should not be enforced.

As to the damages claimed for the failure to complete the building within the time specified, we think the delay has not been entirely excused or justified and that said delay did operate to the detriment of defendants. It is claimed that the extra work consumed about 90 days, and that this was covered by a contract between the Metcalfes and the Mutual executed on December 12, 1913, "just 18 days before the defendants claim that the building should have been actually completed." The amount of the extra work was $14,686, and a third mortgage was given in payment of this. Respondent says:

> "It would be strange, indeed, if the defendants in this case were to be permitted to order $14,000 worth of extra work within 18 days prior to the time that the contract was to be completed and expect the same to be finished without allowing additional time."

But it appears that when this agreement was made the extra work had already been done, so the argument is not persuasive.

[9] To determine whether the extra work would excuse delay, we must look to the statute and to the agreement of the parties. The particular law in point is section 1511 of the Civil Code, as follows:

> "The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:
>
> "1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse;
>
> "2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary; or,
>
> "3. When the debtor is induced not to make it, by any act of the creditor intended or naturally intending to have that effect, done at or before the time at which such performance or offer may be made, and not rescinded before that time."

[10] The case does not seem to fall within any of these subdivisions. It is, however, covered by the contract of the parties. Extra work involves an act of the owners and a modification of the contract. In subdivision 3 thereof it provided that:

> "The time during which the contractor is delayed in said work by the acts of the owners or by the acts of God, which the contractor could not reasonably have foreseen and provided for, or by stormy weather which prevents the work, or by any strikes by employés or labor organizations, shall be added to the aforesaid time for completion; but no such allowance shall be made unless a written demand for additional time with the amount thereof approximately stated and the reasons for such demand given is presented to the owners by the contractor within twenty-four hours after the cause for such delay has accrued."

Then section 9 specifically provides for "alterations, deviations in, additions to, or omissions from" the plans and specifications, and declares that "the same shall in no way affect or make void the contract," except that the additional cost was to be added to the contract price. The extras therefore fall within said subdivision 3 and in order to claim an extension of time it was incumbent upon the contractor to make demand, which was not done.

In McGinley v. Hardy, 18 Cal. 116, there was a modification of the contract, but the case is different from this, in that there was no agreement that written demand should be made for extension of time, and the court very properly held that the new contract operated to extend the time for completion of the building.

We can see no reason why it was not competent for the parties to provide in their contract for an exclusive method by which the time could be extended as to this particular feature, nor do we see anything in the way of giving effect to such agreement.

The mistakes of the architect, we think, also fall under said subdivision 3. He was the agent of the owner, and his mistakes were therefore those of the latter. We think also that the interference by rain falls within said subdivision.

[11] It is at least doubtful whether the claim that a period of 30 days should be allowed because of the condition of Geary street is tenable. The court found that the delay was by reason of the act of the municipal authorities. We are not pointed to any evidence in the record that sustains the finding. It does not seem to be included among the facts of which the court may take judicial knowledge. No doubt, the municipal authorities were engaged at the time in constructing a railroad on said street and the proof was easily available, but it should have been produced. Probably through inadvertence it was not offered. As to whether such action of the municipal authorities would excuse the delay, we think the correct test is declared in Carlson v. Sheehan, 157 Cal. 692, 109 Pac. 29, to the effect that it rests upon the consideration whether it rendered performance practically impossible, and in that connection it is said that mere difficulty or unusual or unexpected expense would not excuse the contractor. It is, in our opinion, a close question whether there is sufficient evidence to sustain the conclusion that the condition of said street rendered the performance of the contract "practically impossible," but as the evidence may be different upon another trial, we refrain from passing upon the point.

We think the judgment and order should be reversed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

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33 Cal. App. 83

LINCOLN v. PACIFIC ELECTRIC RY. CO.

(Civ. 2199.)

(District Court of Appeal, Second District, California. Feb. 24, 1917. Rehearing Denied March 27, 1917; Denied by Supreme Court April 23, 1917.)

1. Appeal and Error 🔑1010(1)—Review—Findings—Evidence to Support.

The findings, when there is any evidence tending to support them, will not be disturbed, though the evidence is conflicting.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3981.]

2. Master and Servant 🔑281(9) — Servant's Injury—Contributory Negligence—Operation of Street Railroad—Disregarding Signal.

In a motorman's action for personal injury, evidence *held* sufficient to warrant jury in believing that plaintiff did not drive interurban car into an open switch causing collision with another car in disregard of switch lamp signals.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 993, 996.]

3. Master and Servant 🔑145 — Rules — Construction—"Under Full Control and Prepared to Stop."

Street railway company's rule that "trains must approach all meeting and passing points under full control and prepared to stop" meant control and preparation appropriate to probable emergencies; the purpose of rule being to avoid accidents.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 288.

For other definitions, see Words and Phrases, First and Second Series, Under Full Control.]

4. Master and Servant 🔑281(9) — Servant's Injury—Contributory Negligence—Operation of Street Railroad—Violation of Rules—Speed.

In motorman's action for personal injury, evidence *held* sufficient to warrant jury in believing that plaintiff did not approach switch in disregard of company's rules as to speed, requiring trains to approach meeting and passing points "under full control and prepared to stop."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 993, 996.]

5. Master and Servant 🔑238(7)—Servant's Injury—Contributory Negligence—Operation of Street Railroad—Mistake in Judgment.

Where jury might have believed that a motorman's failure to stop car before running into an open switch was due only to a mistake in judgment, in using the reverse before applying the air brake, they were justified in holding him not guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 681.]

6. Negligence 🔑98—Comparative Negligence—Operation of Street Railroads—Statute.

The fact that motorman negligently failed to stop his car before running into an open switch, colliding with another car, would not require a verdict against him in his action for personal injuries, if jury believed his negligence slight in comparison with employer's negligence, in view of St. 1911, p. 796, providing that employé's contributory negligence shall not bar a recovery for personal injury where his negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished in proportion to employé's contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 93, 165.]

7. Appeal and Error 🔑932(1)—Review—Presumption—Instructions.

Where instructions as to assessing an employé's damages for personal injuries in proportion to his contributory negligence as provided by St. 1911, p. 796, are not complained of, it will be assumed that jury properly assessed damages, making due allowance in accordance with the facts found.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3782.]

8. Appeal and Error 🔑1048(6)—Harmless Error—Cross-Examination.

In a motorman's action for personal injury, refusal to allow defendant's cross-examination of plaintiff, "There is no way to account for it [running into open switch when lights signified it closed], is there?" was harmless, in view of further testimony elicited, which covered all matters which would probably have been developed upon answer to the question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4145.]

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Verne H. Lincoln against the Pacific Electric Railway Company. Defendant appeals from judgment for plaintiff and from order denying new trial. Affirmed.

Frank Karr, R. C. Gortner, and A. W. Ashburn, all of Los Angeles, for appellant. John S. Steely and Jones & Evans, all of Los Angeles, for respondent.

CONREY, P. J. This is an action wherein an employé of an interurban electric railway company seeks to recover damages for personal injuries alleged to have been sustained by the negligence of the employer. The defendant denied all allegations of negligence, and as a separate defense alleged contributory negligence on the part of the plaintiff. The defendant has appealed from a judgment in favor of the plaintiff and from an order denying its motion for a new trial.

The accident occurred at Long Beach, Cal., on February 6, 1913, at about 6:10 p. m. Plaintiff was, and had been for several years, a motorman of the defendant, running trains upon its line between Los Angeles and Long Beach. American avenue is a double avenue of the city of Long Beach, lying on the east and west sides respectively of a private right of way of the defendant company. On that right of way defendant has double tracks running north and south. At a point between Fifteenth and Fourteenth streets a curved track leads from the south-bound main track of defendant, swinging gradually southwesterly into Fourteenth street. In addition to its interurban cars, the defendant operated local cars, called the Willowville cars, and it was the custom to run Willowville cars into the curve above mentioned so as to allow the through trains south-bound to pass them on the main line. On the evening in question a Willowville car was running southward, followed by a three-car train of which plaintiff, Lincoln, was the motorman. The crew of the local car consisted of the motorman, Lysaght, and the conductor, Jesse Dunn.

At the point of divergence of the curved track from the south-bound main track and on the west side of the tracks, there was a switch stand on which was established a switch which was operated by a lever for the purpose of opening and closing the switch, which when opened gave access from the main tracks to the curved track. The switch was operated by a hand lever, and a part of the apparatus consisted of devices for signaling. These devices consisted of colored lights and also of flat sheets of metal called wings. When the switch was closed and locked and the main line in order, the white wings were perpendicular to the main track, and the red wings were parallel to the main track, green lights alone showing. When the switch was open for a train to take the siding, the red wings were perpendicular to the main track, and the white wings parallel thereto, red lights alone showing. In throwing the switch the top part of the switch would move through an angle of 90 degrees. The rules and regulations of the transportation department of the defendant company then in force were well known to the above-named employés, Lincoln and Dunn. Subdivision B of article 142 of those rules was as follows:

> "After a regular train clears the main track and switches are properly set for the main track, the conductor must step to the side of the track opposite the switch stand until after the opposing train has passed, keeping his hand lantern at night in full view of the approaching train, but giving no proceed signal."

Rule 112 was as follows:

> "Trainmen must not accept a proceed signal as against fixed signals, until they are fully informed of the situation and know they are protected. When fixed signals are in operation, trainmen must not give proceed signals against them."

On the occasion in question, in order to let a through train from Los Angeles pass a local car, the crew of the local car stopped at the switch between Fifteenth and Fourteenth streets. It was the duty of Dunn, conductor of the local car, to operate the switch for the passing of these cars. Dunn stepped to the ground, holding in his hand a red and a white lantern. He gave to the motorman of the through train, Lincoln, a signal with his red lantern requiring Lincoln to stop or slow down until the local car should have been taken out of the way. Dunn then went forward on the ground to the switch to open it so that his local car might get off the main line. The lamp of the switch stand then showed a green light northward and southward in conformity with a closed switch. Dunn opened the switch and the signals changed accordingly. The Willowville car proceeded and entered the switch, going ahead therein until its rear stood at the curb line between the railroad right of way and the westerly division of American avenue, about 138 feet from the switch point. Conductor Dunn, his local car having entered the switch, should then have thrown the handle of the switch westward again to close the switch, which would have caused the red light to disappear on the switch lamp and the green light to throw its rays northward toward the approaching through train. Both parties contend and the evidence tends to show that Dunn did not completely close the switch, but the parties do not agree upon the fact as to what Dunn actually did do. Appellant contends that Dunn left the scwitch entirely open in front of the through train, and that he closed it to cover up his fault immediately after the through train had passed into the curved track and the accident had happened. Respondent contends that Dunn closed the switch in front of the through train at least so far as to change the red light to green, and that the through train got into the curve in spite thereof. At any rate, it is the fact that the train swung into the curve without cutting, bruising, or marking either of the switch points or any of the rails, and crashed into the rear end of the Willowvville local car, whereby the plaintiff was injured.

Immediately behind the three-car train which had just entirely passed into the curved track, the switch was found set for the main track and with the green light showing properly northward and southward. Dunn, the conductor of the local car, denied that he had so set the switch after the collision. Two witnesses testified that they saw the light change its north and south rays from red to green immediately behind the train. Counsel in their briefs agree as to what were the respective theories upon which the case was tried. Respondent's theory is that Conductor Dunn left the switch partly open so that the flange of the right-hand front wheel of the first car engaged with the west point of the switch, which extends northerly 1¾ inches farther than the east point of the switch, and threw the switch instantly fully open and thus allowed the train to swing into the curve without derailment. Appellant's theory is that Conductor Dunn left the switch entirely open, and the respondent brought his train into the curve against a red light and into an open switch.

[1] Appellant concedes, of course, the rule that this court will not disregard a finding of fact by the trial court, or the implied finding of a jury, that is supported by evidence tending to support such finding, and that, if the evidence is conflicting, the finding based thereon will not be disturbed. But appellant contends that the physical facts shown, and against which there is no evidence, compel the conclusion that the plaintiff was guilty of contributory negligence directly and proximately causing the accident. Under this general contention counsel for appellant urge four propositions: (1) That plaintiff was negligent in driving his train toward and into the switch, in disregard of the danger indicated by the lamp thereon, and the company's rules concerning same; (2) that plaintiff was negligent in approaching the switch point not under control, prepared to stop, as required by the rules of the company; (3) that if plaintiff approached said switch under full control, prepared to stop, then he negligently failed to stop within the distance intervening; (4) that the evidence is insufficient to establish any negligence against defendant, except in the failure of Dunn to close the switch, and plaintiff was equally negligent in that event.

[2] 1. The evidence is sufficient to support the implied finding against defendant on the first proposition. The plaintiff did not run into an open switch, with a red signal displayed against him. But it is argued that the switch could not have been entirely closed; for then the train would have remained on the main line. Let this be admitted. Then it is said by appellant's counsel that it is inconceivable that the switch could have been sufficiently open to have allowed the train to enter it, without a corresponding misdirection of the rays of the lamp signal; that to run toward a signal imperfectly displayed is as such negligence as to run against a full red light. In this connection out attention is directed to rule 125 of the company:

> "A signal imperfectly displayed * * * must be regarded as a stop signal."

In accordance with this rule the court instructed the jury that, if they believed from the evidence that as the plaintiff approached the switch stand the lamp signal thereon was imperfectly displayed, such imperfectly displayed signal or absence of signal was then and there, according to said rule, a stop signal, requiring plaintiff to stop his train before reaching the switch, and that a violation of that rule by the plaintiff would constitute negligence. To find a verdict for the plaintiff under this instruction, the jury must have believed from the evidence that the signal was not imperfectly displayed. Is the evidence of the physical facts so far beyond doubt that this finding could not be true? Appellant relies upon the evidence which shows the construction and mode of operation of the switch, and ecrtain photographs which were taken on April 23, 1913, which show the appearance of the switch and its signals in three positions, to wit, when the switch is open, when the switch is closed, and when the switch is half open, and contends that from that evidence the flange of the front right-hand wheel, which would touch the switch first, could not have passed to the right of the point of the switch rail, unless there was an opening of at least one inch at the switch point, which obviously could not be done without affecting the position of the switch lamp and causing its lights to become imperfectly displayed. These facts are relied upon to overcome the testimony of the several witnesses who testified that as the train approached the switch the green light was fully displayed; the contention being that it was physically impossible for this testimony to be true. But there are facts which impair the conclusiveness of this argument. Conductor Dunn, in describing what he did after his Willowville car had gone beyond the switch, said:

> "Then I picked up the switch lever and swung it around and threw it down, and looked up at the light, and it was green, and I stepped across the track and gave the high ball. I could not say whether I locked that switch when I threw it back or not, nor could I say whether I lowered the lever all the way down over the dog or not. After Mr. Lincoln answered me by two toots, his train came on down the line and took the switch without any warning."

Lee Higgins was conductor of the front car of the three-car train. He had been conductor on the Willowville line some time before the time of this accident and had operated the switch referred to herein; it having then the same system of locks and keys as at the time of the accident. He testified:

> "That the points of the switch do open, the one opening on the west and the other on the east closing, when the lever is begun to be moved, just begun to be moved, and yet the sign shows green."

There thus appears to be some testimony, which the jury was entitled to believe that the red light would not necessarily begin to show instantly at the beginning of the motion of the lever which was closing the switch, and that the accident may have been caused by failure of Dunn to effectually close and fasten down the switch towards which plaintiff's train was moving. It is therefore entirely conceivable that on account of the jarring of the train immediately before it reached the switch, or from some other cause, the switch opened enough to throw the train over to the curved track, and yet that the plaintiff would never have seen anything in the signal contradicting its first message to him indicating that the switch was safely closed.

[3, 4] 2. Rule 146 was as follows:

> "Trains must approach all * * * meeting and passing points, under full control, and prepared to stop."

There is no exactly prescribed definition of the conditions amounting to full control, nor of the precise limitations of a preparation to stop. These elements would differ according to the machinery and weight and length of trains or cars, and according to local conditions of tracks and grades. Of course, it means a control and a preparation appropriate to the probable emergencies, and has for its purpose the avoiding of accidents. The plaintiff testified:

> That when the Willowville car stopped, to go over to the curved track, his train was running at the rate of 1 or 2 miles per hour, and was 1,000 feet behind the local car. Then when the train advanced, he picked up speed. "I was going when I struck the switch about 12 to 15 miles an hour; 15 miles would put it to the limit." At that time "I had no electricity on at all." "The Willowville car was then standing at the curb line, between the right of way and the street, with the back end of it at that point, which is 138½ feet in a straight line from the switch stand. Going at 12 or 15 miles an hour, it would be impossible to stop a three-car train in that distance."

Plaintiff's testimony as to speed of his train on arriving at the switch was confirmed by numerous witnesses. Counsel for appellant call attention to the fact that six expert motormen testified that even at 15 miles an hour this train could have been stopped in 50 to 75 feet. There is no other evidence to the contrary, other than plaintiff's testimony showing how he used the stopping devices, and that nevertheless he failed to stop within the distance required to avoid the collision. The testimony of those motormen may favor appellant with respect to the next proposition which we are to discuss, but it really confirms the verdict as to the present question; for it entitled the jury to find that plaintiff had his train under full control and prepared to stop, if they believed that his speed did not exceed 15 miles per hour.

[5] 3. Then why did the plaintiff not stop his train in time to avoid the collision? His failure to do so is urged by appellant as establishing beyond doubt the contributory negligence of the plaintiff. In discussing this proposition we will assume that plaintiff had complied with the rule above stated, and that he came to the switch with his train under full control and prepared to stop. If this were not so, the plaintiff would have been negligent; for in view of the purpose of that rule it would be entirely beyond reason to hold that a properly managed train, if under full control and prepared to stop, would meet the emergency which this train faced, by running 138 feet into the rear of a loaded car, and going 35 feet further after the collision, before the train stopped.

What, then, was the defect in management which caused this train to go on as far as it did go? The train was equipped with devices for reversing the current through the motors, and also was equipped with air brakes. There is no claim that any of these were defective or insufficient. It follows as the night the day, that something was wrong with the plaintiff's management of the machinery committed to his care. His testimony was:

> That when he reached the switch he felt the car raise up and bump, like it had struck something, and immediately he realized that something was wrong, as his train went in on the siding. "The second I felt the jar or raising up, I reversed the current to check the train as quick as I could. and I held it there until I felt the train begin to go ahead again, and it felt like the breakers went out, and I then turned on the emergency brake. I figured that was the quickest way to check the train. * * * If it gets too heavy a charge—for instance, reversing the train—the breakers are put on there expressly to keep the motors from being burned up; and it felt like when I reversed it that it went out; and just the minute I felt the resets or breakers had begun to go, I put it in the emergency, as I thought that was the quickest way to stop the train." "I did all that was possible to stop the train, and I did not stop it until the collision came." "I put on the air as soon as I felt the train give way to the breakers or it felt like the breakers were gone."

All of the six motormen who said that a train of the kind in question and operating under the stated conditions could be stopped within 80 feet or less specified that this would be done by using the air brakes. A train moving at the rate of 12 miles per hour will travel 138 feet in about eight seconds. There is no statement in evidence showing how much time was consumed by the plaintiff in using the "reverse" before he applied the air brakes. Assuming, since the testimony on the point is not contradicted, that the train must have stopped within 80 feet after the air brakes were applied, and remembering that even when retarded by the collision the train did not stop until it had traveled 173 feet from the switch, it must be true that the plaintiff traveled 93 feet and used up five seconds of his precious time before he applied the air brakes. But, although defendant's witnesses declared that by full and instant use of the air brakes the train could have been stopped within 80 feet, they admitted a high degree of efficiency in the method of stopping a train, in emergencies, by reversing the current, a process which also reverses the direction of motion of the car wheels. It was admitted by one of these men, who had been employed as an instructor for the motormen that the motormen were sometimes instructed to use the reverse, in emergencies, "under certain conditions," to stop trains; also, "after applying the power and finding the power would not stop it, then applying the air under those conditions, he could do nothing else." Under the testimony, the jury may have believed that it was a mistake of judgment for the plaintiff to have tried the effect of the "reverse" before using the air brakes, and yet that this error did not amount to negligence.

[6, 7] And even if the jury found that the plaintiff was negligent, this fact did not necessarily require that the verdict be in favor of the defendant. At the time when this accident occurred there was in force a statute which changed in important respects the law relating to the liability of employers for injuries sustained by their employés while engaged in the line of duty of their employment. In section 1 of that act we find:

> That in actions to recover damages for personal injuries thus sustained, "in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employé may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employé." Stats. 1911, p. 796.

The court instructed the jury in accordance with these provisions of the statute, and it is not suggested that there was any error in the instructions given. It is entirely inconsistent with the verdict that, although the jury might have attached the taint of negligence to the conduct of the plaintiff, yet that under the evidence they believed that his negligence was slight, and that the negligence of the defendant "was gross, in comparison." If so, it is to be presumed that in assessing damages the jury made due allowance in accordance with the facts found and as required by the statute.

4. The fourth point is that, if the defendant was negligent by reason of the failure of Dunn to close the switch, then the plaintiff was equally negligent. For reasons which are made apparent by what we have said in discussing the other points considered, this court cannot say that the plaintiff was "equally negligent" with the defendant. The evidence was such that the jury's finding upon the facts must be accepted as final.

[8] On cross-examination of the plaintiff, after the plaintiff had testified that as he approached the switch the light signal facing him was green, he said:

> "And then as I came along, going 10 or 15 miles an hour, my entire train entered that switch. I do not account for it at all."

Defendant's attorney then asked:

> "There is no way to account for it, is there?"

Plaintiff's attorney objected to this question as improper cross-examination and calling for a conclusion of the witness, and the objection was sustained. Appellant suggests that the witness had testified as to his long experience as a motorman, as to speed, stopping of trains, interpretation of signals, and so on, and contends that it was error to refuse permission to ask him how he could account for the fact that the train entered the switch. While the objection might very well have been overruled, we do not think that the defendant was seriously prejudiced by the contrary ruling. The further testimony elicited on the same cross-examination seems to have covered all of the matters which probably would have been developed by or followed upon an answer to the above quoted question. Several other alleged errors in rulings upon evidence are pointed out by appellant, but in their relation to the record they seem even less important than the objection which we have discussed.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

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33 Cal. App. 119

GOLDSTONE v. COLUMBIA LIFE & TRUST CO. (Civ. 1637.)

(District Court of Appeal, Third District, California. Feb. 27, 1917. Rehearing Denied by Supreme Court April 26, 1917.)

1. INSURANCE ⚷94—LIFE INSURANCE—LIABILITY OF INSURER—STATUTE.

Pol. Code, § 633, provides that no person shall act as the agent or solicitor of any insurance company in the state until he has filed with commissioner a duplicate power of attorney from the company, or its authorized agent, authorizing him to act as such agent or solicitor, and providing also for the issuance by said commissioner of a license to such agent. *Held*, that a life insurance company, by its violation of the statute, may not absolve itself from liability on an insurance contract that it has authorized or ratified, though the contract may have been secured by a person not an agent or solicitor in the full meaning of the statute; such statutory provisions as to agents do not change the rule of law as to principal and agent between the insurer and the policy holder, and the insurer, attempting to evade such statute, is nevertheless bound to a policy holder as though the statute had been complied with.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 124.]

2. Insurance 🔑74—Life Insurance—Authority of Agent.

Where the general agent of a life insurance company requested L. to act as the company's agent in certain territory, but was informed by L. that he could not do so on account of his connection with another company, and the general agent proposed that the contract should be made in the name of L.'s wife, and that L. should be the active man in obtaining the business, which was done, L. was authorized by the insurance company to solicit life insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 99, 100.]

3. Insurance 🔑655(2)—Life Insurance—Action on Policy—Evidence.

In an action on a life insurance policy, insurer setting up false answers of insured to questions material to the risk, and plaintiff claiming that such answers were falsely written in the application by the agent of the insurer, the trial court was technically in error in sustaining objection to the questions on the matter asked of the agent, who was not the agent of the company in full compliance with Pol. Code, § 633.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1677, 1680, 1681, 1685.]

4. Insurance 🔑112—Life Insurance—Duty to Read Policy—Adoption of Agent's Fraudulent Act.

Where agent of life insurance company wrote false answers material to risk into insured's application, after delivery of the policy to insured it was the latter's duty to notify the insurance company of the fraud that had been attempted by the agent, and, by silence, he fraudulently approved of the agent's fraudulent act, and became responsible for it, so that the company was not liable on the policy, since it was insured's duty to read the policy upon delivery, and the court, in an action on it, must assume that he did so.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 134.]

5. Insurance 🔑142—Life Insurance—Repudiation of Agent's Fraud—Duty of Insured.

Where the holder of a life policy containing false statements material to the risk fraudulently inserted in the application by the agent died within four months without repudiating the agent's fraud to the insurer, such delay was fatal to recovery; it being the duty of the insured to act promptly.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 263, 264.]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Beatrice Goldstone against the Columbia Life & Trust Company, a corporation. From a judgment for defendant, plaintiff appeals. Judgment affirmed.

Albert Jacoby, of San Francisco, for appellant. Wood, Montague & Hunt, of Portland, Or., and Gavin McNab and Nat Schmulowitz, both of San Francisco, for respondent.

BURNETT, J. By direction of the court and on motion of respondent a verdict in favor of the company was rendered by a jury, and the appeal is from a judgment entered thereon.

Plaintiff, widow of one Jacob Goldstone, brought the action as beneficiary named in a life insurance policy issued by respondent to said Jacob Goldstone on September 26, 1913. It appears that one of the conditions of the policy was as follows:

> "This contract of insurance is made in consideration of the application for this policy, a copy of which is hereto attached, and which application is hereby made a part of this contract."

In said application, signed by said Goldstone appears this covenant:

> "I hereby agree that the statements herein contained, together with the statements made by me to the medical examiner and contained in part 2 of this application, are hereby warranted to be true, full, and correct as facts, and that this application, together with the policy which may be issued, shall constitute the contract between me and the company."

It is the claim of respondent, fully set up in its answer, that, in violation of said agreement and for the purpose of defrauding the company, the insured gave false answers to certain questions that were material to the risk, and that therefore the company was relieved of any liability under said policy. On the other hand, appellant contended at the trial that the answers were written in by an agent of the company without the knowledge or connivance of the insured, and therefore the insurer cannot take advantage of its own wrong, but is charged with the same responsibility as though the answers were true.

The questions were as follows:

> (1) "Have you ever applied to any company or society or order for insurance without receiving a policy or certificate of the exact kind, rate, and amount applied for, or for reinstatement of a lapsed policy or certificate without being reinstated?" and (2) "Is any negotiation or application for other insurance now pending or contemplated?"

Each question was answered in the negative, whereas, admittedly, the truth is that on September 22, 1902, Goldstone had made an ineffectual application for life insurance to the Northwestern Mutual Life Insurance Company of Milwaukee; likewise, in November, 1903, to the Guardian Life Insurance Company of New York; similarly, in August, 1913, to the Equitable Life Assurance Society of the United States; also to the New York Life Insurance Company, in August, 1902, and another to the same company in 1905; furthermore, in July, 1913, he made another application to the said New York Life Insurance Company, which application was still pending at the time the application herein concerned was made.

In pursuance of her contention plaintiff called as a witness one S. J. Levy from whose testimony it appears that he solicited from said Goldstone the said insurance; that he was the duly authorized agent of the said New York Life Insurance Company and had issued to him, pursuant to section 633 of the Political Code of this state, as such agent, a power of attorney; that prior to his interview with Goldstone he was visited at his office at 14 Montgomery street, San Francisco, by one B. F. Bernsten, then the acknowledged and admitted general agent of defendant for the state of California; that said Bernsten requested Levy to act as the agent of respondent in and around the territory of San Francisco, but was informed by the latter that he could not do so on account of his connection with the New York Life, a competing company, whereupon Bernsten, in order to get around and evade the law, proposed as follows:

> "Well, make the contract in the name of your wife, make her the agent, and you can be the active man in obtaining the business whatever it is."

Levy continued:

> "Under those circumstances, we entered into an agreement whereby the business was to be solicited by myself, but Mrs. Levy was to be known as the agent, in order not to conflict with the contract that I had with the New York Life Insurance Company."

Mrs. Levy was thereupon appointed such agent, and Mr. Levy, in accordance with his agreement with Bernsten, proceeded to solicit, procure, and write insurance for the defendant company, and among others he approached Goldstone, submitted to him for his signature said application for insurance, collected the premium, and subsequently delivered the policy in question to said deceased. Appellant then attempted to show by said witness that he wrote in the answers to said questions without the knowledge of the insured, but the court sustained an objection, and it was not permitted. The ruling was based upon the court's understanding of the force and effect of said section 633 of the Political Code, providing that:

> "No person shall in this state act as the agent or solicitor of any insurance company doing business in this state until he has produced to the commissioner, and filed with him, a duplicate power of attorney from the company, or its authorized agent, authorizing him to act as such agent or solicitor"

—and providing also for the issuance by said commissioner of a license to such agent. The court, in holding that the case falls within said section, declared that it was enacted to the end that, if a broker or anybody else comes to one selling life insurance, there may be a safe way for the one solicited to find out whether the company is authorized to do business in the state, and also whether the solicitor is authorized to solicit insurance, and the court seemed to be of the opinion that no one acting as an agent could bind the company unless he was so commissioned, and that a person dealing with a solicitor not so authorized does so at his peril.

[1] Said section, no doubt, was enacted for the protection of the public as well as of the insurance companies, and its provisions, of course, should be complied with. No company should knowingly fail to regard its requirement, nor should any person assume to act as agent or solicitor without said power of attorney and said license. However, as far as the company is concerned, we do not understand that by its violation of said statute it may absolve itself from liability for a contract that it has authorized or ratified, although the contract may have been secured by a person not an agent or solicitor in the full meaning of the statute. The reasonable rule, we think, and one sustained by the authorities is that such statutory provisions as to agents do not change the rule of law as to principal and agent between the company and the policy holder, and that the company attempting to evade such statute is nevertheless bound to its policy holders, as though the statute had been complied with.

[2, 3] We think also that there is justification in the record for the contention that said S. J. Levy was authorized by the company to solicit said insurance, and also that his act in so doing was subsequently ratified. It would follow that the court was technically in error in sustaining the objection to the questions asked of the witness. It would seem almost incredible that one of some standing, as Levy must have been would be guilty of such reprehensible and even despicable conduct as to attempt deliberately the perpetration of a fraud upon the company and the deceased, but we must assume that his answers, if given, would have presented such a situation.

However, we need not go into that at length; as, notwithstanding such error, under the admitted facts, it must be held, we think, that the law demands the verdict that was rendered.

[4] As already seen, the policy was immediately delivered to Goldstone. It was his duty to read it, and we must assume that he did so. Long v. Newman, 10 Cal. App. 430, 102 Pac. 534. He knew, therefore, that his application as well as the certificate of the physician, each of which was an integral part of the policy and the consideration therefor, contained two material and vital statements that were false. His legal and moral duty was then to notify the company of the fraud that had been attempted. By his silence he virtually approved of the fraudulent act of the agent and became responsible for it. By his conduct he made Levy his agent as well as the agent of the company, and the forfeiture of the policy is the price of his folly. If he had pursued the course required by good conscience the company might have excused the misrepresentation, but, of course, that is merely problematical. He could at least have secured a return of the premium paid, but by his acquiescence he denied himself any relief from the wicked act of the agent of the company.

This feature of the case is covered by the decision of the Supreme Court in Madsen v. Maryland Casualty Co., 168 Cal. 204, 142 Pac. 51, wherein one Graff, a soliciting agent for defendant, solicited the insurance from plaintiff, who was very deaf, as was well known to said Graff. The application for the policy was filled out by Graff, and, without being signed or read to or by plaintiff, was sent to the general agent of defendant. It contained a warranty to the effect that plaintiff was neither partially nor totally deaf. A policy was issued by the defendant and sent to plaintiff through the mail. In reversing the case the court said:

> "By accepting and retaining the contract without objection plaintiff was bound by its terms and cannot now be heard to say that he did not read it or know its terms."

Many cases are therein cited in support of the principle. We call specific attention to only two of them. One is the familiar case of New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934, wherein the court, through Mr. Justice Field, said:

> "There is another view of this case equally fatal to a recovery. Assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated, not only upon himself, but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agents, and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statements. The consequences of that approval cannot after his death be avoided."

In Quinlan v. Providence, etc., Insurance Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645, it is said:

> "In determining the question of liability in this case it is immaterial whether the plaintiff read the policy or not, or that he had no actual knowledge of the conditions or of the limitations of the power of Kelsey. The conditions and limitations were a part of the contract, and he was bound to take notice of them, and is not excused upon the plea that he omitted to acquaint himself with the provisions of the policy."

Nor do we think there is any force in the contention that the Madsen Case should not be considered controlling for the reason that therein the agent was a mere soliciting agent and the time during which the policy was in possession of the insured was a period of several years. S. J. Levy was no more than a soliciting agent here. At least, he had no authority to waive warranties for the company, and was therefore in no better position in that respect than a soliciting agent. This question of the authority of an agent to waive conditions is learnedly discussed in Sharman v. Continental Ins. Co., 167 Cal. 117, 138 Pac. 708, 52 L. R. A. (N. S.) 670, and we need not further consider it.

[5] As to the time, a delay of four months in repudiating the fraud is as fatal as a delay of four years. It is the duty of the insured to act promptly. He cannot speculate with death. It is, of course, always imminent, and at any moment it may claim even the most robust. The situation of the insured and the nature of the contract made it his imperative duty to act immediately. The importance of such speedy action is certainly emphasized by the circumstance of his death within a little less than four months from the time the policy was issued. In the absence of any claim that the delay was caused by any act of respondent or that it was unavoidable for any reason, we consider it fatal to a recovery.

The cases generally seem to take it for granted that the insured must act with great promptness in such contingency. We may refer specifically to only one, decided by the Supreme Court of Wisconsin, Bostwick v. Mutual Life Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, reported with an exhaustive note in 67 L. R. A. 706, wherein a similar question was involved. Therein it was held that:

> "If a person receives a policy of insurance ostensibly in response to an application therefor, which he signed and parted with in the belief, induced by the fraud of the agent taking the same, that it called for a policy different from that which it called for in fact, he is bound, as a matter of law, to examine the policy within a reasonable time after it comes to his hand, and to discover obvious departures therein from the one which he supposed he was to get, and promptly, upon discovering the same to rescind the transaction, give the company due notice thereof, and do all on his part which justice requires to restore the former situation, or he will be held to have accepted the policy as satisfying his application, so as to be precluded from rescinding the same."

And it was further held that the "reasonable time" began to run when he received the policy, and that a delay of four months and a half before moving to rescind is too long a time.

We think the judgment should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

(33 Cal. App. 128)

FOLEY v. CITY OF OAKLAND. (Civ. 1950.)

(District Court of Appeal, First District, California. Feb. 28, 1917. Rehearing Denied March 29, 1917; Denied by Supreme Court April 26, 1917.)

1. MUNICIPAL CORPORATIONS 🔑126—OFFICES—COUNCIL'S POWER TO ABOLISH.

The act of a city council in abolishing an office is an exercise of legislative power.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 298–300.]

2. MUNICIPAL CORPORATIONS 🔑191 — OFFICERS — COUNCIL'S POWER OF REMOVAL — CHARTER.

One appointed assistant sanitary inspector under city of Oakland ordinance could be removed by ordinance abolishing the office, the council being empowered by Charter, § 31 (St. 1911, p. 1551), to discontinue offices, and section 39, providing that council shall be vested with all powers of legislation "adequate to a complete system of local government," and the charter not limiting that power; and section 80, providing that persons employed by the city on September 1, 1910, may retain their employment subject to reclassification by the civil service board unless removed for cause, or because the civil service board determines "that their employment by the city is unnecessary," did not deprive the city council of authority to abolish the office itself.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 764.]

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by J. G. Foley, against the City of Oakland. Judgment for plaintiff, and defendant appeals. Reversed.

Paul C. Morf, City Atty., and W. H. O'Brien, Deputy City Atty., both of Oakland, for appellant. Charles A. Beardsley, of Oakland, for respondent.

KERRIGAN, J. This is an appeal by the defendant from an adverse judgment. The case involves the proper construction of certain provisions of the charter of the city of Oakland.

[1, 2] The facts of the case may be summarized as follows: The city of Oakland is a municipal corporation governed by a freeholders' charter (Stats. 1911, pt. 2, p. 1551). The health department is under the direction of a commission of public health and safety. Ordinance No. 350 N. S. created the position, among others, of assistant sanitary inspector in that department. The plaintiff was in the employ of the city on September 1, 1910, and was appointed to said office of assistant sanitary inspector. On July 20, 1915, said ordinance was repealed by Ordinance No. 885 N. S. with the consequent abolition of the position held by the plaintiff. Section 31 of the charter (found at page 1575 of the Statutes of 1911) provides:

> "The council shall have the power by ordinance to creat, consolidate and discontinue offices, deputyships, assistantships and employments other than those prescribed in this charter * * * and also the method by which * * * such office, deputyship, assistantship or employment * * * shall be declared vacant."

Section 39 of the charter (Stats. 1911, p. 1577) reads:

> "The council shall be the governing body of the municipality. It shall exercise the corporate powers of the city, and, subject to the express limitations of this charter, shall be vested with all powers of legislation in municipal affairs adequate to a complete system of local government consistent with the Constitution of the state."

The act of a city council in abolishing an office is an exercise of legislative power. Downey v. State, 160 Ind. 578, 582, 67 N. E. 450; 5 R. C. L. 614. There is no express provision in the charter limiting the legislative power of the council to create or abolish offices or positions other than that contained in that part of section 31 above quoted; in fact it is not contended that the city council has not the general power to create and abolish clerkships and offices. Respondent's position is based on the latter part of section 80 of said charter (Stats. 1911, p. 1605), which section, after enumerating the employés of the city excepted from the civil service provisions of that act, reads:

> "Provided, that persons employed by the city * * * on September 1, 1910, may retain their employment under the city, subject to classification and reclassification by the civil service board without further examination, unless removed for cause, or unless it shall be determined by the civil service board that their employment by the city is unnecessary."

Respondent argues that, while the city council may have the general power to abolish offices, such power, under the above-noticed portion of section 80, is vested in the civil service board so far as those persons are concerned who were in the employment of the municipality on September 1, 1910.

We think this position cannot be maintained. The civil service board is given power to determine that an employé is unnecessary, and it may perhaps remove him and leave the office vacant, but still existing; but the provision of the charter conferring this power fails far short of depriving the city council of its authority to abolish the office itself. On September 1, 1910, the date referred to in section 80 of the charter, the board of freeholders were engaged in framing the present organic act; and doubtless it was deemed expedient not only to give the persons who were at that time in the employ of the municipality civil service standing without examination, but also to subject them to removal only for cause or upon a showing that their employment was unnecessary, instead of leaving them, as are other civil service employés, subject to removal by the heads of the different departments of the city, with a right to appeal to the civil service board. But the charter did not go farther in this behalf; and section 80 thereof does not give to the civil service board the power to abolish offices, such power being lodged only in the council.

The judgment is reversed.

We concur: LENNON, P. J.; RICHARDS, J.

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33 Cal. App. 76

PLEASANT VALLEY HOTEL CO. v. HENDERSON. (Civ. 1955.)

(District Court of Appeal, First District, California. Feb. 24, 1917. Rehearing Denied by Supreme Court April 23, 1917.)

Limitation of Actions ⟹46(1)—Contracts—Ratification of Transactions.

Where corporate directors in January, 1912, borrowed money from the corporation agreeing to repay it when certain purposes should be accomplished, and those purposes were accomplished in April, 1913, at which time each of the two directors was charged with one-half the loan on the books of the corporation, the corporation may maintain an action for such sum in November, 1914; for, as the corporation ratified the transaction in April, 1913, the cause of action did not accrue until then, and the two-year period prescribed by Code Civ. Proc. § 339, subd. 1, had not expired in November, 1914.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 240, 251, 253.]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by the Pleasant Valley Hotel Company, a corporation, against E. A. Henderson. From a judgment for plaintiff, defendant appeals. Affirmed.

Everts & Ewing, of Fresno, for appellant. C. K. Bonestell, of Fresno, for respondent.

KERRIGAN, J. This is an appeal by defendant from an adverse judgment. The question for determination in this case is as to whether or not, of the several causes of action alleged in the complaint, the demand therein set forth for $1,000 was barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure.

The record shows that the action was commenced on November 19, 1914; that on January 6, 1912, defendant and one George F. Patterson, who were directors of the Pleasant Valley Investment Company, plaintiff's assignor, borrowed from that company $2.000 for certain purposes, and agreed to repay the same when those purposes should be accomplished; that those purposes were accomplished so far as they could be in April, 1913, at which time, in compliance with their agreement, each was charged on the books of the company with $1,000, and that at that time each agreed to pay to the investment company such sum; that George F. Patterson paid the money so borrowed by him; but that the defendant has failed and neglected to repay the amount so charged against him.

Assuming that the circumstances under which the $2,000 were obtained from the Pleasant Valley Investment Company stamped the transaction as a conversion of the funds of that company, still the company could waive the conversion, and, repudiating the action of defendant and Patterson, could perhaps have brought an action immediately for money had and received. However that may be, it appears from the record that the Pleasant Valley Investment Company elected to ratify in detail the transaction as negotiated by those directors; it chose to adopt their acts as its own, to regard them as valid, and to enforce the performance of the obligations arising therefrom. Therefore the statute of limitations did not commence to run against the plaintiff's cause of action on January 6, 1912, the time the money was obtained by defendant and Patterson, but from the time the obligation to repay was fixed, to wit, in April, 1913. The action therefore, having been filed in November, 1914, was brought before it was barred by the statute.

Judgment affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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33 Cal. App. 93

JOHNSON v. JOHNSON et al. (Civ. 1615.)

(District Court of Appeal, Second District, California. Feb. 26, 1917.)

1. Husband and Wife 🔑270(10)—Findings to Support—Fraudulent Conveyance of Community Property.

A wife, suing her husband for separate support and maintenance, and joining certain of his relatives on the theory that they had, by means of a fraudulent conspiracy with him, acquired certain real estate alleged to be community property, was not entitled to a decree against the grantees, there being no finding of fraud and the evidence showing that they had paid full value and consideration for the conveyance of the property by the husband to them.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 983.]

2. Husband and Wife 🔑301—Community Property—Fraudulent Conveyance by Husband—Judgment for Wife for Attorney's Fees.

If there was fraud in the husband's conveyance to his relatives, there was no authority, statutory or otherwise, under which the court was warranted in rendering judgment against the grantees for $150 attorney's fees in favor of the wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1099.]

3. Husband and Wife 🔑267(1)—Community Property—Decree for Support and Maintenance—Marital Relation.

A decree for permanent support and maintenance in favor of a wife did not affect the marital relation, and until such relation is dissolved, the husband is entitled to control the community property, with absolute power of disposition other than testamentary, though, without the wife's written consent, he cannot make a gift or conveyance without valuable consideration under Civ. Code, § 172.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 929, 930, 936.]

4. Husband and Wife 🔑286—Wife's Suit for Separate Maintenance—Effect.

The purpose of a wife's suit for separate maintenance is specifically to enforce her husband's general duty by directing him to make certain definite payments at regular intervals for her support, and, subject to such provision, the relations of the parties to each other and the community estate is the same as if no such action had been brought or an award made.

5. Husband and Wife 🔑299(1)—Suit for Separate Maintenance—Community Property—Judgment.

In a wife's suit against her husband for permanent support and maintenance, wherein she joined some of his relatives on the theory that, by means of a fraudulent conspiracy, they had acquired certain community realty, where the court found that a trust company should be appointed trustee of half the amount of the community estate, to receive and disburse the same on the wife's order, the judgment giving such fund to the wife absolutely, and without limitation, was improper.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1094.]

6. Husband and Wife 🔑298½—Separate Maintenance—Findings.

In a wife's suit for separate maintenance and support, wherein she joined her husband's relatives on the theory that he had fraudulently conveyed certain community realty to them, defendants were entitled to findings on issues presented by their answer.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1091, 1092.]

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Sarah Johnson against Nels Johnson and others. From a judgment for plaintiff, defendants appeal. Reversed.

I. Henry Harris, of Los Angeles (Charles A. Bank, of Los Angeles, of counsel), for appellants. J. H. Ryckman, of Los Angeles, Harriman, Ryckman & Tuttle, of Los Angeles, for respondent.

SHAW, J. In this action plaintiff, without asking for a divorce, sought a decree awarding her permanent support and maintenance, as provided in section 137, Civil Code. Upon the theory that they had, by means of a fraudulent conspiracy with her husband, acquired certain real estate alleged to be community property of the couple, and thus deprived her of her interest therein, she joined as defendants with him his father and mother, Frank and Beda Johnson, and his brother, Bayard Johnson. Plaintiff obtained a judgment, from which all of the defendants appeal upon a record presented in accordance with sections 953, 953a, and 953b, Code of Civil Procedure.

By the decree it was adjudged that plaintiff, Sarah Johnson, do have and recover of and from defendants Beda Johnson, Frank Johnson, and Bayard Johnson the sum of $1,787.50, together with attorney's fees of $150, which sum of $1,787.50 the court adjudged to be one-half of the proceeds of the community property so conveyed by Nels Johnson. It was further adjudged that Nels Johnson pay to plaintiff the sum of $20 per month as an allowance for the support and maintenance of Frances Johnson, the minor child of plaintiff and her husband. As stated, the theory of the complaint as to the defendants other than the husband was that they had, by means of fraud, acquired community property of plaintiff and her husband.

[1] Waiving any question as to the sufficiency of the allegations of fraud, as to which, however, we entertain grave doubt, there is no finding of fraud on the part of any of the defendants; nor is there any evidence whatsoever tending in the slightest degree to justify a finding that would warrant a judgment such as that here rendered against defendants Frank, Beda, and Bayard Johnson. For aught that appears in the findings to the contrary, they paid full value in consideration of the conveyance of the property so made by Nels Johnson to them, and the evidence without substantial contradiction shows the payment of such consideration. Briefly stated, the evidence shows that after his marriage Nels Johnson obtained a contract for the purchase of a lot at the price of $1,800. In making the first payment he borrowed $500 from his father, which sum he paid thereon at the execution of the contract. Of the deferred payments $750 was paid out of his earnings after marriage. Being unable to keep up the payments and being largely indebted to his father, he, in payment of such indebtedness and $150 cash at the time paid to him by his father, conveyed the property to his mother, who paid the balance of $550 due upon the contract for the purchase thereof and took a deed to the property, which she afterwards conveyed to her son Bayard Johnson for $2,500, and he, under an arrangement with his father, conveyed it in exchange for an equity in other property which was subject to a mortgage of $7,500. The court found this equity to be of the value of $4,125 which, after deducting the $550 paid by Beda Johnson, left $3,575, all of which the court declared to be community property of plaintiff and her husband. It thus appears that, at most, $1,250 represented the community interest in the lot, and since it is conceded that Beda Johnson in acquiring the deed thereto paid $550 of the purchase price, it would appear in any event that she was entitled to such proportionate share of the $4,125 as her payment bore to the purchase price of the lot. In her complaint plaintiff alleged that the first payment of $500 made upon the contract of purchase was paid out of the separate funds of Nels Johnson. If her allegation be accepted as true, then only $750 paid in the purchase of the lot constituted community funds.

[2] Assuming the existence of fraud, we know of no authority, statutory or otherwise, under which the court was warranted in rendering the judgment against defendants other than Nels Johnson for the sum of $150 attorney's fees.

[3] Moreover, the decree did not affect the marital relation (McKay on Community Property, § 410; Kusel v. Kusel, 147 Cal. 57, 81 Pac. 295), and until dissolved, the husband was entitled to the control of the community property, with absolute power of disposition other than testamentary, provided that without the written consent of the wife he could not make a gift thereof or convey the same without a valuable consideration (Civ. Code, § 172), and we know of no principle of law under which a wife without obtaining a divorce can be awarded one-half of the community estate. The case of Cummings v. Cummings, 14 Pac. 562, was an action for divorce wherein the plaintiff, alleging that the husband had conveyed community property with the intent on the part of both the grantor and grantee to defraud plaintiff of her rights therein, sought a decree annulling the same and awarding her a one-half interest therein. It was there held that an action to set aside a conveyance of community

property made by a husband, on the ground of fraud, cannot be maintained by the wife while the marriage bond exists. In support thereof the court cited the case of Greiner v. Greiner, 58 Cal. 115, where it was likewise held (quoting from the syllabus):

> "A wife cannot maintain an action while the marriage bond exists, to set aside a transfer of the common property, made by the husband for the purpose of defrauding her."

See, also, Van Maren v. Johnson, 15 Cal. 312; Kusel v. Kusel, supra; Tibbetts v. Fore, 70 Cal. 245, 11 Pac. 648; Valensin v. Valensin (C. C.) 28 Fed. 602.

[4] The purpose of the suit for separate maintenance is to specifically enforce the general duty of the husband by directing certain definite payments to be made at regular intervals for the wife's support. Subject to such provision, their relations to each other and to the community estate is precisely the same as though no such action had been brought or an award made. The status of the parties may be restored by reconciliation, in which case the necessity for the separate maintenance would terminate. Notwithstanding this fact, however, or other conditions which might be mentioned, a judgment of this character would give to the wife one-half of the community property.

[5] Another objection made to the judgment, which seems to be well founded, is that the court found that the Title Insurance & Trust Company should be appointed as trustee of one-half of the amount of the community estate, to receive and disburse the same upon plaintiff's order, but in the conclusions of law, as well as in the judgment, the court gave said fund to plaintiff absolutely and without any limitation thereon. It is not awarded as maintenance, but the judgment awards it to plaintiff absolutely, to be dissipated, given away, lost in speculation, or used in any manner which her fancy or whims might dictate.

[6] The answer of defendants alleged that in a former action brought by plaintiff against Nels Johnson for divorce, a trial of which was had, the matters alleged in this action had been adjudicated and determined by the court, wherein the divorce was denied, but an order was made under section 136 of the Civil Code, allowing plaintiff $25 per month for maintenance. The answer also alleged that defendant Frank Johnson had loaned to defendant Nels Johnson the sum of $500 for the purpose and used by the latter in making the initial payment upon the contract for the purchase of said lot. The court made no finding as to either of these issues tendered. Clearly, defendants were entitled to findings upon both issues.

The judgment appealed from is reversed.

We concur: CONREY, P. J.; JAMES, J.

(33 Cal. App. 156)

MATCHETTE et al. v. CALIFORNIA FRUIT CANNERS' ASS'N. (Civ. 1933.)

(District Court of Appeal, First District, California. March 3, 1917. Rehearing Denied April 2, 1917; Denied by Supreme Court April 30, 1917.)

1. Master and Servant 🔑101, 102(8)—Master's Duty to Furnish Safe Working Place—Ordinary Care.

An employer's duty to furnish employé with a reasonably safe place to work is fulfilled when he exercises ordinary care for that purpose.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 173.]

2. Master and Servant 🔑238(3) — Servant's Injury — Contributory Negligence —Choice of Working Place.

When an employé chooses a dangerous method of work instead of a safe way provided and is injured, he is guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 745.]

3. Negligence 🔑136(22) — Action for Brakeman's Death — Contributory Negligence—Question of Law.

A brakeman killed while switching cars in yards of defendant canning company who unnecessarily stood between platform and track, it being impossible to stand there during passage of a large box car, and he being experienced with this particular case, *held* guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 324.]

4. Negligence 🔑56(1)—Action for Brakeman's Death—Violation of Contract Between Railroad and Defendant.

In action for brakeman's death from being crushed between railway track and platform, it was immaterial that defendant canning company had not complied with contract with railroad prescribing distance to be left between platform and track, where the space actually existing was only a few inches less, and evidence showing that the accident might have occurred in any event.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 69.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Zanona Matchette and another against the California Fruit Canners' Association. Defendant appeals from judgment for plaintiffs and from order denying new trial. Reversed.

Thomas, Beedy & Lanagan, of San Francisco, for appellant. Preston & Preston and Barrett & Thomas, all of San Francisco, for respondents.

KERRIGAN, J. Charles C. Matchette, a brakeman in the employ of the harbor commissioners of the state of California on its belt line railroad in the city and county of San Francisco, met his death while in the performance of his duties as a member of a switching crew on the premises of the defendant, the California Fruit Canners' Association. This action was brought by his widow and minor daughter to recover damages for his death, which is alleged to have been caused by the negligence of the defendant. The jury rendered a verdict in favor of the plaintiffs and against the defendant for the sum of $5,000, and from the judgment and from an order denying a new trial, the defendant appeals.

The first contention of the appellant is that the evidence fails to establish that any duty owed to the deceased by the appellant was left unperformed, or that it was guilty of any negligence whatever, but that, on the contrary, the evidence affirmatively shows that the death of Matchette resulted from his own negligence. From the correctness of this contention we see no escape.

The record discloses the following facts: The defendant at the time of the injury complained of owned and maintained certain buildings situated in San Francisco which it used in the operation of its business of canning fruit and for warehouse purposes. Between these buildings was a space of some 72 feet or thereabouts upon which were constructed two spur tracks from the Belt Line Railroad owned and operated by the state of California. These spur tracks were standard gauge, and their length on defendant's property was approximately 210 feet. At the point where these tracks entered the defendant's property they were built on a curve, the curve continuing a distance of some 120 feet, from which point the tracks ran straight for a like distance upon said property. Parallel to the track throughout its entire length and on the westerly side of the cannery building there had been erected a platform, varying in width from the point where the track was straight to the place of the accident, and the edge of which was about 4 feet 8 inches from the outer rail of the easterly spur track. The tracks were laid upon a trestle about 14 feet high, which rested upon the basement of the building, and the platform was about 3 feet 6 or 7 inches above the level of the track. On the morning of February 23, 1911, the day of the accident, the switching crew of which deceased was a member had switched one car onto the westerly spur track on defendant's premises, and then pulled their train back into Beach street, which bounds the south side of defendant's plant, and switched a large box car loaded with cans upon the easterly spur track. The switching equipment of the railroad consisted of an engine and a flat car called a trailer. The crew was composed of the engineer and fireman, two switchmen, and a foreman. The deceased was one of the switchmen, and it was his duty on this occasion to spot the car that was being delivered; that is, to put it at a place on defendant's spur track indicated by the foreman. When the train which caused the accident was being backed in it consisted of an engine, next the trailer, and the box car that was being delivered. The trailer had a running board at one end, upon which the other switchman, Conway by name, took a position where he could receive and transmit to the fireman or engineer the signals given by the deceased. In the performance of his duties deceased took a position against the platform before mentioned, and as the train came in over the easterly spur track and swung on the curve the middle of the large box car struck him and pressed him against the edge of the platform, causing his death. The evidence conclusively shows that the deceased had been in the railroad business for a number of years and was an experienced brakeman, that at the time of the accident he had been employed on the belt line road for several months as a member of the switching crew, and had been upon the defendant's premises many times before, and that he had on former occasions been accustomed to deliver large box cars, such as the one that crushed him, upon this identical spur. The evidence further shows that the position which the deceased took was not necessary for the performance of his duties. The engine was in such a position that he could not signal directly to the engine crew, and it was his business only to instruct his fellow switchman, who was on the trailer, and who in turn would pass on the signal to the engine crew. There was no object to be served by his being upon the ground, the chief purpose of a switchman taking such a position being to couple or uncouple cars, or to give signals directly to the engine crew or throw switches, none of which acts were required of the deceased at this time, Conway being there for that purpose. The duty of deceased was merely to spot the car. In the performance of that duty he had free choice of several positions where he could have stood. He could have stood upon the platform, or he could have signaled from the side or top of the car, or he could have stood between the tracks.

Under these circumstances it is argued by the appellant that the deceased selected a place of obvious danger to perform his duties; that he knew, or ought to have known, that while a space of less than 5 feet between the outer rail and the form on a curved track might leave room enough in the case of a flat car, when a large car with its additional overhang such as caused his death was being switched in it was impossible for a man to stand there and avoid being struck by the car.

[1] The duty of an employer to furnish an employé with a reasonably safe place to work is fulfilled when he exercises ordinary care for that purpose. Deceased was properly upon defendant's premises under an implied invitation. It was the defendant's duty to use reasonable care in providing a reasonably safe place for decedent to work, and, so far as the evidence shows, it fully discharged that duty. Deceased was an employé of the belt line railroad, and under the control of

his superiors. The appellant could not instruct him as to the manner in which he should do his work. The deceased had assisted in bringing up the car which crushed him, knew its dimensions and was an experienced brakeman, and he had a free choice as to where he should stand to spot from, and he chose a place of obvious danger. The location by defendant of the permanent structures necessary and convenient to accommodate its business near the tracks did not of itself constitute a danger; and even assuming that it did, it was obvious to the deceased, who, as we have said, was an experienced railroad man.

[2] The recent case of Hontz v. San Pedro, etc., R. R. Co., 161 Pac. 971, is, in our opinion, on all fours with the case at bar. There the deceased was an experienced brakeman, and while a member of a switching crew engaged in moving cars in the lumber yard of the defendant company was killed. Over a spur track in the lumber yard there was a drawbridge which was raised to an upright position when switching was in progress. At times when raised the drawbridge sagged and leaned a trifle over a pit. This fact constituted no peril when flat cars only were being handled, but it brought the bridge close to the side of box cars. The bridge at the time of the accident was raised, and it leaned slightly toward the track. Decedent knew the position of the bridge, but for some unexplained reason in broad daylight, and without any necessity for so doing, he started to climb the ladder on the side of a moving box car, and before reaching the top came into collision with the bridge and was killed. Mr. Justice Henshaw, in delivering the opinion of the court, said:

> "It is a universal principle that, when a safe way has been provided for an employé for the performance of an act, and another and dangerous way exists, if the employé chooses to take the dangerous way and is injured, he is guilty of contributory negligence as matter of law."

[3] It is argued by plaintiffs, however, that the questions of negligence and contributory negligence were for the jury, and that, as those questions were resolved in plaintiffs' favor, this court should not disturb the verdict and the judgment based thereon. The case last cited effectively disposes of this contention also, for it is there said:

> "But if, in cases such as this, it is to be said that the question of contributory negligence is one of fact, it is extremely difficult to conceive of a case where it could be one of law."

This statement of the law is applicable with equal force to the present case; for the facts and conditions upon which the question arises are identical. Here, although the distance between a car of ordinary size and the platform was not great, still it was perhaps sufficient for a brakeman using great care to stand there, but when large cars were switched in he could not do so without being struck; and, as before stated, the deceased was familiar with the premises, experienced, and had switched in like cars before, at which times he spotted from other positions. The entire evidence thus shows conclusively that the deceased was killed through his own negligence.

[4] Untenable also is the contention of the plaintiffs that the defendant created a trap by failing to comply with the terms of a contract it had entered into with the Southern Pacific Railroad Company, under which the track was built, which in part provided that defendant was not to erect or maintain a platform nearer to the track than 4 feet 8 inches. The rights of the parties hereto, as the trial court correctly instructed the jury, are in no manner measured by or dependent upon such contract. The obvious purpose of the provision in that contract was to leave a space that would accommodate large cars; and even if the provision had been complied with, the space would have been increased but a few inches, and the danger, for aught the evidence shows, would have been equally great, because any person who stood between the car and the platform when large cars were switched in was certain in any case to be struck.

In view of the conclusion we have thus reached it becomes unnecessary to notice the question of the proximate cause of the injury and further questions presented by the briefs.

The judgment and order are reversed.

We concur: LENNON, P. J.; RICHARDS, J.

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33 Cal. App. 135

PEOPLE ex rel. LYONS v. McALEER.

(Civ. 2106.)

(District Court of Appeal, Second District, California. March 1, 1917. Rehearing Denied by Supreme Court April 30, 1917.)

1. ELECTIONS 🔑51—OFFICERS—TRANSFER OF OFFICER.

Where the civil service commission failed to obey the mandatory provision of Charter of Los Angeles County, art. 9, § 34, whereby it was not only authorized, but required, to prescribe a general rule pursuant to which all transfers from one position to a similar position in the same class and grade should be made, there was no law in the charter or elsewhere authorizing such a transfer, and the act of the commission in attempting to transfer a deputy county clerk to the office of registrar of voters did not vest him with any title to the office.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 44, 45.]

2. ELECTIONS 🔑51—OFFICERS—REGISTRAR OF VOTERS.

The registrar of voters is an appointive county officer, and, the office not being in the unclassified service named in Charter of Los Angeles County, art. 9, § 33, appointment to it must, as required by express provision of section 11, subd. 1, be made by the board of supervisors from the eligible civil service list, consisting of three persons certified by the commission as standing highest in accordance with the general rule prescribed by the commission for the creation of such eligible list.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 44, 45.]

3. Elections 🔑51—Officers—Transfer by Civil Service Commission.

The office of registrar of voters of the county of Los Angeles being an independent office, as distinct and separate from that of county clerk as that of auditor or recorder, and being specified by the charter as an office to be filled by appointment to be made by the board of supervisors from the eligible list, it could not, under the pretense that it was of like grade and class of that of deputy clerk, be filled by act of the civil service commission under guise of transferring such clerk to such independent office.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 44, 45.]

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Proceedings in the nature of quo warranto by the People of the State of California, on the relation of David B. Lyons, against Thomas McAleer. From a judgment for respondent, relator appeals. Reversed, and trial court directed to enter judgment on the findings in favor of relator.

U. S. Webb, Atty. Gen., and John Beardsley and A. B. Shaw, Jr., both of Los Angeles (David Evans, of Los Angeles, of counsel), for appellant. W. J. Ford, Percy V. Hammon, and Oscar Lawler, all of Los Angeles, for respondent.

SHAW, J. The subject of this proceeding, in the nature of quo warranto brought in the superior court of Los Angeles county at the relation of David B. Lyons, is the title to the office registrar of voters of Los Angeles county. Upon the trial in the court below judgment was entered declaring the respondent, Thomas McAleer, entitled to the office, and that the relator, David B. Lyons, had no right thereto, from which judgment the plaintiff has appealed.

The facts out of which the proceeding arose are as follows: Pursuant to the provisions of section 7½ of article 11 of the Constitution, the electors of the county of Los Angeles duly adopted a charter for the government of said county, which upon being approved by the Legislature and as provided therein, took effect on June 2, 1913. Among other offices created by the charter and which the board of supervisors was authorized to fill by appointment was that of "registrar of voters." While the charter, save as to services to be rendered in connection with petitions for the recall of officials as provided in article 11 thereof, is silent as to the duties of the official holding such position, we may assume that they are identical with those which were imposed upon the county clerk by general laws, and for the performance of which such clerk was allowed a deputy in charge of the registration department at a salary of $150 per month (section 4230, Pol. Code), which position, as such deputy in charge of said department, McAleer as the duly appointed, qualified, and acting deputy, had held from the date of his appointment on June 2, 1911. By subdivision 1 of section 11 of the county charter the board of supervisors is authorized to appoint the registrar of voters, the appointment of whom (since the incumbent does not fall with the unclassified service hereinafter referred to) must, as provided by said section, be made from the eligible civil service list submitted to said board by the civil service board created by secton 30 of article IX of the charter, which subdivision 1 of section 11 also provides that the board of supervisors shall by ordinance fix his compensation. Section 33 of the charter divides the civil service of the county into the unclassified and classified service, and provides that the classified service shall include all positions now existing or hereafter created, excepting certain positions mentioned as belonging to the unclassified service, which, however, does not include the registrar of voters; that being included in the classified service. Section 34 of said article IX provides that the civil service commission, consisting of three members to be appointed by the board of supervisors (section 30), "shall prescribe, amend and enforce rules for the classified service, which shall have the force and effect of law," which rules, among other things designated in 16 subheads, shall provide:

> "1. For the classification of all positions in the classified service. 2. For open, competitive examinations to test the relative fitness of applicants for such positions. 3. For public advertisement of all examinations. 4. For the creation of eligible lists upon which shall be entered the names of successful candidates in the order of their standing in examination. * * * 6. For the appointment of one of the three persons standing highest on the appropriate lists. * * * 10. For transfer from one position to a similar position in the same class and grade. * * * 11. For promotion based on competitive examination and records of efficiency, character, conduct and seniority. * * * An advancement in rank or an increase in salary beyond the limit fixed for the grade by the rules shall constitute promotion. Whenever practicable vacancies shall be filled by promotion. * * * 16. For the adoption and amendment of rules only after public notice and hearing"

—followed by the provision that:

> "The commission shall adopt such other rules, not inconsistent with the foregoing provisions of this section, as may be necessary and proper for the enforcement of this article."

Section 37 provides that:

> "All persons in the county or township service holding positions in the classified service as established by this article, at the time it takes effect, whether holding by election or by appointment, and who shall have been in such service for the six months next preceding shall hold their positions until discharged, reduced, promoted or transferred in accordance with the provisions of this article."

Section 38 provides that:

> "The auditor shall not approve any salary or compensation for services to any person holding or performing the duties of a position in the

classified service, unless the pay roll or account for such salary or compensation shall bear the certificate of the commission that the persons named therein have been appointed or employed and are performing service in accordance with the provisions of this article and of the rules established thereunder."

It is further provided by section 50, which relates to the recall of officials and specifies certain duties in connection therewith to be performed by the registrar of voters, that:

> "Until such time as the board of supervisors shall appoint a registrar of voters under the provisions of this charter, the powers and duties by this section conferred upon the registrar of voters shall be exercised and performed by the county clerk."

On June 2, 1913, the day the charter became operative, the board of supervisors by ordinance fixed the salary of the registrar of voters at $150 per month.

No rules whatever were adopted by the commission until January 1, 1914. On October 15, 1913, the county clerk of Los Angeles county addressed a communication to the civil service commission, recommending that Mr. McAleer be transferred to the position of registrar of voters, which communication, on October 16, 1913, was transmitted to the board of supervisors, together with a letter from the civil service commission stating that:

> "This commission holds that under the civil service provisions of the charter it may authorize the transfer of Mr. McAleer upon recommendation of the board of supervisors, and that, in the event the board fails to recommend the transfer, then the position should be filled by open competitive examination."

On October 27th the board of supervisors made an order authorizing the transfer of McAleer from the position as deputy county clerk in charge of registration department to the office of registrar of voters; and on November 4, 1913, the civil service commission, as shown by its minutes, made an order as follows:

> "Upon the joint request of the county board of supervisors and county clerk Lelande, the transfer of Thomas McAleer from service as registration clerk, in the office of the county clerk, to the office of registrar of voters, was authorized."

It thus appears that, in the absence of rules which the commission was by section 34 to prescribe and enforce for the classified service, and without any competitive examination therefor, Thomas McAleer, who was a deputy county clerk in charge of the registration department, was by the civil service commission transferred therefrom to the newly created office of registrar of voters. The recommendation of the county clerk that such transfer be made is entitled to no weight whatsoever; neither did the order of the board of supervisors authorizing the making of the transfer confer any power upon the commission to make the same. We must therefore, in order to sustain the action of the commission, look for some provision of the charter which empowered it to make the transfer. By subdivision 10 of section 34 the commission was not only authorized, but required, to prescribe rules under which it might make transfers from one position to a similar position in the same class and grade. Assuming, but not holding, that the office of registrar of voters created by the charter was in the same class and grade as that of deputy county clerk in charge of the registration department, nevertheless, until adopted, there was no rule having the force and effect of law under which such transfer could be made. The provision of the charter was not self-executing, but contemplated the adoption of a rule having the force and effect of law to make it operative, and the power to enact such legislation was delegated to the civil service commission. In other words, the charter, which may be termed the organic law of the county, conferred upon the civil service commission the power to enact a law for the transfers designated in subdivision 10 of section 34; but until such legislation there was no law authorizing the commission to take any action in such cases. Counsel for respondent insist that the jurisdiction of the commission to make the transfer did not depend upon the adoption of such rule; that in making the transfer it had the same power to act in the absence of the rule as though it had been made. In support of this contention they direct our attention to section 3 of article XII of the charter of San Francisco, which provides:

> "The commissioners shall make rules to carry out the purposes of this article, and for examinations, appointments, promotions and removals, and in accordance with its provisions may from time to time make changes in the existing rules."

In construing this provision (Cook v. Civil Service Commission, 160 Cal. 589, 117 Pac. 663), the Supreme Court said:

> "The section of the charter requiring the adoption of general rules for examinations, etc., by the commissioners, expressed, not a mandatory, but a directory, admonition. There is nothing in the language of the act which makes the adoption of such rules a jurisdictional prerequisite to the holding of examinations by the board. These rules were merely 'to carry out the purposes of this article,' i. e., those relating to civil service. The rules were to be a part of the scheme of testing the fitness of candidates for promotion, but the right to examine candidates was not made to depend upon the adoption of these general rules. * * * The commissioners' failure to pass general rules, and the errors, if any, in establishing the possible percentages in the awarding of credits, were not matters of judicial fibre, and in no wise affected the jurisdiction of the commission."

In that case, which was a proceeding in certiorari, the question involved was the power of the board to hold a competitive examination in the absence of general rules authorized by the section of the San Francisco charter. In the case at bar no competitive examination was held; nor was there any observance of the civil service scheme adopted, which was clearly intended to prevent transfers or appointment to office, other than in accordance with rules which the commission in express terms was required to adopt. Moreover, the provision of the San Francisco charter which the Supreme Court was called upon to construe in the case referred to was almost identical with the provision in the Los Angeles charter which provides that:

> "The commission (in its discretion) shall adopt such other rules, not inconsistent with the foregoing provisions of this section, as may be deemed necessary and proper for the enforcement of this article."

[1] The commission failed and neglected to obey the mandatory provision of section 34, whereby it was not only authorized, but required, to prescribe a general rule under and pursuant to which all transfers should be made. Until such rule was adopted there was no law in the charter or elsewhere authorizing the purported transfer; hence the act of the civil service commission was without authority, arbitrary, and insufficient to vest in McAleer any right or title to the office. While it is true, as claimed by respondent, that the commission, under subdivision 1 of section 34, was authorized to make a rule providing for the classification of all positions in the classified service, it does not follow that said commission, by making the transfer on November 4, 1913, legally adjudged the position of deputy county clerk in charge of the registration department was in the same class and grade as that of registrar of voters, for the reason that, since the commission had adopted no rule for the classification of positions in the classified service, which includes the office of registrar of voters, there was no law under and pursuant to which the commission could determine said positions to be in the same class and grade. To sustain respondent's position would remove all limitations upon the power of the commission to make transfers, and, in the absence of general rules for guidance, leave it free to act arbitrarily in each particular case, thus nullifying the purpose for which the civil service provision was adopted.

[2] The registrar of voters, as we have seen, is an appointive county officer (section 14), and since it is not in the unclassified service named in section 33, the appointment to the office must, as required by the express provision of subdivision 1 of section 11, be made by the board of supervisors from the eligible civil service list, consisting of three persons certified by the commission as standing highest in accordance with a general rule prescribed by the commission for the creation of such eligible list. Subdivision 4, § 34.

[3] In our opinion, the office of registrar of voters was an independent office, as distinct and separate from that of county clerk as is that of auditor or recorder, and since it is specified as one of the offices to be filled by appointment to be made by the board of supervisors from the eligible list, it could not, under the pretense that it was of a like grade and class with that of deputy county clerk, be filled by act of the commission under the guise of transferring such deputy clerk to such independent and distinct office. To hold otherwise would violate the plain import of the language contained in the charter and be subversive of the purpose which the electors had in adopting the provision.

The claim of relator, Lyons, to the office is based upon the following proceedings: On November 20, 1914, pursuant to an order of the civil service commission, an examination was held in accordance with rules theretofore adopted for the purpose of filling the office of registrar of voters. As a result of this examination Lyons was rated highest, and, with others, placed on the list of those eligible for appointment to said office. On January 6, 1915, the commission certified to the board of supervisors the names of Lyons and two other persons standing highest, as shown by said examination, any one of whom was eligible for appointment to the office, and on August 10, 1915, the board of supervisors duly appointed Lyons as registrar of voters. Upon receiving a certificate of his appointment to the office, he duly qualified as such official and demanded from McAleer, the incumbent, possession of the office, books, and equipment, with which demand McAleer refused to comply. The action of the commission in holding the examination, certifying to the board of supervisors the list of eligibles for appointment, and the action of said board of supervisors in appointing Lyons seems to have been had and taken in strict accordance with the provisions of the charter, from which we conclude that McAleer had no right or title to the office, and that David B. Lyons was entitled to the same. And since the facts upon which our conclusion is reached appear from the findings, the judgment in favor of McAleer is not only reversed, but upon the going down of the remittitur the trial court is directed to enter judgment upon the findings in favor of David B. Lyons.

We concur: CONREY, P. J.; JAMES, J.

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33 Cal. App. 104

CHENOWETH v. CHAMBERS, State Controller. (Civ. 1644.)

(District Court of Appeal, Third District, California. Feb. 27, 1917. Rehearing Denied by Supreme Court April 26, 1917.)

1. STATUTES 🔑188—CONSTRUCTION—GENERAL RULES.

Where the words of a statute are not ambiguous and their effect is not absurd, the court will not give it other than its plain meaning, although it may appear probable that a different object was in the mind of the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 267, 276.]

2. OFFICERS 🔑30—INCUMBENCY OF TWO OFFICES—STATUTES—CONSTRUCTION—"TERM."

Const. art. 4, § 19, providing that no legislator shall during the term for which he shall have been elected hold or accept any office, trust, or employment under the state, became effective December 21, 1916. Petitioner was elected as representative for the term beginning January, 1915, and ending January 8, 1917, but resigned on December 19th to accept another office. *Held*, that the word "term" referred to the period for which the petitioner was elected, and not merely to his incumbency, so that petitioner did not evade such provision by resignation.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 37–43.

For other definitions, see Words and Phrases, First and Second Series, Term.]

3. OFFICERS 🔑19—INCUMBENCY OF TWO OFFICES—STATUTES—CONSTRUCTION—"SHALL."

Such provision, though it employs the words "who shall be elected," does not have a wholly prospective effect as to the time of election of the assemblymen, since the word "shall" neither legally nor grammatically denotes mere futurity, but conveys the idea of obligation.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 22, 23.

For other definitions, see Words and Phrases, First and Second Series, Shall.]

4. OFFICERS 🔑19—INCUMBENCY OF TWO OFFICES—STATUTES—CONSTRUCTION.

Nor does the expression "during the term for which he shall have been elected" imperatively demand construction so as to apply only to assemblymen elected after passage of the amendment.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 22, 23.]

Mandamus by Walter W. Chenoweth against John S. Chambers, as Controller of the State. Writ denied.

Garret W. McEnerney and A. F. Burke, both of San Francisco, and Downey, Pullen & Downey, of Sacramento, for petitioner. U. S. Webb, Atty. Gen., and R. T. McKisick, Deputy Atty. Gen., for respondent.

CHIPMAN, P. J. Petitioner seeks the writ of mandate to compel respondent to issue his warrant for the payment of a portion of petitioner's salary. Petitioner was elected a member of the assembly for the Fourteenth assembly district at the general election of November 3, 1914. His term of office began on the first Monday after the 1st day of January, 1915, and ended, by operation of law, on January 8, 1917. He duly qualified as such assemblyman and performed his duties as a member of the assembly at the Forty-First regular session thereof, and also at the special session held in January, 1916. He resigned his office as assemblyman on December 19, 1916, and his resignation was duly accepted by the Governor. He had previously, but since his election as assemblyman, been appointed auditor of the state board of prison directors, and served in that capacity during the entire month of December at the Folsom state prison. He was paid for his services prior to December 19, 1916, but was denied a warrant for the balance of that month's services.

The action of the controller is based upon amended section 19, art. 4, of the Constitution, which took effect December 21, 1916, and reads as follows:

> "No senator or member of the assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this state; provided, that this provision shall not apply to any office filled by election by the people."

"It is the contention of the petitioner," reads his brief, "that the amendment is inapplicable to him for two reasons: (1) The amendment is prospective only in its operation, and therefore does not affect senators or members of the assembly who, like the petitioner, were elected before the amendment took effect; and (2) the petitioner had ceased to be a 'member of the assembly' before the amendment took effect, and therefore at no time during the operation of the amendment was within the subject matter of the amendment or affected by it."

Section 19 of article 4 formerly provided that:

> "No senator or [assemblyman] shall, during the term for which he shall have been elected, be appointed to any civil office of profit under this state which shall have been created, or the emoluments of which have been increased, during such term, except such offices as may be filled by election by the people."

The amended section is much more sweeping than its progenitor, for it applies to all offices, other than elective offices, and forbids the holding or accepting by a senator or assemblyman of any office, trust, or employment under this state "during the term for which he shall have been elected." The purpose of the amendment, as stated by one of its proponents in the official argument addressed to the electors, was to bring the Constitution into harmony with the American theory of government that "those who execute the laws should not be the same individuals as those who make the laws," and for the further reason "that a legislator who is holding a position on the state pay roll is too apt to allow the wishes of the one responsible for his appointment to decide the manner in which his vote shall be cast. A man in such a position is, to say the least, not in that independent frame of mind which should be possessed by the ideal legislator."

The question here is: Was it intended to apply to petitioner whose term of office began before the adoption of the amendment and had not expired at the time it went into effect? And, if so intended, could he evade its operation by resigning before the amendment took effect?

[1] We may safely accept as rules of construction what was said in Smith v. Union Oil Co., 166 Cal. 217, 135 Pac. 966, cited by petitioner:

> "Where the words of a statute are not ambiguous and their effect is not absurd, the court cannot give it other than its plain meaning, although it may appear probable that a different object was in the mind of the Legislature."

No question arises here as to what the people desired to accomplish by adopting this amendment. Its object is plain enough and is manifest on its face.

[2] The word "term," used in the section, refers, we think, to the period for which the petitioner was elected, and not merely to his incumbency. Rice v. National City, 132 Cal. 354, 64 Pac. 580. When we speak of the "term" for which an officer has been elected, we mean the period of time fixed by statute during which he may serve, and not to the time he may happen to serve. Said the court, in Ellis v. Lennon, 86 Mich. 468, 49 N. W. 308:

> "The term for which respondent was elected is clearly defined by the charter, and the language 'the term for which he was elected' has a clear and well-defined meaning. He was elected to serve for two years, whether he served that time or not. The language used in the statute fixes the period of his ineligibility, and excludes a construction which would have attached in the absence of that language."

In the instant case the statute fixed the term of petitioner's office as assemblyman.

We need not consider the effect of petitioner's resignation prior to the going into effect of the amendment. If the section applies to a senator or assemblyman whose term of office had not expired on December 21, 1916, we do not think that petitioner succeeded in evading its force by his resignation prior to December 21st; for the section deals with a fixed period of time, to wit, the "term" of the officer, and not to the period of his incumbency.

The House of Representatives of the state of Maine submitted certain questions to the Supreme Court of that state, but the interrogatories did not reach the court until after the Legislature had adjourned. For this and other reasons a majority of the court declined to respond to the request. Three of the judges dissented from this refusal, and, in answer to one of the interrogatories, said:

> "The Constitution in terms (article 4, pt. 3, § 10) prohibits the appointment of a senator or representative, during the term for which he shall have been elected, to any civil office of profit under this state, which shall have been created or the emoluments of which increased during such term; i. e., the term for which he was elected. As to such officers the appointment itself is prohibited, and the prohibition continues, not only while the member retains his seat in the Legislature, but continues until the expiration of the term for which he was elected. He cannot, therefore, be appointed to such office during that term, even though he has resigned his seat in the Legislature." Advisory opinion to Governor, 49 Fla. 269, 39 South. 63; Ellis v. Lennon, 86 Mich. 468, 49 N. W. 308; People ex rel. Sherwood v. State Board of Commissioners, 129 N. Y. 360, 29 N. E. 355.

[3] Respondent concedes that the amendment was not intended to nor does it operate retroactively. His contention is that it should be given prospective effect from and after December 21, 1916. There is no disagreement among counsel as to the fact that the amendment went into effect on that date. Petitioner's contention is that it was intended to apply only to senators and assemblymen thereafter to be elected, and that this is made manifest by the language employed; that the amendment speaks only in terms of futurity; that it disqualifies only those "who shall be elected, and further provides that the disqualification shall operate only during the term for which they shall have been elected"; thus "expressly and in two ways indicates the intention of the framers that it should have a prospective operation only." This interpretation means that senators chosen when petitioner was elected are not disqualified for two years from and after the first Monday in the year 1917. If the amendment had been proposed by the Legislature, a possible inference might arise that the members did not intend to disqualify themselves. The amendment, however, was proposed by the people at large, through the initiative, and we may safely assume what was common knowledge that it was intended to reach a practice in state administration of many years' standing and which the people believed should be presently eradicated. The amendment had its origin in a spirit for reform that permeated the state and was intended to cure what the people believed to be a present existing evil, and not merely one likely to arise in the future. Did they so express their intent as to make it imperative on the court, under accepted rules of construction, to hold, as is now contended, that "grammatically (and hence legally) the amendment is limited in its operation to such senators and assemblymen as shall be elected after it takes effect"?

The stress of the argument requiring us so to hold rests upon the presumption that the grammatical construction of the language "during the term for which he shall have been elected" compels the conclusion that "the prohibition is expressed in terms of simple futurity, and the class of officers to be affected is grammatically limited to such as should be elected after the amendment becomes operative." It is urged that "the verbs are all in the future tense"; that the word "shall" the simple future; that the class of senators and assemblymen to which the act shall apply "is expressed in the future perfect tense as senators or assemblymen who shall have been elected"; that in employing the future perfect tense the amendment limits its application to senators and assemblymen who shall be elected after the amendment takes effect.

We are quite satisfied that the word "shall" where first used lends no force to petitioner's contention. Neither legally nor grammatically does it denote mere futurity. It is used here as a word of command, in accordance with the Constitution, that its provisions "are mandatory and prohibitory, unless by express words they are declared to be otherwise." Const. art. 1. In Fernald's Working Grammar of the English Language, p. 141, the distinction between "shall" and "will" is pointed out, and the author says the difference between these two auxiliaries "in the expression of future action or state is one requiring careful study." The author states that primarily "shall" denotes obligation. "In the first person it simply denotes future fact. In the second and third person the idea of obligation remains, and is felt to be imposed by the person speaking; hence, you 'shall' or 'they shall' means, I will compel you or them to act. * * * Consequently you (he or they) shall, expresses command or necessity, never simple future action." In the amendment the word "shall" must be read in connection with its context. "No senator or member of assembly shall," etc., which is a command that senators and assemblymen shall not hold or accept any office. There is here no suggestion of futurity. The language is imperative and is directed to every member of the Legislature in the present tense. We do not think that the word "shall" where first used in the provision conveys the idea of futurity at all. On the contrary, it carries with it an implication which should aid us in giving the proper construction to what follows.

[4] The expression "during the term for which he shall have been elected" presents a question of more difficulty. In a strictly grammatical sense the phrase, standing alone, conveys the idea of futurity. Reading the section in its entirety, it does not appear to us imperatively to demand a construction contrary to what we have the right to assume the electors, in voting on the amendment, understood to be its purpose and the class of officers to whom it was intended to apply. The phrase or its equivalent is frequently found in statutes and Constitutions, and the cases show that it is applied to past as well as to future acts or conditions. As was said, in Norris v. Sullivan, 47 Conn. 474:

> "The words 'shall have levied' are susceptible of both past and future application; they furnish a convenient form for legislative use when it is desired to give all-inclusive force to a single expression. Therefore, as they may mean future, or past and future, it becomes a question of legislative intent in each statute."

Respondent points out that such expressions are so frequently found in statutes that the Code of Wisconsin (section 4972) established the following among other rules of construction:

> "1. The words 'shall have been' include past and future cases."

In a Missouri statute with respect to the time of commencing an action, there was a proviso:

> "That if any action shall have been commenced within the time prescribed in this section, and the plaintiff therein suffer a nonsuit, * * * such plaintiff may commence a new action," etc. Rev. St. 1899, § 2868, amended by Laws 1905, p. 138.

This statute was before the court in Clark et al. v. Kansas City, etc., R. R., 219 Mo. 524, 118 S. W. 40, and it was there contended that the grammatical construction of the statute made it inapplicable to actions commenced before its passage. We venture to quote at some length from the opinion, which seems to us not only sound law, but good, ordinary common sense:

> "Courts have no right, by construction, to substitute their ideas of legislative intent for that unmistakably held by the Legislature and unmistakably expressed in legislative words. 'Expressum facit cessare tacitum.' We must not interpret where there is no need of it. * * *
>
> "Therefore, if the law says that it is to operate only upon cases to be brought thereafter, if it in terms excludes pending cases, then we have nothing to do but to enforce it. Attending to that view, we do not read the statute as contended by counsel for the respondent. Its use of the future form of the verb 'commence,' as developed in the phrase 'shall have been commenced,' in correct usage in the discourse of good writers and speakers, includes the past as well as the future. That phraseology in a statute has been held by the Supreme Court of Connecticut to be 'susceptible of both past and future application; they [the words] furnish a convenient form for legislative use when it is desired to give all-inclusive force to a single expression. Therefore, as they may mean future, or past and future, it becomes a question of legislative intent in each statute.' * * *
>
> "Our own statute on construction (R. S. 1899, § 4160) requires that 'words and phrases shall be taken in their plain or ordinary and usual sense.' With that rule in mind, let us illustrate: If a rule were bulletined on a given Tuesday by the headmaster in charge of teaching grammar in a school, as follows: 'No pupil shall be whipped twice for a mistake which shall have been made in parsing'—would any boy in the school take the rule to apply only to future mistakes in parsing? Could he not well plead the rule (with high hope of its allowance) if his mistake and one flogging occurred on the Monday prior and another flogging was threatened on the Wednesday subsequent to the rule for the same mistake? Or if C, a plantation owner, is building barns and writes his overseer: 'Paint all barns red that shall have been commenced'—would B, his overseer, take that command to mean that only barns commenced after the order should be painted red? Nay, if a very stickler for grammatical precision—a John Horne Tooke, a Lindley Murray, or a Dr. Marsh—should make a New Year's rule for his self-guidance, viz.: 'If my reading of any book shall have been commenced, I will finish it'—would he construe his own rule not to include Anatomy of Melancholy, or the Decline and Fall, put in reading on the prior Christmas?
>
> "We may presume all legislators grammarians, but that presumption would not drive us to the conclusion that they meant only future action when they wrote 'shall have been commenced.'"

Section 19, art. 5, of the Constitution was amended in 1908 and relates to the compensation of state officers. It reads:

> "The Governor * * * and surveyor general shall, at stated times during their continuance in office, receive for their services a compensation which shall not be increased or diminished during the term for which they shall have been elected, which compensation is hereby fixed for the following officers, as follows: * * * Such compensation to be in full for all services by them respectively rendered in any official capacity or employment whatsoever during their respective terms of office: Provided, however, that the Legislature may, by law, diminish the compensation of any or all of such officers, but in no case shall have the power to increase the same above the sums hereby fixed by this Constitution."

The salaries of the officers named were materially increased by the amendment. It went into effect November 3, 1908. Kingsbury, the then surveyor general, demanded of the controller a warrant for the unpaid balance due him for the month of November, 1908, calculated at the rate fixed for his salary as surveyor general by the amendment. His demand was denied, and he brought mandate in this court, reported in the case entitled Kingsbury v. Nye, 9 Cal. App. 574, 99 Pac. 985. Both parties seek support in this case. The point now under discussion was distinctly raised, and it was contended by respondent:

> "The amendment must be deemed to have a prospective operation and to apply to the offices enumerated, upon the expiration of the terms of the present incumbents, and not before."

In reply we said:

> "The point made that the rule requiring that the amendment be given a prospective effect necessarily postpones its operation until after the present terms expire, and that any other view would be to give a retroactive effect to the amendment, we think, cannot be sustained. The amendment, as we apply it, is in no sense given a retroactive operation; it is simply given force from and after its ratification, and it operates prospectively thenceforward. If, as we have held, the amendment took effect upon its ratification, and operated, as respondent admits, prospectively, we know of no authority for holding that its operation must be postponed until the terms of the incumbents have expired."

The rules of grammar were not invoked in that case. The decision favorable to petitioner turned largely on the view we took that the inhibition to the increasing of salaries was addressed to the Legislature. Said the court:

> "The amendment under review having gone into operation from the date of its adoption, it must be given effect thenceforward, unless we can say that some restriction has been put upon its operation, either by the terms of the amendment or by implication derived from the terms so used. We can find nothing in any of the terms, and nothing is claimed to be found therein, except the provision as to the increase or diminution of the compensation, which we hold was addressed to the Legislature alone. Had such intention dwelt in the minds of the proponents of the amendment, it would have been easy and simple to restrict its effect and withhold its benefits from present incumbents."

The case is not directly in point, but it must be admitted that the value of the decision would be greatly impaired if the strict rule of grammar now urged should be held to prevail instead of the more reasonable rule of construction adopted by the courts.

Petitioner cites many cases in support of his contention where the word "shall" is used or verbs are expressed in the future perfect tense. For example:

A statute conferred certain rights upon a person who had paid an assessment in the event that such assessment "shall be set aside, altered or reduced," and it was held:

> "That such assessments only should be embraced as should be vacated, altered, or reduced after the act took effect." City of Elizabeth v. Hill, 39 N. J. Law, 555.

A statute provided that:

> "Whenever a married man shall be deserted by his wife, or a married woman shall be deserted by her husband, for the space of one year, * * * he or she may bring an action," etc. Laws 1874, c. 66, § 1.

An action was brought July 21, 1874, alleging desertion July 17, 1873. The court held that the language of the statute evidenced an intention that it should have a prospective operation only. Giles v. Giles, 22 Minn. 348.

A statute read:

> "All and singular the goods and chattels, lands, tenements and real estate of every person against whom any judgment shall be obtained in any court of record either at law or in equity," etc. Laws 1891, p. 246.

The court held the statute to apply only to judgments entered subsequently to the passage of the act. Jones v. Stockgrowers' Nat. Bank, 17 Colo. App. 79, 67 Pac. 177.

Section 5, art. 6, of the California Constitution of 1879 provided that:

> "All actions for the recovery of the possession of * * * real estate shall be commenced in the county," etc.

It was held in Gurnee v. Superior Court, 58 Cal. 88, that:

> "Neither in its language nor in its spirit does it apply to actions already commenced."

These cases are cited as examples of the simple future tense. Aside from the element of futurity said to influence the decisions, it seems to us that the character of the statutes and the purposes contemplated by them would have required that they be given a prospective operation unless a contrary intention was made clearly to appear. Take, for example, the Minnesota case, giving an action where the husband or wife, as the case may be, "shall be deserted for the space of one year." Obviously it would violate the rules of construction to give such a statute a retroactive operation. So also it may be said of a Michigan statute (cited as an example of the future perfect tense) giving the court power to grant a divorce when the defendant "shall have become an habitual drunkard." Comp. Laws 1857, § 3227. The court, in reversing the judgment granting the wife a divorce, said:

> "To bring the case within the fair intention of this statute, we think the defendant must have become an habitual drunkard after the marriage."

The evidence was that the habits of the husband with respect to drink were substantially the same prior to his marriage, and that the complainant was well aware of this when she married him. Porritt v. Porritt, 16 Mich. 140. Another example given as showing the weight accorded to grammatical construction is the case of State v. Boyd, 21 Wis. 210. The section of the Constitution of Wisconsin is quite similar to section 19, art. 4, of our Constitution before its amendment in 1916. The relator was elected to an office existing previously to his being chosen a member of the Legislature. The emoluments of the office had not been increased when he was elected to it, but were increased by a subsequent enactment while he was a member of the Legislature, but subsequent to his election to the office of county judge. The Constitution provided:

> "No member of the Legislature shall, during the term for which he was elected, be appointed or elected to any civil office in the state which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected." Const. art. 4, § 12.

The court said:

> That, according to the most natural grammatical construction of the provision, it "only forbids a member of the Legislature, while such member, from being appointed or elected to any civil office which shall have been previously created, or the emoluments of which shall have been previously increased, during the term for which he was elected."

It was said arguendo:

> "The future perfect tense is used—an office 'which shall have been created, or the emoluments of which shall have been increased,' etc. —indicating a future action done and completed before the appointment or election, the other future action to which it refers."

The writer of the opinion stated:

> That this construction is not the one he was at first disposed to place upon the provision; that it seemed to him "that the purity and fidelity of the representative, as well as of the public interest, would be most effectuallly secured by excluding those persons from office who had been concerned in creating it or rendering it more lucrative. But the author of the Constitution did deem it expedient to adopt such a rule of disqualification, and a much more restricted one has found its place in that instrument."

We are not quite sure but that the learned justice's first impressions would have led to a safer solution than was finally reached. However, the question there was as to Boyd's right to an office which he held when elected a member of the Legislature, and rules of construction, perhaps, would not have justified ousting him from that office under a provision which plainly provided that the office to which he was forbidden to be elected or appointed was an office created during the term he was serving in the Legislature, and not an office to which he was previously elected. The court said that the case was "not within the language of the provision, according to its most natural grammatical construction." But suppose Boyd had been elected to and was holding a civil office after (i. e., during the term for which) he had been elected a member of the Legislature; a different case would have arisen. And it is just such a different case as is presented by the amendment we are considering—no member of the assembly shall, during the term for which he shall have been elected, hold or accept any office. Under the old section the disqualification came about by his participating in the creation of the office or the increase of its emoluments. Under the new section he is forbidden to hold or accept any office during the term for which he shall have been elected. His participation in creating the office is no longer the evil to guard against. The evil intended to be combated by the amendment was the holding or accepting by members of the Legislature any office under this state during the term of office as such members. No possible reason can be suggested why the amendment did not operate upon every member of the Legislature at the moment it took effect. Nor can any good reason be given why its operation should be limited to members only who shall have been elected after December 21, 1916, since without question the mischief which it was designed to remedy was present and quite as menacing as it would be two or four years thereafter, and since the class upon whom it was to operate was the same on that date as it would be at some future date. That it was so intended when submitted to the people there can be no doubt, and we do not think the language used to express that intention compels us, under settled canons of construction, to nullify that intention, or would justify its nullification.

Respondent cites several cases illustrative of the fact that expressions in statutes in the future perfect tense are not necessarily required to be given a strictly grammatical interpretation. One of these examples is found in Lane v. Lane (Q. B.), reported in volume 65 N. S. Law Journal Reports (1896) p. 63. The statute involved was section 4 of the Married Woman Act, 1895, reading as follows:

> "Any married woman whose husband shall have been convicted summarily of an aggravated assault upon her within the meaning of section 43 of the Offenses against the Person Act, 1861, or whose husband shall have been convicted upon indictment of an assault upon her, and sentenced to pay a fine of more than £5, or to a term of imprisonment exceeding two months, or whose husband shall have deserted her, or whose husband shall have been guilty of persistent cruelty to her, or willfully neglecting to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately and apart from him, may apply to any court of summanry jurisdiction * * * for an order or orders under this act."

The act took effect January 1, 1896. The wife applied to the justices of Glamorganshire for an order under said section, alleging the persistent cruelty of her husband. All the acts complained of were committed previous to January 1, 1896. The justices held that the section was not retrospective in its effect and they had no jurisdiction. The wife appealed. Reversing and remanding the case there were separate opinions of the judges. The president, Sir F. H. Jeune, said:

> "But upon the language of the section and the reason of the thing the matter seems to be extremely clear. The words 'shall have been' are hardly ambiguous; in my view, they deal with all offenses, past and future (considered with regard to the date of the act), and not only to future offenses."

Justice Barnes said:

> "Looking at the wording of the section and at the whole act, the question seems free from any doubt, and in my judgment the language used in section 4 is not at all ambiguous. It seems

> quite clear to me that the expression 'any married woman whose husband shall have been guilty of persistent cruelty to her may apply,' etc., deals with all cases of persistent cruelty which have happened prior to the decision of the court."

They not only looked to the language employed, but also "to the reason of the thing."

The case of Queen v. The Inhabitants of Christ-Church, reported in Law Journal 1849, Michaelmas Term, 12 Victoria, p. 28, is cited. There the court was considering a statute providing, among other things, that a pauper who "shall have resided" within the parish for a period of five years fixed by the statute shall thereafter be irremovable. The controversy arose in an attempt of St. John's parish to deport one Mary Sweeny and her four children to the parish of Christ-Church. The order of removal was sustained, Lord Denman delivering the opinion. We cannot give his reasoning in full. Referring to the statute, he said:

> "The word 'shall' denotes rather the happening of the event, on which the exception is to apply, within the time assumed to have been before computed, than the future relation of such event to the time when the statute passed. It denotes the subjunctive mood rather than the future time."

He stated:

> That the claim that there is a presumption against a retrospective statute being intended "is founded on a misconception. The statute is prospective only. Its direct operation is only on removals; after it has passed it does not alter existing rights in respect of completed removals. A space of time is an essential ingredient in the case to which it applies, and this space of time may consist in part of time passed before the statute passed, as is the case with statutes in limitation and prescription, but they are not therefore classed with the retrospective statutes."

A Minnesota statute which provided:

> "That every dwelling house or other building, for the construction, erection or repairs of which any person shall have a claim for materials furnished or services rendered, shall, with the land," etc., "be subject." Pub. St. 1849–1858, c. 86, § 14.

In Mason & Craig v. Heyward, 5 Minn. 74 (Gil. 55), the court said:

> "The words 'shall have a claim' mean and refer to the time of the passage of the act, and subsequently, and comprehend claims of such nature existing when the act was passed."

Further reference to cases seems unnecessary. The future form of verbs is so frequently used by writers of statutes and Constitutions and literary productions to include the past as well as the future that we must regard it as correct usage.

We do not think that the amendment is couched in such language as to make it impossible or unreasonable for us to hold, without violating settled rules of construction, that it was intended to apply to a member of the Legislature whose term began before December 21, 1916, and did not terminate until after that date.

The writ is denied.

We concur: HART, J; BURNETT, J.

(33 Cal. App. 164)

WEST v. JESSE A. LINNEY & CO. et al.

(Civ. 1660.)

(District Court of Appeal, Second District, California. March 3, 1917.)

1. Master and Servant 🔑278(9) — Injury to Servant—Sufficiency of Evidence.

Evidence that shingles on a roof to which a painter's scaffold was attached slipped, causing the scaffold to fall and injure plaintiff employé, sustains a finding that the master was negligent, in not providing a safe place to work, where the scaffold could have been tied to a chimney.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 958.]

2. Master and Servant 🔑265(14) — Contributory Negligence—Burden of Proof.

Where defendant employer's negligence has been established, defendant has the burden of proving plaintiff employé's contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 893, 908.]

3. Master and Servant 🔑281(12) — Contributory Negligence — Sufficiency of Evidence.

A finding that plaintiff employé was not guilty of contributory negligence while upon a painter's scaffold is sustained under St. 1911, p. 796, providing that an employé's slight contributory negligence shall not bar recovery, etc., where his alleged negligent actions were completed before the accident, and would not necessarily have caused the scaffold's fall.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 995.]

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Benjamin West against Jesse A. Linney & Co. and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Robt. T. Linney and Ralph W. Schoonover, both of Los Angeles, for appellants. Harriman, Ryckman & Tuttle, of Los Angeles, for respondent.

CONREY, P. J. In this action it was alleged by the plaintiff that he was employed by the defendants as a house painter upon a certain house in the city of Los Angeles; that, while working in the course of that employment upon a scaffold supplied and erected by defendants and suspended by ropes and hooks from the building, the scaffold suddenly and without warning and through the negligence of the defendants fell and precipitated plaintiff to the ground below, whereby he received the described injuries. It was pleaded that the negligence of the defendants consisted in failure to provide plaintiff a secure and sufficient scaffold upon which to work and proper and sufficient supports for said scaffold. Defendants appeal from the judgment and from an order denying their motion for a new trial.

It is conceded that the ropes, hooks, jacks, and platform constituting the scaffold were supplied by the defendants to the plaintiff and two other workmen who were co-operating with him as fellow workmen in painting the house. It was also shown without conflict in the evidence that the scaffold fell suddenly and without warning and thereby the plaintiff received his injuries. The scaffold was erected by workmen of the defendants who put the materials in place and swung the platform into the position where it was when it fell. It was clearly shown by the evidence and is not disputed that the scaffold was of a kind commonly used and well approved in the painting business, and that the particular materials were superior of their kind and in first-class condition. The method of erecting the scaffold was as follows: The ropes were hung from hooks which were fastened to roof jacks which rested upon the shingles of the roof. The upper end of each jack was thrust under an upper course of shingles, and the jacks were prevented from slipping by certain rows of screws the points of which were arranged so as to catch upon the shingles of the roof. Two shingles at the lower side of the roof and upon which one of the jacks rested slipped out of place and fell to the ground. At the same instant the jack and hook slipped off, thereby causing the rope and platform to fall.

[1] In his testimony the plaintiff described the staging and the materials by which it was upheld, and stated that when the staging was put up he tested the falls by swinging upon each of the ropes attached to two of the hooks "before we put the scaffolding on." Lee Wilson, a witness for the defendants, was one of the men working with the plaintiff. Wilson testified that, with the assistance of one Doremus, he placed the hooks on the roof and tested them; that he waited at each hook until it was tested, and this one looked perfectly safe; that in this particular case he had no doubt of its safety, but because of the appearance of the shingles he made an extra test; that he made an examination of the shingles to see if they were nailed or loose, and they were not loose at the time he put down the jack. The plaintiff did not take part in placing the hooks on the roof or share in putting up the apparatus, except that he tested the falls as above stated. As to the safety of the shingles and of the placing of the hooks thereon, he relied upon the defendants and upon his fellow workmen; also a member of defendant partnership was present when the scaffold was put up. The roof was old and weather beaten. Immediately after the accident some pieces of shingle of that character, apparently corresponding to the shingle space left vacant on the edge of the roof, were found lying on the ground where the scaffold fell. These were exhibited to the court in connection with the testimony, but are not before us.

It was possible to have secured the scaffold against slipping of the shingles and a consequent fall by fastening a rope to the hooks and tying it to a chimney on top of the roof. This actually had been done while they were painting another side of the house. Under the circumstances shown, we cannot say that there is no evidence tending to prove that the defendants negligently failed to provide plaintiff a safe scaffold upon which to work.

[2, 3] The accident occurred on the 16th day of October, 1912. At that time there was in effect a statute relating to the liability of employers for injuries of this kind. Stats. 1911, p. 796. Section 1 of that act provided that in actions of this class:

> "The fact that such employé may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employé."

It was further provided that it shall not be a defense that the injury was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant. Negligence of the defendants having been shown, the burden was upon the defendants to establish their plea of contributory negligence. In order to establish such plea, it must have been made to appear not only that the plaintiff was negligent, but that such negligence was a proximate cause of the accident; and even if these conditions were established, the plaintiff's cause of action could not be entirely defeated if the court or jury found from the evidence that the contributory negligence of the plaintiff "was slight and that of the employer was gross in comparison." Applying the evidence in this case to the rules governing contributory negligence under this statute, we cannot say that the court was not justified in its finding that plaintiff's injuries were not proximately caused or contributed to by his own negligence or fault. There is some testimony tending to show that the plaintiff, in some of his movements to and fro upon the scaffold, violated certain rules current among painters which are usually observed for the purpose of avoiding accident. But these acts of the plaintiff had been completed prior to the time of the accident, and were not such as to require the court to find that they were the acts which caused the scaffold to fall.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

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33 Cal. App. 197

PEOPLE v. KITLEY. (Cr. 662.)

(District Court of Appeal, First District, California. March 12, 1917.)

CRIMINAL LAW 🔑1151—APPEAL—REVIEW—VERDICT.

Where it does not appear that prejudice resulted to defendant from the refusal of his request for a postponement of the trial, and the evidence amply sustains the verdict, the conviction will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045–3049.]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

James Kitley was convicted of crime, and he appeals. Affirmed.

Walter Stingley and J. C. Thomas, both of Oakland, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. Upon an investigation of the record, and after listening to the oral argument of the appellant, we are not satisfied that the trial court abused its discretion in denying the defendant's request for a postponement of the trial, and at any rate it does not appear to us that any prejudice resulted to the defendant.

As to the appellant's criticisms of the charge of the court, that charge is in our opinion clear and correct; nor do we find any merit in the point that the testimony of the prosecutrix is inherently improbable and therefore insufficient to support the verdict and judgment. On the contrary, an inspection of the record convinces us that they are amply sustained by the evidence.

The judgment and order appealed from are therefore affirmed.

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33 Cal. App. 195

PEOPLE v. SMITH. (Cr. 671.)

(District Court of Appeal, First District, California. March 12, 1917.)

LEWDNESS 🔑10—EVIDENCE—SUFFICIENCY.

In a prosecution for the felony defined by Pen. Code, § 288, which punishes lewd and lascivious conduct with minor children, evidence *held* to sustain a conviction of an attempt to commit the act charged.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. § 15.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

William Smith was convicted of crime, and he appeals. Affirmed.

Knapp Orton and W. C. Tupper, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was charged with the commission of the felony defined by section 288 of the Penal Code, which punishes lewd and lascivious conduct with minor children; and the point that the appellant makes in his appeal from the judgment and order appealed from is that, because defendant's conviction was of an attempt to commit the act charged, there is no evidence warranting the verdict, for the reason that the information charges that the defendant placed his hands upon certain parts of a minor female child, and there is no direct evidence to that effect. It is argued that he could not be convicted of an attempt, because the prosecution did not show specifically that he had made any move to place his hands upon the parts in question. The appellant also contends that the evidence does not show his guilt beyond a reasonable doubt.

Considering the latter point first, we think it sufficient to say that the jury by its verdict has decided it contrary to appellant's contention. As to the first point urged, the evidence introduced at the trial was direct and circumstantial. There is circumstantial evidence of the defendant taking the child into a barn or vacant house, and that the child's clothing was disarranged. There is the admission on the part of the defendant that he did touch the child's clothing, and there is the testimony of the police officer that the defendant stated to him that he allowed his passion to get the best of him and that he played with the child. Upon the whole evidence the jury rendered its verdict of an attempt to commit the act charged; and we are satisfied from a review of the record that the evidence is sufficient to support the verdict and judgment.

For that reason the judgment and order appealed from are affirmed.

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33 Cal. App. 130

COMPTON LAND CO. v. VAUGHAN et al.
(Civ. 2203.)

(District Court of Appeal, Second District, California. Feb. 28, 1917.)

VENDOR AND PURCHASER ⚿18(4)—OPTION TO PURCHASE—CONSTRUCTION.

An agreement contemplating the purchase of land, reciting part payment, but providing that the agreement was an option exclusively, and that the prospective purchaser has no rights in the property until a second payment, and that on default of such payment both parties were released, and the prospective vendor should retain the initial payment as liquidated damages, upon which there were indorsements extending the date of the second payment upon consideration of smaller payments, which indorsements confirmed the terms of the original agreement as an option merely, the payments made being the consideration upon which the option to purchase rested, and upon the lapse of the time fixed by the contract, and extension indorsements, and default in second payment, neither the purchaser nor his assignee could recover any of the payments made.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action to remove cloud from title by the Compton Land Company against John A. Vaughan and another. Judgment for plaintiff, and defendant Henry S. Woolner appeals. Affirmed.

Albert M. Norton and Henry S. Woolner, both of Los Angeles, for appellant. John G. Munholland, of Los Angeles, for respondent.

JAMES, J. The appeal in this case is taken from a judgment entered in favor of the plaintiff. In the complaint facts were set out showing that plaintiff, on or about the 14th of December, 1911, executed in favor of defendant John A. Vaughan a certain writing, which is in the complaint called "an option agreement." This agreement related to certain realty. It is alleged that defendant Vaughan failed to comply with the terms and conditions of the agreement and failed to complete the purchase of the real property which was described. It was then alleged that the defendants "claim an estate or interest in said premises adverse to plaintiff by and through said option agreement, which in truth and in fact is void and of no effect." Allegation is made that the option agreement was recorded in the office of the county recorder and remained as a cloud upon plaintiff's title. The prayer was that the option agreement be adjudged void and canceled and satisfied of record, and "that the cloud created thereby be removed," and for general relief. An answer was filed and the case proceeded to trial, with the result as stated.

There was no dispute as to the terms of the writing, which was set out in full, together with certain extension indorsements, as an exhibit in the complaint. The agreement was dated December 14, 1911, and recited that the plaintiff had received from Vaughan the sum of $300 "as part payment for the following described real property." (Here follows a description of the realty affected.) The agreement then contained the following recitations:

> "The entire price to be paid for the above described real property is $28,500 and to be paid as follows: $300 cash as hereinbefore mentioned. $6,200 on or before ninety days after date. The balance of $22,000 to be divided in six equal payments."

The time of the maturity of the notes was then set forth, and further on in the document it was recited as follows:

> "It is distinctly understood that this instrument is an option exclusively, and that the holder of said option has no right to enter on or in any manner assume ownership or possession of any part of said above-described property until above-mentioned $6,200 is paid and said John A. Vaughan has executed above-mentioned notes, and the agreement for sale of real estate as herein called for is duly escrowed. A good and sufficient agreement for sale of real estate, with a resolution of the board of directors, deed to be executed and delivered by the said Compton Land Company, * * * on or before the 14th day of March, 1912. * * * If the said payment of $6,200 is not paid or tendered on or before the said 14th day of March, 1912, then this contract to be void and of no effect, and both parties released from all obligations herein, and in that event the said $300 paid on this date is to be retained by the Compton Land Company as liquidated damages."

The alleged option agreement was duly signed by the plaintiff corporation and by John A. Vaughan, defendant. On March 11, 1912, an indorsement was made on the writing, signed by both parties, which recited that:

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

"The within option agreement is hereby amended by mutual consent of both contracting parties, as follows, viz.: First, in lieu of $6,200 cash payment on March 13, 1912, that upon the receipt of $300 cash on or before March 13, 1912, $5,900 being balance of the $6,200 cash payment, together with the interest on said $5,900 and on the $22,000 from March 13/12 at 7% per annum, to be extended to June 13, 1912, on which date $5,900 and all accrued interest to be paid."

Some additional conditions were stated affecting the notes, and the indorsement concluded with the following words:

"All the items and terms mentioned and referred to in the within original option to obtain as therein written."

Again, on June 13, 1912, the following indorsement was made and signed by the parties:

"The foregoing amendment to option is hereby continued to December 1, 1912, by mutual consent of both parties thereto, in consideration of the receipt this day of $1,000 by the Compton Land Company; the cash payment of December 1, 1912, to be $4,900, and all interest accrued on the above-mentioned $1,000 and $4,900, and on $22,000 from March 13, 1912; the six semiannual notes of equal amounts, aggregating $22,000, are to be dated December 1, 1912."

A further indorsement, dated 11-25-12, being one of assignment of the rights of the option holder to the defendant H. S. Woolner, appeared. There was no contention, as shown by the testimony heard, that on December 1, 1912, the person in whose favor the option was issued, or his assignee, had made the payment required, and it was admitted that no money was paid, except that shown by the writing and the indorsements appearing as before mentioned. More than two months after the expiration of the last mentioned date this action was filed. Defendant Woolner first asserted by his answer that certain incumbrances existed against the land which made it impossible for the plaintiff to comply with its agreement; and, secondly, set up a counterclaim contending that there should be returned to him all of the money paid under the agreement. It is sufficient to say that the findings of the trial court which determined that there was no incumbrance which would prevent full compliance being made by the plaintiff with its agreement, are supported by the evidence. As to whether the defendant was entitled to have returned any part of the money paid upon the written agreement depends altogether upon the determination as to whether the contract as drawn constituted of itself or by the indorsements made thereon, an agreement of sale or a mere option to purchase. It will be noted that the proposed vendor sedulously asserted in the agreement that the instrument was an "option exclusively." It further appeared that it was contemplated that only after the $6,200 had been paid was the vendor to execute "a good and sufficient agreement for sale." The contract in its original form, and without the indorsements, purported only to extend to Vaughan an option to have later executed in his favor an agreement of sale which would bind both parties. It is said in the agreement that, in the event the payment of $6,200 was not made on or before the 14th of March, 1912, "then this contract to be void and of no effect and both parties released from their obligations herein."

Quite plainly it appears that if Vaughan, at the time the $6,200 payment became due, had failed to pay and no extension had been granted to him, the vendor would not have had the right to sue Vaughan to recover that payment, or to compel him to purchase the property at the price and according to the terms set forth in the agreement. If the vendor had not this right, then, as there was no mutuality of remedy, the contract is at once given the impression of being an option merely, the benefits of which Vaughan might or might not, at his election, take advantage of. The mere fact that the initial payment was to be applied upon the purchase price does not change the condition of the contract in the respect just considered. Such was also the case in the contract before the court in White v. Bank of Hanford, 148 Cal. 552, 83 Pac. 698. And see, also, Briles v. Paulson, 170 Cal. 196, 149 Pac. 169. Neither can it be gathered from the indorsements made upon the contract, whereby it was extended upon the consideration of the payment, first of $300, and then of $1,000, that there was any intent upon the part of the parties to change the character of their contract relations. It was merely provided that the dates of payment should be changed, and that portion of the contract remained in force which postponed the execution of a formal agreement of sale until the time when the $6,200 payment, or the reduced amount thereof, should fall due. If the money paid was, and we so hold, the consideration upon which the option to purchase only rested, then upon the lapse of the time fixed by the contract and the extension indorsements, the vendor meanwhile holding itself ready to fulfill its obligations, the option holder would have received all the consideration bargained for. He got what he paid for, and there was nothing to be returned to him. It is even held, where there have been considered contracts which admittedly constitute agreements to purchase and sell realty binding upon both parties, that the vendee in default may not recover payments made by him under his contract, although in that case the remedy of the vendor, where he chooses to be the actor in the litigation, is generally that of foreclosure. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17.

The foregoing propositions are the only ones which are properly presented by this appeal, or which require or merit attention of the court. We think that the trial judge was correct in the findings and judgment as made.

The judgment is therefore affirmed.

We concur: CONREY, P. J.; SHAW, J.

33 Cal. App. 126

CONSOLIDATED LUMBER CO. v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR LOS ANGELES COUNTY et al. (Civ. 2312.)

(District Court of Appeal, Second District, California. Feb. 28, 1917.)

JUSTICES OF THE PEACE ⚷159(6)—APPEAL—SURETY—EXCEPTIONS.

Code Civ. Proc. § 978a, referring to undertakings on appeal from justices' courts and exceptions thereto, declares that the adverse party may except to the sufficiency of the sureties, and, unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party to the amount stated in their affidavits, the appeal must be regarded as if no undertaking had been given. Section 948, referring to exceptions to sureties on appeals from the superior court, in terms requires that notice of exception to sureties be served upon the appellant. *Held*, that notice of exception to sureties on appeal from justice court must be filed with the justice and served on the appellant, and in case of failure to serve the same on the appellant, such exceptions are unavailing, and, though the sureties do not justify, furnish no ground for dismissing the appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 555.]

Original petition by the Consolidated Lumber Company, a corporation, for a writ of prohibition against Superior Court of the State of California in and for the County of Los Angeles and others. Alternative writ discharged, and petition for peremptory writ denied.

McClure & Turner, of Los Angeles, for petitioner. H. E. Gleason, of Los Angeles, for respondents.

PER CURIAM. An alternative writ of prohibition was issued herein under which the respondent superior court was required to show cause why it should not be prohibited from proceeding further in a certain action entitled Consolidated Lumber Company v. F. A. Shorey, where, after judgment in a justice's court, the defendant appealed to the said superior court. Within five days after the defendant Shorey had filed in the justice's court his undertaking on appeal, the plaintiff filed in the justice's court a notice of exception to the sureties who executed the undertaking on appeal, but did not serve upon the defendant or his attorney any notice of such exception. No justification of sureties was had, and upon that ground the plaintiff moved the superior court to dismiss the appeal. The superior court denied the motion, and has set down the case upon its calendar for trial.

Section 978a of the Code of Civil Procedure, referring to undertakings on appeal from justices' courts and the exceptions thereto, states that:

> "The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given."

The same words were formerly contained in section 978. It will be observed that the statute is silent as to the manner in which the exception shall be taken, and if the matter had not been determined by decision, we would be inclined to hold that such exception might be taken in a justice's court orally, and that it would be sufficient to have the fact noted in the justice's docket without service or filing of any notice whatever. The corresponding provision (Code Civ. Proc. § 948), referring to exceptions to sureties on appeals from the superior court, in terms requires that notice of exception to sureties be served upon the appellant. The omission to state any such requirement in section 978a strongly argues that a less formal mode of exception was intended in the case of an appeal from a justice's court. However, this question was before the Supreme Court in Reynolds v. County Court of San Joaquin County, 47 Cal. 604, where the court said:

> "The mere filing of such an exception with the justice of the peace after appeal taken does not seem to be authorized by the statute, and it is of course unreasonable to hold the appellant in default when he had no notice, in law or fact, that further justification of sureties had been required by his adversary."

In Budd v. Superior Court, 14 Cal. App. 256, 111 Pac. 628, this court held that the notice of exception to sureties must be filed with the justice, and that no such exception will be deemed to be complete until such notice is filed. With that ruling and the reasons for it as there stated, we are satisfied; but it is not inconsistent therewith to further hold that the notice must be served upon the appellant. In Budd v. Superior Court it was intimated that such service upon the opposite party of the notice of exception to sureties is not essential, and we repeated that suggestion in McCarty v. Superior Court, 30 Cal. App. 1, 159 Pac. 736. But in these decisions the only question directly at issue was upon the contention that the notice of exception must be filed. Basing our decision upon Reynolds v. County Court, supra, we now hold and determine that the notice must be served as well as filed, but that the exception is not complete until both served and filed.

The alternative writ is discharged, and petition for peremptory writ is denied.

33 Cal. App. 142

SACRAMENTO COUNTY v. CHAMBERS, State Controller. (Civ. 1645.)

(District Court of Appeal, Third District, California. March 1, 1917.)

1. COUNTIES 🔑1—STATES 🔑119—POLITICAL FUNCTIONS — USE OF STATE MONEY FOR COUNTIES.

Counties are not municipal corporations, or, strictly speaking, corporations of any kind, as they are obviously lacking in the essentials which chiefly characterize and distinguish municipal corporations, but are local subdivisions of the state created by the sovereign power of the state without consent or action of the people who inhabit them, although they may be classed as quasi corporations and may be within the inhibitions of Const. art. 4, §§ 22, 31, relating to use of state money.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 1; States, Cent. Dig. § 118.]

2. STATES 🔑119—FUNDS—USE — CONSTITUTIONAL PROVISIONS.

St. 1915, p. 1530, providing for a bureau of tuberculosis under the direction of the state board of health and the granting of state aid to cities and counties for the support and cure of persons afflicted with tuberculosis, and giving the state board of health authority over all institutions, public and private, where tuberculosis patients are treated, is not violative of Const. art. 4, § 22, providing that no money shall be appropriated or drawn from the state treasury for the use or benefit of any corporation, association, asylum, hospital or other institution not under the exclusive management or control of the state as a state institution, although Pol. Code, § 4223, gives county supervisors authority to establish and maintain a county hospital, section 4041, subd. 7, gives such board power to purchase and acquire water rights, and section 4307, subd. 7, enumerates county charges.

[Ed. Note.—For other cases, see States, Cent. Dig. § 118.]

3. STATES 🔑119—LOAN OF CREDIT—CONSTITUTIONAL PROVISIONS.

St. 1915, p. 1530, is not violative of Const. art. 4, § 31, providing that the Legislature shall have no power to lend or authorize the lending of the credit of the state or of any county or other political corporation or subdivision of the state, etc., for the payment of the liabilities of any individual, association, municipal or other corporation, etc.

[Ed. Note.—For other cases, see States, Cent. Dig. § 118.]

4. CONSTITUTIONAL LAW 🔑60—DELEGATION OF POWER—BOARD OF HEALTH.

St. 1915, p. 1530, is not violative of Const. art. 11, § 13, providing that the Legislature shall not delegate to any special commission, private corporation, or individual any power to appropriate, supervise, or in any way interfere with any county, city, or other municipal government, money, property, or effects.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 89, 90, 93.]

5. HEALTH 🔑21—POLICE POWER.

St. 1915, p. 1530, is a valid exercise of the sovereign power and police power of the state to take all necessary steps for the promotion of the health and comfort of its inhabitants and to make regulations essential to the protection of the state and the people thereof against the prevalence of disease, as the true purpose of county government organizations is to perform functions which belong to the state itself, and the state may employ them jointly with itself or alone as instrumentalities in aid of the administration or carrying out of its own general governmental functions and policy.

[Ed. Note.—For other cases, see Health, Cent. Dig. § 25.]

Original application for a writ of mandate by the County of Sacramento against John S. Chambers, as Controller of the State of California. Writ granted.

Hugh B. Bradford, Dist. Atty., of Sacramento, for petitioner. Kemper B. Campbell, of Los Angeles, for State Board of Health. U. S. Webb, Atty. Gen., and R. T. McKisick, Deputy Atty. Gen., for respondent.

HART, J. This is an original application for a writ of mandate to compel the respondent, as state controller, to draw his warrant in favor of the petitioner for the sum of $2,299.30, in payment of the claim of said petitioner arising under an act of the Legislature of 1915, entitled:

> "An act to provide for the establishment and maintenance of a bureau of tuberculosis under the direction of the state board of health; defining its powers and duties; providing for the granting of state aid to cities, counties, cities and counties and groups of counties for the support and care of persons afflicted with tuberculosis; making an appropriation therefor; and repealing certain acts of the Legislature of the state of California." Stats. 1915, p. 1530.

The first section of said act provides:

> "The state board of health shall maintain a bureau of tuberculosis for the complete and proper registration of all tuberculosis persons within the state; for supervision over all hospitals, dispensaries, sanatoria, form colonies and other institutions for tuberculosis, both public and private; for advising officers of the state penal and charitable institutions regarding the proper care of tuberculosis inmates, and for such educational and publicity work as may be necessary; for administration of the fund for state aid to cities, counties, cities and counties and groups of counties for the care of patients who are county charges in city, county, or city and county tuberculosis wards or hospitals or in tuberculosis wards and hospitals maintained by any group of counties, and for the performance of such other duties as may be assigned by the said board."

The second section provides that the state board of health shall appoint a director, who shall be duly qualified and trained in public health work. In addition to the administration of the bureau, under the supervision of the said state board, it is by said section made the duty of the director, "and he is hereby vested with full power," to inspect and investigate, and have access to all records and departments of all institutions, both public and private, where tuberculosis patients are treated. "He shall prepare annually for each institution a report of its rating on sanitary construction, enforcement of sanitary measures, adequate provision for medical and nursing attendance, provision for proper food, and such other matters of administration as may be designated. Administration of the fund for the care of patients who are county charges in city, county, and city and county tuberculosis wards and hospitals and the tuberculosis wards and hospitals maintained by any group of counties shall be based upon his reports and under the rules and regulations of the board."

Section 3 provides that any city, county, etc., establishing a tuberculosis ward or hospital shall receive from the state $3 per week for each person in the active stages of tuberculosis, cared for therein at public expense, who is unable to pay for his support, and who has no relatives legally liable and financially able to pay for his support, and who has been a bona fide resident of such city, county, etc., for one year; provided, that the city, county, etc., shall not become entitled to receive such state aid unless the tuberculosis ward or hospital conforms to the regulations of and is approved by the state bureau of tuberculosis. "The medical superintendent of each hospital receiving state aid under this act shall render semiannually to the state bureau of tuberculosis a report under oath showing, for the period covered by the report, (1) the number of patients in the active stages of tuberculosis cared for therein at public expense, unable to pay for their own support and having no relatives legally liable and financially able to pay therefor, and (2) the number of weeks of treatment of each of such patients."

The refusal of the respondent to draw his warrant in favor of the petitioner for the amount named in the petition is based entirely upon the claim that said statute, in so far as it authorizes the payment of the sums specified therein to cities, counties, etc., for the purposes stated in the act, is in violation of sections 22 and 31, art. 4, and section 13, art. 11, of the Constitution. His position, more specifically stated, is that the maintenance and support and the control of county hospitals constitute duties and burdens which the law casts upon the supervisors and the taxpayers of counties, and that the expense necessary to be incurred in supporting such hospitals is a county charge, citing sections 4223, 4041, subd. 7, and section 4307 of the Political Code. It is hence argued that, since county hospitals are not under the exclusive management and control of the state as state institutions, the proposed payment of money drawn from the treasury to counties, etc., for the purpose mentioned in the said act is in contravention of section 22, art. 4, of the Constitution; (2) That counties are municipal corporations, and that therefore the payment of such moneys to counties would involve a gift of the same, contrary to section 31 of said article; (3) that the act, in violation of section 13, art. 11, of the Constitution, attempts to delegate to the bureau of tuberculosis or the state board of health the power to control and supervise, and thus interfere with the affairs of a county, to the extent to which the bureau or board may require the tuberculosis ward or hospital of such county to conform, in the management thereof, to the regulations established by said bureau, and to make reports thereto, as prescribed by the act.

[1] Referring first to one of the several points made by the petitioner in support of the claim that the act in question impinges upon none of the provisions of the Constitution within the inhibitions of which the respondent insists the act in question falls, it may be remarked: That it is well settled that counties are not municipal corporations or, strictly speaking, corporations of any kind. They are obviously lacking in the essentials which chiefly characterize and distinguish municipal corporations, and it has often been said that they do not come within the latter class of corporations. It is true that both municipal corporations and counties are governmental agencies, but the manner and source of their creation and the purposes, respectively, to subserve which they are brought into existence and activity are entirely at variance. "Municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the persons composing them, for the promotion of their own local and private advantage and convenience. On the other hand, counties are local subdivisions of the state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former (municipal) is asked for, or at least assented to, by the people it embraces; the latter organization (counties) is superimposed by a sovereign and paramount authority. * * * With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy." 1 Dillon on Municipal Corporations (5th Ed.) § 35. Counties, however, possess some corporate characteristics. Like all involuntary political or governmental subdivisions of the state, they are classed as quasi corporations. But whatever may be their proper classification, we are not prepared to say that counties are not within the inhibitions of sections 22 and 31 of article 4 of the Constitution against the drawing or appropriation of money from the state treasury for the benefit of a corporation or any institution not under the exclusive control and management of the state and against the making of any gift of such money to any individual, municipal or other corporation of whatsoever kind or character. It is undoubtedly true that the design of the sections of the Constitution invoked against the act in question was to prevent the appropriation of the moneys of the state for any purpose other than that which pertains to the state, and that an appropriation by the Legislature of money from the state treasury for a purpose wholly foreign to any of the essential func-

tions of the state government would clearly and unquestionably amount to a gift within the plain meaning and intent of section 31, art. 4. Stevenson v. Colgan, 91 Cal. 649, 651, 27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230; Bourn v. Hart, 93 Cal. 321, 28 Pac. 951, 15 L. R. A. 431, 27 Am. St. Rep. 203.

[2-4] But we do not hesitate to express the opinion that the provision of the act in question, authorizing the payment to counties of the sums to be used for the purpose therein specified, is not in contravention of the sections of the Constitution just adverted to. Nor are we impressed with the argument that said provision of said act is obnoxious to the objection that it offends section 13, art. 11, of the Constitution, in that it involves an attempt by the Legislature to delegate to "a special commission," etc., the power to interfere with or supervise the affairs of counties or to "perform any municipal function whatever."

[5] It has never been, nor will it ever be, questioned that among the first or primary duties devolving upon a state is that of providing suitable means and measures for the proper care and treatment, at the public expense, of the indigent sick, having no relatives legally liable for their care, support, and treatment, those who are infirm and helpless from the ravages of advancing years and without means of their own or relatives upon whom the law places responsibility for their care and support, and the insane, likewise situated as to means necessary for their care, support, and safe-keeping. Cooley on Taxation, p. 204. Nor can it for a moment be doubted that it is the duty of the state to take all necessary steps for the promotion of the health and comfort of its inhabitants and to make such regulations as may be conceived to be essential to the protection of the state and the people thereof, so far as such result may be attained, against the visitations and prevalence of deadly epidemical and endemical diseases, and to take and prosecute such health and sanitary steps and measures as will result in stamping them out, or, by recognized methods of scientific treatment, reducing to the lowest possible minimum the percentage of fatalities following therefrom. These are duties which the state owes to its inhabitants for the protection, promotion, and the preservation of their general happiness and welfare; and, as is true of the duty of the state in the matter of taking proper care of the impecunious or indigent who are afflicted with disease and who have no means for caring for themselves or relatives legally responsible for such care, they are duties which the state may perform in the exercise of its sovereignty, even in the absence of direct constitutional authority therefor—indeed, duties which it may discharge under its inherent power of police.

But we do not understand that it is claimed by the respondent that the duties to which we refer do not rest upon the state, or that the state is without the power to execute them. In fact, as we understand the position of the respondent, it is not claimed by him that the sections of the Constitution invoked against the validity of the legislation involved in this dispute were intended to have the effect of prohibiting the state from performing the duty or exercising the power of which we have been speaking. In such a case, these questions may arise, however: Whether the state has shifted the burden of those duties upon the counties, and, if not, whether, in the exercise of the power whereby it may perform those duties, the state has adopted a mode or method of doing so which is not discountenanced by any of the provisions of the Constitution. In this case, the fundamental proposition upon which the respondent builds up his argument against the constitutional propriety of that provision of the act in question which authorizes the payment of certain sums to the counties for the purpose stated therein is that the state has made it the duty of counties to maintain hospitals for the care, support, and treatment of the indigent sick, and that therefore the burden of supporting such hospitals is upon the counties and not upon the state. The Constitution nowhere places the burden of maintaining, supporting, caring for, and treating the indigent sick upon the counties of the state. The Legislature, however, in the exercise of its duty and power to establish a system of county governments (section 4, art. 11, Const.), has, in fixing and enumerating the powers of boards of supervisors of the counties, authorized said boards to establish and maintain county hospitals, prescribe rules for the government and management thereof, and appoint county physicians and the necessary officers and employés thereof, who shall hold office during the pleasure of the board (Pol. Code, § 4223), to build or rebuild, furnish, or refurnish hospitals and almshouses (Pol. Code, § 4041, subd. 7), and has further provided that the necessary expenses incurred in the support of the county hospitals, almshouses, and the indigent sick and otherwise dependent poor, whose support is chargeable to the county, constitute county charges. Pol. Code, § 4307, subd. 7.

As stated, upon the foregoing provisions of the Political Code the argument is erected that, the state having transferred to counties the duty and burden of maintaining hospitals for the care, support, and treatment of the indigent sick, an appropriation of any moneys from the state treasury for the support of such afflicted persons amounts to a gift, and is therefore in violation of the Constitution, and that the statute in question not only runs up against that inhibition of the Constitution, but violates the other sections of the organic law above referred to for the reasons heretofore stated. There is no doubt that the Legislature, by the legislation above referred to, intended to and did transfer from its own shoulders, and so placed upon the counties, the duty and burden of caring for, supporting, and treating the classes of persons mentioned. But this does not mean that the state has thus forever surrendered all control over those matters or the right itself to exercise full and complete and exclusive jurisdiction and control over hospitals for the indigent sick and helpless paupers. As before stated, the Constitution does not require this burden to be borne by the counties. The state may so transfer it to counties, however, in the exercise of its sovereignty. As we have seen, counties are mere agencies of the state, the functions of whose organization are, to the extent of the territorial limits of their geographical divisions, concerned with the administration of the general governmental policy of the state, "and are, in fact, but a branch of the general administration of that policy." All the people of the state, while not directly interested in the administration of the affairs of municipal corporations of which they are not members, are so interested in the administration of the governmental affairs of a county, whether they reside or own property therein or not, because, as stated, such administration involves, to the extent of the geographical limits of a county, the administration of the affairs and policy of the state. The state may, through its Legislature, and in the exercise of its sovereign power and will, in all cases where the people themselves have not restricted or qualified such exercise of that power, apportion and delegate to the counties any of the functions which belong to it. On the other hand, the state may take back and itself resume the exercise of certain functions which it had delegated to those local agencies; and, in some cases, particularly those having reference to the state's police power, we know of no reason, constitutional or otherwise, why the state and the counties may not act conjointly and synchronously in carrying out the policies of the former. Indeed, an analogy to the latter situation may be found in the matter of the regulation by the state of the right to pursue and kill wild birds and animals. By an act of the Legislature of 1909 (Stats. 1909, p. 663), the authority to issue licenses for such hunting and killing is vested, not only in the state board of fish commissioners, but also in the county clerks of the various counties of the state. The act requires the last-named officials, upon application therefor, to issue such licenses, to receive the fees therefor, to account for the same to the state controller every three months, and pay all sums so received into the state treasury, they (the clerks) to receive as their compensation for the services so performed out of the state "game preservation fund" 10 per cent. of the amounts accounted for. County of Sacramento v. Pfund, 165 Cal. 84, 130 Pac. 1041. This so-called "game law" does not, it is true, make the collection of the licenses therein provided for a function of the county organization. But it is very clear that it does employ a part of that organization's machinery for carrying out its policy with respect to a branch of its own functions, and we doubt not that it could have devolved that duty upon the counties themselves, designating the particular officers thereof to discharge it, and have provided that the compensation for such service should be paid into the treasury of the county from the state fund mentioned in that act, in which case it would not be contended or held, as it has never been contended or held under the provisions of the present game law, that the payment for the service so performed for the state out of moneys in the state treasury would involve a gift of such moneys within the inhibition of section 31, art. 4, of the Constitution or an appropriation or the drawing of money from said treasury in violation of section 22 of said article. The game law, however, as before suggested, stands as a concrete example of the proposition above explained, viz.: That the true purpose of county government organizations is to perform functions which belong to the state itself, and that the latter may employ them, either jointly with itself or alone, as instrumentalities in aid of the administration or the carrying out of its own general governmental functions and policy.

The act in question does not, it seems to us, go any further than the act regulating the right to pursue and kill wild game and animals, above referred to. It does not purport to nor does it involve an appropriation of money for the support or in aid of the support of county hospitals. As a matter of fact, there is no such institution as a county hospital as a separate entity. As has been shown, the Legislature has authorized, or empowered the supervisors of counties to establish and maintain, at the expense of taxpayers of counties, hospitals at which the indigent sick and infirm, otherwise eligible to the public bounty in that particular, may receive proper care, support, and medical treatment. The power to maintain such establishments, like that whereby the counties may build and maintain public roads and highways, or administer public justice, is only a part of the general scheme established by the Legislature, whereby those political subdivisions are required to exercise and perform certain of the functions of the state which the latter, for convenience and economy, has elected to commit to them. As above declared, the state may, if it so elects, assume entire control of the matter of caring for and supporting and administering aid to the classes of persons for whose benefit county hospitals are established and maintained. It has the right and the power to establish and maintain, under its own exclusive control and management, hospitals for such purposes, and so entirely relieve counties of that duty and burden. And, having the right and the power to take upon itself entire responsibility for the support and the treatment of all such persons, it has the undoubted right and power to take exclusive or only partial control and assume corresponding liability for the care, treatment, and support of a portion or a certain class of such persons, or those only who are afflicted with a particular kind of malady. By establishing state hospitals, under its exclusive control and management, where the insane and feeble-minded are maintained and given medical treatment, the state has exercised this very right and power. And it is in effect what it has done in this case.

Tuberculosis is a deadly disease, fatal almost in every instance, unless, in its earliest stages, its progress is arrested and the tubercle bacilli are destroyed. That it is a contagious disease, or one that is by contact transmissible from a victim of the malady to one not so afflicted, is a thoroughly established scientific fact. By health statistics and data gathered and published by the public health department of the state government, it has been shown that over one-seventh of all the deaths in California, prior to the passage and enforcement of the law here under attack, were caused by this dread and justly dreaded disease, and that, down to the time mentioned, the ratio of deaths from tuberculosis was constantly increasing. Incidentally, it may be observed that, according to verified and authentic statistics gathered and prepared by the same official authority, there has been in California a marked and readily noticeable decrease in deaths from said cause since the passage and enforcement of this statute.

There are still in California, however, as we learn from the official reports of the said health department, large numbers of persons suffering from this deadly disease, mostly in the form of attacks upon the pulmonary organs, very many of whom are without financial means to pay for their own support and medical treatment and without relatives legally liable or financially able to give them support and the care and treatment indispensable in such cases. The existence of such conditions is obviously a positive menace to the health of the inhabitants of the state.

But it has been demonstrated that by special scientific treatment, under favorable sanitary and general health conditions, tuberculosis, when not advanced to its final stages, may be cured, but that, unless such conditions are established and uniformly maintained, the difficulty of securing restoration of the patient, however able, persistent, and scientific may be the medical treatment, becomes in most cases insuperable.

Considering and finding all these facts, as we must assume that it did, the Legislature has adjudged that drastic or at least more than the usual or ordinary precautions taken to guard and protect and preserve the public health should be provided for and taken against the spread of this well-nigh implacable destroyer of human life. That body conceived, as certainly there was real, substantial, and alarming occasion for conceiving, that measures should be adopted requiring the subjection of the disease to the strictest surveillance, to the end that spread of the disease by the indiscriminate intercommunication of its victims with the public at large might be prevented, and to special medical treatment and scientific nursing, under such scientifically arranged and maintained conditions as the latest and most scientifically conducted investigations and experiments have demonstrated to be all-essential to successful treatment of the malady. The manifest purpose of the statute is therefore twofold: (1) To succor those indigents who are afflicted with tuberculosis and who have no relatives legally liable for their support, maintenance, and treatment, or, if legally liable, having no financial means to discharge the liability; (2) to prevent the spread of the disease.

The state, to attain these ends, has, by the statute in question, and in the exercise of its sovereignty—indeed, in the exercise of its police power—assumed the right and authority to control the matter of the care and treatment of those indigents who are legally entitled to be cared for and treated at public expense, and who are afflicted with tuberculosis; but, in the place of erecting and maintaining hospitals or sanatoria for that purpose in various parts of the state, which it would have a right to do, it has employed the counties, its agents in the administration of certain of its functions of government, as instrumentalities for or aids in controlling and managing that branch of its governmental duties and policy. That this is the true analysis and exposition of the object and intent of the statute in controversy here is evidenced by the provisions that, as conditions to the payment to the counties of the money therein provided for, the latter must establish tuberculosis wards or hospitals in compliance with regulations established by the state bureau of tuberculosis, that the medical superintendent of such wards or hospitals must render, semiannually, to the said state bureau, a report under oath, showing the number of patients in the active stages of tuberculosis legitimately cared for therein at public expense and the number of weeks of treatment of each of such patients, and that the director of the state bureau may have full power to inspect and investigate, and have access to all records and departments of all institutions, both public and private, where tuberculosis patients are treated, and must prepare annually for each institution a report of its rating on sanitary construction, enforcement of sanitary measures, adequate provision for medical and nursing attendance, provision for food, and such matters of administration as may be designated, etc. The latter provision, giving the state's agents the authority to inspect and investigate private tuberculosis hospitals, is indicative of the importance attached by the state to the exercise of special care in the matter of the treatment of tuberculosis and the maintenance of the most favorable sanitary conditions and surroundings wherever victims of that disease may be cared for and treated. The state undoubtedly has the right, under its police power, to adopt sanitary or other appropriate regulations, applicable to the whole state and to private as well as to public tuberculosis sanatoria, looking to the stamping out of the disease and the prevention of its increase, and thus to the protection of the public health. With respect to county tuberculosis wards or hospitals, it proposes by the law in question to do no more than this. In authorizing the payment by the state of the sum named in the act to counties maintaining such wards or hospitals according to regulations formulated and promulgated by its health department, the Legislature did not intend nor was it the object of the act to appropriate the state's money to or for the benefit of counties, but only to facilitate the proper execution of its scheme to control in part or itself supervise the matter of the treatment of indigent tuberculosis patients, legally entitled to be taken care of at public expense. Obviously, the counties, to which these moneys are authorized to be paid, are, as to such money, mere trustees of an express trust, with absolutely no authority or right to divert the use of the same to any other than the purpose or object for which it has been expressly appropriated by the state. As repeatedly herein declared, we can perceive no sound reason for holding that it is not within the competence of the state to enter into such an arrangement with the counties under its broad and comprehensive and essential sovereign power, that power, unhampered by constitutional restrictions, except, perhaps, as to the mode and manner of its exercise, under which the state is not only authorized, but it is its duty, to make and enforce all such reasonable rules and regulations as may be necessary and conducive to the promotion and preservation of the general health, happiness, and welfare of its inhabitants. Thus it is very clear that, in enacting the law with which we are here concerned, and thereby making an appropriation of the state's money for the proper carrying out of the plan therein set forth for the cure and suppression of a dangerous contagious disease, the state has not transcended, but has remained within its rights as a sovereign commonwealth. Thus it does not make a gift of the public money in contravention of the thirty-first section of article 4 of the Constitution, nor appropriate the money of the state to the use or benefit of the corporations or associations or institutions specified in section 22 of said article. Nor, under our view as above set forth as to the nature of the power under which the state has proceeded in the enactment of the law in question, should it be necessary to suggest that the provision of the last-named section of article 4 of the Constitution expressly authorizing the state to grant aid to institutions conducted for the support and maintenance of certain classes of persons (minor orphans, half orphans, etc.), even when viewed by the light of the rule of construction, "Expressio unius est exclusio alterius," does not preclude the state from the exercise of the right to apply its police power on all proper and appropriate occasions, and to pass laws, such as the one before us, whose purpose is to protect the lives, health, and general happiness of its inhabitants. And it is equally patent, for reasons already given, that the act does not authorize the state bureau of tuberculosis or the state board of health to interfere with or supervise counties, their property or affairs. As stated, the supervisory control exercised by the state under the act is over the tuberculosis patients in the hospitals of those counties conforming in their treatment of those cases to the regulations of said state bureau.

It is conceded that the petitioner maintains a tuberculosis ward in connection with its county hospital conforming in all particulars to the rules established by the state bureau of tuberculosis for the regulation thereof.

In accordance with the foregoing views, the demurrer interposed by the respondent to the petition is hereby overruled, and a writ of mandate is hereby ordered to issue out of this court directed to said respondent, commanding him to issue to and in behalf of the petitioner his warrant for the amount named in the petition.

We concur: CHIPMAN, P. J.; BURNETT, J.

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33 Cal. App. 161

Ex parte SMITH. (Cr. 531.)

(District Court of Appeal, Second District, California. March 3, 1917.)

LICENSES ⚿6(5) — SUBJECT OF LICENSE — "BUSINESS TRANSACTED IN CITY."

For one engaged in carrying passengers between two points, both outside a city, along a route extending through the city, to drive through it, without therein stopping or doing any of the other incidental acts of such transportation, does not constitute "a business transacted and carried on in such city," which under the Charter of Cities of the Sixth Class, section 862, subd. 10 (Deering's Gen. Laws 1915, p. 1123), it may license for purpose of revenue and regulation; but is a mere incident of the business.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 5, 6.]

Application by F. L. Smith for writ of habeas corpus. Petitioner discharged.

C. E. McDowell, of Los Angeles, for petitioner. Hartley Shaw, of Los Angeles, for respondent.

SHAW, J. An ordinance of the city of Tropico, which is a city of the sixth class, among other things, contained a provision in effect making it unlawful, without first obtaining a license so to do, for any person to operate or carry on the business of operating any auto bus or motor vehicle over the streets of said city in carrying passengers for hire from one point to another, both of which points are outside the boundaries thereof. Upon a complaint charging petitioner with the violation of this ordinance, in that on November 21, 1916, he did "unlawfully operate a motor vehicle engaged in the business of carrying passengers for hire, which said motor vehicle was then and there operated and run over a particular route and between particular points, to wit, between the city of Bakersfield and the city of Los Angeles, through the city of Tropico and over San Fernando boulevard, a public street in said city, without first paying a license fee and obtaining a license therefor from said city of Tropico, contrary to the provisions of ordinance No. 119 of said city," a warrant was issued upon which he was arrested and held in custody by the city marshal.

Petitioner contends that the provision of said ordinance with the violation of which he is charged is invalid for a number of reasons, chief among which is the claim that a city of the sixth class is not vested with authority to enact an ordinance imposing a tax by license or otherwise upon motor vehicles conducting the business of transporting passengers from Los Angeles to Bakersfield over public highways a small part of which extend through the city of Tropico, where, as here conceded, no stops are made for the purpose of either taking on or discharging passengers in such city, nor any soliciting of business had therein. While under its police power such city may adopt and compel the observance of all reasonable measures intended for the regulation of traffic over the streets by all persons operating motor vehicles thereon, its sole power to levy a tax of this character is found in subdivision 10, section 862, of the charter for cities of the sixth class (Deering's Gen. Laws, Ed. 1915, p. 1123), which provides that the board of trustees of said city shall have power "to license, for the purpose of revenue and regulation, all and every kind of business authorized by law and transacted and carried on in such city or town, and all shows, exhibitions and lawful games carried on therein; to fix the rates of license tax upon the same, and to provide for the collection of the same by suit or otherwise." Under this provision the power of the city to impose a license upon a business is clearly limited to that only which is "transacted and carried on in such city." That by virtue of this section the city of Tropico may require persons, companies, or corporations who therein conduct the business of transporting passengers for hire to be licensed, admits of no question. It is the occupation, however, not an act which is merely incidental thereto, which is subject to the tax. Merritt v. State, 19 Tex. App. 435; Weil v. State, 52 Ala. 19; Merced County v. Heim, 102 Cal. 159, 36 Pac. 399. Business is defined as that which occupies the time, attention, or labor of men for the purpose of profit or improvement. Trustees of Columbia College v. Lynch, 47 How. Prac. (N. Y.) 273. It may be said to embrace all things necessary to be done to fully accomplish the purpose implied by the undertaking. The business conducted by petitioner, as alleged in violation of the ordinance, is that of transporting passengers for hire, not in the city, but between termini both of which are outside thereof, incidental to, connected with, and as a part of which a number of acts other than transportation, such as soliciting business, taking on and discharging passengers, collecting fares, and caring for their welfare en route, are necessary to be performed. The transportation of the passengers over any particular part of the public highway is one of the incidents of the business, but it no more constitutes the business than does the collection of their fares. Hence it cannot be said that the carrying of passengers for hire from Los Angeles to Bakersfield by means of a motor vehicle operated over the public highway, a part of which extends through Tropico where no stops are made, nor any of the incidental acts of such transportation performed other than traveling along the streets, constitutes a business "transacted and carried on in such city." Adopting the contrary view urged by respondent, the conclusion must logically follow that a physician, grocer, plumber, indeed, every one engaged in a professional calling or business in one city, having occasion to make a professional call or deliver goods to a purchaser, to do which required him to travel upon the highways through other cities, could under a like provision of the ordinance to that here involved be subjected to a tax in the guise of a license levied upon the theory that such use of the streets constituted "a business transacted and carried on" in the different cities through which he passed. While the use of the streets may be regulated, the city has no power to convert them into toll roads, and thus exact tribute from those who in the conduct of business elsewhere have occasion to use them solely as highways.

For the reasons given, the provision of the ordinance in question, for the violation of which petitioner is deprived of his liberty, is invalid. It is therefore ordered that he be discharged from the custody of the city marshal.

We concur: CONREY, P. J.; JAMES, J.

33 Cal. App. 167

STEWART et al. v. STEWART HOTEL CO. et al. STEWART ESTATE CO. v. STEWART HOTEL CO. (DETWILER et al., Interveners). (Civ. 1620.)

(District Court of Appeal, Third District, California. March 5, 1917. Rehearing Denied by Supreme Court May 3, 1917.)

1. CORPORATIONS 🔑60 — CAPITAL—CONVEYANCES.

Where a corporation transferred to its stockholders a leasehold and personal property, the conveyance was a transfer of the corporation's capital or assets within Civ. Code, § 309, which is equivalent to capital stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 162.]

2. CORPORATIONS 🔑186—TRANSFERS—VALIDITY OF CONVEYANCES.

Under Civ. Code, § 309, declaring that directors of corporations must not make dividends, except from the surplus profits arising from the business thereof, nor must they create any debts beyond their subscribed capital stock, nor must they divide, withdraw, or pay to the stockholders or any of them any part of the capital stock, nor reduce or increase the capital stock, but that nothing shall prevent division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon the dissolution or expiration of its term of existence, a corporation, to save itself from loss, may, in view of section 343, allowing corporations to acquire their own stock under the assessment scheme provided by law, transfer assets in consideration of a delivery to it of its own stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 695–701.]

3. CORPORATIONS 🔑186 — TRANSFER OF ASSETS TO STOCKHOLDER.

A corporation conducting a successful hotel business acquired a lease upon other hotel property and equipped it at a large expense. The venture proved unprofitable; the second hotel being conducted at a loss which practically equalled the profit derived from the first hotel. Most of the equipment was unpaid for, and creditors were pressing the corporation, threatening it with ruinous litigation. Thereupon stockholders of the corporation who owned the demised premises offered upon assignment of the lease and transfer of the furniture and equipments to surrender their stock and assume all indebtedness incurred by reason of the equipment of the second hotel. *Held* that, as the venture had proved a loss and was threatening the corporation with ruin, and as the value of the property did not exceed the amount of the debts assumed by the stockholders, the transaction was not subject to attack under Civ. Code, § 309, declaring that directors shall not divide, withdraw, or pay to the stockholders any part of the capital stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 695–701.]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Suit by Charles A. Stewart and another against the Stewart Hotel Company and others, in which Caroline B. Detwiler and others intervened, and, together with the defendant, cross-complained, consolidated with an action by the Stewart Estate Company against the same defendants, in which similar cross-complaints were filed. There were judgments for plaintiffs, and defendants and cross-complainants appeal from the same and an order denying new trial. Affirmed.

William P. Hubbard, of San Francisco, for appellants Stewart Hotel Co., Noah W. Gray, and Charles E. Linzee. Stratton, Kaufman & Torchiana, of San Francisco, for appellants Caroline B. Detwiler, De Etta A. Detwiler, A. K. Detwiler, and J. R. Harrison. Edgar C. Chapman, of San Francisco, for appellants J. W. Mason and Rose Mason. Lilienthal, McKinstry & Raymond, of San Francisco, for appellant John G. Barker. Brittain & Kuhl, of San Francisco, for respondents Charles A. Stewart, Margaret Stewart, and Stewart Estate Co.

CHIPMAN, P. J. The transcript concerns two actions, commenced in the superior court of the city and county of San Francisco, namely, one numbered 39900, Charles A. Stewart and Margaret Stewart v. Stewart Hotel Company et al., and one numbered 39901, Stewart Estate Company v. Stewart Hotel Company et al. The actions were consolidated and tried together under stipulation that the evidence taken should apply interchangeably to each of said actions. Both are in form the ordinary actions to quiet title—the action 39900 to the title to a certain leasehold interest in the real estate referred to in and the subject of the action 39901 and also certain furniture and equipment constituting what is spoken of as the hotel plant of the Hotel Stewart, situated on Geary street between Mason and Powell streets, in said city. The controversy is between plaintiffs in both actions and the defendants, the Stewart Hotel Company and certain of its stockholders.

The Stewart Hotel Company was incorporated in June, 1906, for the purpose of conducting a hotel soon after the great fire and earthquake of April, 1906. The corporation acquired certain leasehold interests in some improved lots situated at the corner of Gough and Eddy streets, in said city. There were six incorporators, each of whom contributed $5,000, which appears to have been the only cash contributions to the corporation. They were plaintiffs Charles A. Stewart and Margaret Stewart, his sister, and defendants John W. Mason, John G. Barker, T. W. Nowlin, and A. K. Detwiler. Up to January 14, 1908, the Stewart Hotel Company had issued 6,000 shares of its authorized capitalization of 7,500 shares of the par value of $10 each. The buildings on these lots were reconstructed and put in condition for hotel purposes and were opened to the public under the name of Jefferson Hotel. Charles A. Stewart was president of the corporation, and both he and Margaret Stewart were at all times members of the board of directors until shortly after May 12, 1908, and jointly owned 2,000 shares or one-third of the issued shares of the Stewart Hotel Company. They also owned a lot on the southerly side of Geary street, near Powell, upon which they erected an eight-story building to be known as the "Hotel Stewart." During the progress of the construction of this building the Stewart Hotel Company entered into negotiations with the Stewarts, Charles and Margaret, for a lease of the Hotel Stewart, and in the latter part of September, 1907, the work of installing the furniture and equipment was commenced, and the hotel was opened for business the latter part of November or early in December, 1907. On January 2, 1908, a lease of the Hotel Stewart premises was entered into between the Stewarts individually and the Stewart Hotel Company "for the full term of ten years from and after the 1st day of January, 1908," at the monthly rental of $3,500, containing the usual covenants found in such leases, and requiring the lessees to furnish a surety bond in the sum of $15,000 to secure the payment of rents and the keeping of the terms of the lease. The books of the Stewart Hotel Company showed net profits of the Jefferson Hotel as follows: In January, 1908, $1,566.56; in February, $2,991.25; in March, $1,901.37; in April, $1,474.86. The Hotel Stewart was fitted out at an expenditure of $106,528.69 on account of which there had been paid by said company, prior to May 12, 1908, as found by the court, "only the sum of $24,328.12," and that on that date the company was indebted to various creditors about the sum of $90,000, and, in addition thereto, $2,000 on a promissory note to Ella R. Ransom and $3,528.60 to the Stewarts for rent of the Hôtel Stewart. It appeared that the Hotel Stewart, to the close of April, 1908, suffered operating net losses as follows: January, 1908, $5,516.45; February, $1,664.25; March, profit, $420.70; April, loss, $1,369.95. The statement of accounts payable showed an indebtedness at the end of January of $122,754.88 and at the end of April of $133,054.13.

The court made the following finding:

"XIII. The court finds that on the 12th day of May, 1908, and for two or three months prior thereto said defendant Stewart Hotel Company owed to W. & J. Sloane Company, one of its creditors, a sum in excess of $50,000 for furniture and carpets installed in said hotel; that said W. & J. Sloane Company, together with other creditors, had been pressing said defendant Stewart Hotel Company for some months previous for payment of their debts; that said W. & J. Sloane Company had shortly prior to the 12th day of May, 1908, threatened that unless their indebtedness was immediately or quickly adjusted they would institute litigation and either attach all the property of the defendant Stewart Hotel Company or involve it in expensive and ruinous litigation; that defendant Stewart Hotel Company endeavored to raise funds to meet the obligations of said W. & J. Sloane Company, but was unable to do so; that said defendant Stewart Hotel Company endeavored to obtain terms and time from said W. & J. Sloane Company and its other creditors, but was refused any and all concessions or indulgence or additional terms or time or credit; that said defendant Stewart Hotel Company was unable to obtain financial assistance from either its stockholders or from banks in San Francisco."

There had been much discussion in the board of directors as to the financial stress under which the Hotel Stewart was being operated, and on May 2, 1908, the president called a special meeting at which the minutes show the following, all directors being present except Barker:

"The purpose of the meeting was announced to be for the purpose of considering and acting upon a proposition for the disposal of this company's lease of the Hotel Stewart together with the hotel plant consisting of furniture and fixtures and all personal property, as a whole.

"Charles A. Stewart and Margaret Stewart, as individuals, asked the board if the company would accept a proposition from them to take the Hotel Stewart off the hands of the company and assume all the liabilities of the company incurred in promoting the same, in consideration of $20,000 of the capital stock of the company held by said Chas. A. and Margaret Stewart to be turned back to the treasury of the company.

"A general discussion of said proposition was had, and the board expressed a willingness to accept such a proposition, substantially as offered, if the details could be equitably adjusted between the parties, and in order to act intelligently it was suggested that the offer be put in writing and submitted to the board. Adjourned.

"T. W. Nowlin, Sec."

The minutes for May 12, 1908, show as follows:

"The board met pursuant to notice, at the office of the company, No. 848 Gough street, San Francisco, Cal., this 12th day of May, 1908, at 8 o'clock p. m. Present: Chas. A. Stewart, president; Margaret Stewart; John G. Barker; John W. Mason; T. W. Nowlin. Mr. Noah W. Gray met with the board. The minutes of the last regular and adjourned and special meetings were read and duly approved. * * *

"The following proposal, in writing, was submitted to the board by Chas. A. Stewart and Margaret Stewart:

"'San Francisco, Cal., May 12, 1908.

"'Board of Directors, Stewart Hotel Company—Gentlemen: The undersigned, Charles A. Stewart and Margaret Stewart, hereby offer and tender to the Stewart Hotel Company the following proposition: We will take an assignment of the lease of the Hotel Stewart on Geary street near Powell and a bill of sale of all the furniture and fixtures and hotel plant therein, from the company, and in consideration therefor will transfer to the company all of the capital stock which we own in the Stewart Hotel Company, being 2,000 shares of the par value of $20,000. We will assume and pay all the liabilities incurred and now outstanding in promoting and operating the Hotel Stewart and hold the company harmless therefrom and will assume and pay the note of Ella R. Ransom for the sum of $2,000. The company to assume and pay all the liabilities incurred and now outstanding on account of the Hotel Jefferson and hold us harmless therefrom, all accounts to be brought up to May 1, 1908, and this offer to take effect as of that date. Very respectfully, Chas. A. Stewart, Margaret Stewart.'

"Upon motion of Director Jno. W. Mason and second of Director T. W. Nowlin, it was resolved that the said proposal of Chas. A. Stewart and Margaret Stewart, as submitted, be accepted by this company, and that the president and secretary be, and they are hereby, instructed and empowered to execute on behalf of the company whatever instruments may be required to effect the transfers covered by said proposal, and that the stock received from said Chas. A. Stewart and Margaret Stewart on account of said transfer be turned into the treasury of this company. Said resolution was unanimously adopted by the vote of the directors present, excepting the directors Chas. A. Stewart and Margaret Stewart, who abstained from voting on said resolution. Adjourned. T. W. Nowlin, Secretary."

The transaction was consummated by bill of sale of the furniture and equipment of the Hotel Stewart executed by the corporation to the Stewarts, taking date, however, of May 1, 1908. The bill of sale recited that the conveyance "is made without reservation on the part of said first party [the corporation], but subject to all outstanding claims for the purchase of said described personal property or any part thereof, which said claims the second parties [the Stewarts] have assumed and agreed to pay holding said first party free from all liability therefor." The assignment of the lease declared that it was "intended as a cancellation of said lease and merger of the same in the said parties of the first part therein named [the Stewarts]." The proposition of the Stewarts was that "all accounts to be brought up to May 1, 1908, and this offer to take effect as of that date"; and this was the date at which the relation of the corporation to the business of the Hotel Stewart ceased. At this point it may be stated, as found by the court, that the Stewart Estate Company, plaintiff in action 39901, "since the 30th day of April, 1908, has been a corporation duly organized," etc., and that on May 20, 1908, the Stewarts conveyed to the Stewart Estate Company by grant deed the said lots and hotel buildings on Geary street and the leasehold property. The Stewarts, Charles and Margaret, hold all the stock in the Stewart Estate Company and went into possession and control of the Hotel Stewart at the date of the transfer by the Stewart Hotel Company, and ever since have been in possession and control of said property, receiving to its use the issues and profits thereof. Says the brief of appellants:

> "The principal legal question involved is whether the transaction of May 12, 1908, between the defendant Stewart Hotel Company, on the one hand, and the plaintiffs Charles A. Stewart and Margaret Stewart, on the other, while acting as directors and stockholders of that corporation, violated section 309 of the Civil Code."

This section provides as follows:

> "The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; nor must they create any debts beyond their subscribed capital stock; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock, except as hereinafter provided, nor reduce or increase the capital stock, except as herein specially provided. * * * Nothing herein prohibits a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution, or the expiration of its term of existence."

In their answers and cross-complaints it is sought to have the transfer of said lease to the Stewarts declared to be a nullity, that plaintiffs be required to account for the rents, issues, and profits of said real and personal property from the 1st day of May, 1908, for reasonable attorney's fees, for judgment against plaintiff Stewart Estate Company and the cross-defendants, Charles A. and Margaret Stewart, for the amount found due upon such accounting, and quieting the title of defendants to said leasehold and personal property.

The court adjudged the plaintiffs to be "the absolute owners of the property described in the complaint herein, and are entitled to the exclusive possession thereof," and that "defendants have not, nor has either or any of them, any right, title, interest, or claim in or to the property described in the complaint." Defendants appeal from the judgment and from the order denying the several motions for a new trial.

It becomes necessary to state such further findings of fact as formed the basis of the court's conclusions of law and judgment. We quote from the findings in action 39901. Following finding XIII, above quoted, the court found:

> "XIV. The court finds that if attachment proceedings had been instituted by said W. & J. Sloane Company or the other creditors, or bankruptcy proceedings had been instituted by them, it would have involved the defendant Stewart Hotel Company in heavy loss and possible ruin.
>
> "XV. The court finds that on said 12th day of May, 1908, and for some time prior thereto, the lease that defendant Stewart Hotel Company had of said Stewart Hotel property was proving a heavy burden and a liability, which said Stewart Hotel Company was at that time unable to meet."

The court found that at the time the Stewarts' proposal was acted upon all the stockholders of the Stewart Hotel Company were present "save and except (interveners) Caroline B. Detwiler and De Etta A. Detwiler," and as to them the court found that they "had notice and knowledge of said sale of said property and the assignment of said lease and the circumstances surrounding the same, within a short time, not exceeding 90 days, after the 12th day of May, 1908, and that said interveners, Caroline B. Detwiler and De Etta A. Detwiler, did not at any time protest or object thereto and did, by their failure to protest and object thereto, acquiesce in said transaction."

As to the motive for entering into the transaction the court found as follows:

> "XXI. The court finds that for the purpose of saving the defendant Stewart Hotel Company from financial loss and ruin, and for the purpose of relieving said Stewart Hotel Company from the burden of the indebtedness incurred in the equipment of the Hotel Stewart, and for the purpose of relieving said Stewart Hotel Company from the burden and liability of the lease held by it, and for the purpose of saving to the defendant Stewart Hotel Company the valuable and profit-paying asset of the Hotel Jefferson, and for the purpose of making said Stewart Hotel Company a going profit-making concern instead of a financially burdened corporation, the proposal made by said Charles A. Stewart and Margaret Stewart, hereinbefore in these findings referred to, was accepted by the defendant Stewart Hotel Company after a full and fair discussion."

Also as follows:

"XXV. The court finds that the consideration paid by said Charles A. Stewart and Margaret Stewart for the conveyance and delivery to them of said hotel plant, furniture, furnishings, and equipment, together with the assignment, cancellation, and surrender of said lease, was a full, fair, and adequate consideration, and was at the time believed by all the stockholders of said Stewart Hotel Company to be such.

"XXVI. The court finds that all the stockholders and directors present at the meeting of May 12, 1908, believed said proposal and its acceptance and the transfers made in pursuance thereof to be for the best interests of the defendant Stewart Hotel Company, and believed them to be absolutely necessary to save said Stewart Hotel Company from serious loss or financial ruin, and they acted upon said belief in accepting said proposal.

"XXVII. The court finds that immediately after the 12th day of May, 1908, there was a complete novation of all the indebtedness of the defendant Stewart Hotel Company arising out of the equipment, furnishing and operation of the Hotel Stewart, by and through which the Stewart Hotel Company was relieved of all of its debts aggregating, as hereinbefore found, more than $90,000; and said debts were, with the knowledge and consent and ratification of the creditors of the Stewart Hotel Company, assumed by said Charles A. Stewart and Margaret Stewart personally, and were fully paid by them prior to the time of the commencement of this action. * * *

"XXIX. The court finds that the capital stock of defendant Stewart Hotel Company was not reduced or withdrawn or divided or paid over in any manner, or in any sum, by reason of the proposal and acceptance of May 12, 1908, or by reason of the bill of sale, transfer, or delivery of the furniture, equipment, furnishings, and hotel plant, or by reason of the assignment, cancellation, or surrender of the lease or the transfer to the defendant Stewart Hotel Company of said 2,000 shares of stock, and further finds that it was not reduced, divided, or withdrawn in any manner or for any amount, by reason of any fact alleged in any of the pleadings in this action.

"XXX. The court further finds that neither the capital stock nor the assets of said corporation were divided, withdrawn, paid over, diminished or impaired in any manner, and further finds that the leasehold of said Hotel Stewart had no value of any kind."

It was further found that the Sewart Hotel Company continued in business for more than three years after said proposal and agreement, "and no objection was at any time made to said proposal and agreement and the consummation thereof by any of the stockholders of said corporation until the year 1912"; that all the terms and conditions of said proposal and its acceptance long prior to the commencement of this action "were fully performed, kept, discharged and executed"; that all the debts of the Stewart Hotel Company owing by it on May 12, 1908, have since said time and before the commencement of this action been fully paid and discharged; that all of the outstanding stock of said company amounts to 5,660 shares; that there is not now in the treasury of said company the 2,000 shares which were transferred to it by the Stewarts; and that said stock so transferred "has, since the transfer thereof, been in whole or in part reissued by defendant Stewart Hotel Company." It was further found that the transactions done under the proposal of May 12, 1908, "were not void nor voidable, but that each of them was duly and regularly and legally done without fraud or fraudulent intent and for a full, fair and adequate consideration"; that the Stewarts conveyed said property to the Stewart Estate Company on May 20, 1908; that said company acquired said property "with full knowledge of the facts in these findings made"; and that said conveyance to said company was not made in collusion with said Stewarts or either of them, "nor was it made to defeat the claims of defendants or interveners, or any one else."

[1] It cannot be disputed that in transferring to its stockholders Charles and Margaret Stewart the lease and plant of the Hotel Stewart the directors of the Stewart Hotel Company were disposing of the company's capital stock, that is to say, of its capital or assets. Among the numerous cases cited by appellants as explanatory of the statute are Martin v. Zellerbach, 38 Cal. 309, 99 Am. Dec. 365; Kohl v. Lilienthal, 81 Cal. 378, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520; Tapscott v. Mexican Colo., etc., Co., 153 Cal. 667, 96 Pac. 271; Schulte v. Boulevard, etc., Co., 164 Cal. 464, 129 Pac. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013.

[2] The general rule is so thoroughly well settled that any discussion concerning its application ordinarily would be superfluous. Meeting the position of respondents that the facts here furnish an exception to the rule, appellants say:

> "Let it be conceded for purposes of the argument only that the transaction by which a corporation attempts to exchange its assets for certificates of stock held by a stockholder might be beneficial from the standpoint of the corporation; yet nevertheless we insist as a proposition of law that it is no more valid than if such transaction were a detriment to the corporation, for the simple reason that it is a transaction prohibited by statute."

As we view the case, and as appellants seem to view it, this statement presents the principal question submitted for decision. Appellants cite Martin v. Zellerbach and Kohl v. Lilienthal, supra, as decisive of the question. On the other hand, respondents, while conceding the general rule to be as claimed by appellants, contend that, "like all general rules, however, it is subject to certain well-recognized exceptions," which, "instead of weakening or destroying the rule, indicate most clearly the philosophy of it"; that "in this state we have no law in terms forbidding a corporation to acquire its capital stock," i. e., its shares; that "the acquisition by the corporation of its capital stock is not ipso facto void." It is pointed out that the statute (Civ. Code, § 343) provides that a corporation may acquire its own stock under the assessment scheme provided by law; that a corporation may likewise acquire its own stock in payment of a debt owing by a stockholder to it, or to secure it from loss (Ralston v. Bank of California, 112 Cal. 208, 44 Pac. 476), and it may be compelled to buy back its own capital stock if at the time of its issue it contracted to do so. (Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 129 Pac. 582, 44 L. R. A. [N. S.] 156, Ann. Cas. 1914B, 1013).

In the Zellerbach Case, 38 Cal. 300, 99 Am. Dec. 365, two corporations, the Eureka Lake Company and the Miners' Ditch Company, owning in severalty several water ditches, and having no interests in common, agreed to form a new corporation, to be called the Eureka Lake Water Company, to which each should convey all its property; the stock of the new corporation to be distributed in certain proportions to the stockholders of said two old corporations. The Eureka Lake Company was indebted to plaintiff in the action, who obtained a judgment against it and became the purchaser of its property under execution sale, obtaining the sheriff's deed therefor. Before plaintiff obtained the judgment the defendant recovered a judgment against the new corporation and became the purchaser of the whole of its property upon execution and obtained a sheriff's deed therefor. Plaintiff sued to recover possession of the property which he had bought, and the foregoing facts were set up as an equitable defense. It was the property of the Eureka Lake Company that was in controversy. The court, after saying that the transaction as agreed upon and attempted to be carried out, if effectual in law, would of necessity have resulted in an alienation of the entire property and capital of the Eureka Lake Company, and that not a dollar would have remained to satisfy the demands of creditors, said:

> "The contract was that this stock [in the new corporation] was to be issued, and it was afterwards issued, directly to the stockholders of the Eureka Lake Company. It does not vary the principle that the consideration to be paid was stock instead of money. If the contract had been that, on the transfer of the property, the Eureka Lake Water Company would pay to the stockholders of the Eureka Lake Company $100,000 in cash as the price of the property, the legal proposition involved would have been precisely the same as in this case. In either case the consideration would have been paid, not to the trustees, as a fund primarily liable to creditors, but to the stockholders, for their own use."

It will be observed that the point decided was that the shares of the new company representing, as they did, the capital or assets of the corporation, could not be divided or distributed to the stockholders; for it would in effect be a distribution of the capital and was expressly forbidden by statute. The court said:

> "We wish it to be expressly understood that our decision is limited to the precise facts, as disclosed by the record. That it may not be regarded as covering broader grounds than intended, we deem it proper here to say that we express no opinion upon the question whether property of the kind in question may be transferred by parol and the delivery of possession, or whether, if there are two rival corporations, like the Eureka Lake Company and the Miners' Ditch Company, organized for the same purpose of supplying water to a mining region where the demand is limited, which, in consequence of the greater expense of managing the two separately, and the competition, are both doing business at a loss, and are liable to become insolvent, it would not be lawful, in pursuance of their interests, to form a new corporation for the same purpose, and convey the property of both to such new corporation in the manner pursued in this instance, provided the new corporation, as a part of the arrangement, should assume and become obligated to pay all the debts of the old corporation. Such an arrangement might be for the interest of all parties, creditors as well as stockholders, and, if lawful, would be valid as to all. The personal liability of the stockholders in such case would continue, and no property would be withdrawn from liability to the creditors' demands. The prohibition of the thirteenth section of the act concerning corporations is directed against the trustees, and seems designed to protect creditors as such, and also to protect the stockholders against their mismanagement in distributing capital stock in the form of dividends, with a view of holding out the idea that the corporation is more prosperous than it is, for the purpose of promoting some unlawful object. If all parties interested are secured from injury, and the purpose is a lawful one, the object of the provision would seem to be accomplished, and there would be no one entitled to complain. Such a transaction was regarded as lawful in Treadwell v. Salisbury Manufacturing Co., 7 Gray (Mass.) 393 [66 Am. Dec. 490]. But we do not intend to express any opinion on these grave questions now, for no sufficient facts are presented in the pleadings or findings to require it, and we only allude to the questions in order to guard our opinion in so important a case, from misconstruction or misapprehension."

The Lilienthal Case, 81 Cal. 378, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520, involved a similar question. There two mining corporations, the Head Center Consolidated Mining Company, a California corporation, and the Tranquility Mining Company, a New Jersey corporation, owning contiguous mining claims, formed a new corporation, to which they severally conveyed their mines, the new corporation, called the Head Center & Tranquility Mining Company, paying therefor 100,000 shares of the stock of the new company to each of the two corporations. The case related to the shares issued to the Head Center Company. The ground conveyed by this company to the new company did not comprise all the property of the Head Center Company, and it still continued to carry on corporate business and reducing ores. It was not free from debt, and afterwards levied an assessment and paid up its then existing indebtedness. Its term of corporate existence had not expired, and the company had not disincorporated. Plaintiff Kohl and others commenced the action against the Head Center Company and certain of its officers, alleging ownership in certain of the 100,000 shares of the new company so received for the sale of the property of the Head Center Company. Defendants claimed that these shares were the property and assets of the Head Center Company, that the company had no right under the law to distribute them to its stockholders, and that its directors were entitled to represent and vote them at all meetings of the new company. Plaintiffs had judgment in the lower court, and on appeal the judgment was reversed. Among other things, the court said:

> "There is, however, one other fact found by the court necessary to the support of its judgment, if under the law it could be supported at all, but which finding we do not think is supported by the evidence. That finding is that it was 'mutually understood and agreed by and between the stockholders of both the old companies that the stock of the new company should be equally divided between and belong to the stockholders of the old companies.'"

It was not decided that the consolidation was illegal. The point decided was that the stockholders of the old Head Center Company (plaintiffs being such) were not entitled to have their proportion of the stock of the new company distributed to them for the reason, given in the Zellerbach Case, that it would in effect be distributing the capital or assets of the Head Center Company.

So it was held in San Francisco, etc., R. R. Co. v. Bee, 48 Cal. 398, 405:

> "It was certainly not competent to the members of that corporation to dissipate this fund and place it beyond the reach of creditors by merely going through the process of reincorporation, taking on a new corporate name, transferring the assets of the old corporation to the new one without consideration, and issuing the capital stock in the new corporation to the holders of the capital stock of the old corporation. This transaction involved a breach of positive statute law."

We will next notice two of the many cases cited by respondent.

In Ralston v. Bank of California, 112 Cal. 208, 44 Pac. 476, one Baum held a certificate for 60 of defendant's shares which provided that no transfer of the stock would be made on the books until payment of all indebtedness due the bank from the stockholder in whose name the stock might stand. In 1881 Baum transferred the stock to Sather, who on September 13, 1886, demanded the transfer of the stock. Baum was then indebted to the bank beyond the value of the stock. The demand was refused. Soon after Sather died, and in April, 1888, said shares were distributed to plaintiffs in trust under Sather's will. On March 10, 1887, the bank sold and transferred to Greenebaum & Co., at a large discount, the indebtedness held by it against Baum. On July 3, 1888, plaintiffs demanded registry of the transfer of the stock, which was refused unless plaintiffs would pay the balance of its claims against Baum above the amount received from Greenebaum & Co. The action was in trover for the conversion of the shares. Defendant recovered in the trial court, and on appeal the judgment was reversed, and a judgment directed in favor of plaintiffs for the value of the shares at the time the second demand was made and interest from that date. We quote from the opinion:

> "The argument that the corporation becomes the owner of the shares converted, and hence that its stock is reduced otherwise than in the manner provided by law (Civ. Code, § 359), and hence further that such conversion is legally impossible because contravening the policy of the law, has no great force. If necessary to save itself from loss, the bank might have contracted for and have received the title to these shares in payment of Baum's debts to it, and the transaction would have been perfectly legal. Ex parte Holmes, 5 Cow. [N. Y.] 426. With the same purpose in view the bank, apparently in good faith and under claim of right, refused the registry, and this had the undesigned effect of converting the shares; and it is not perceived how acquisition of title by this means can, though wrongful as regards the plaintiffs, be more obnoxious to public policy than by contract in the case supposed. The authorized capital is not reduced, for the shares are not extinguished, but may be reissued. Cook on Stocks & Stockholders, § 314; Morawetz on Corporations, § 434; Bank of San Luis Obispo v. Wickersham, 99 Cal. 655 [34 Pac. 444]."

The court said it would be legal for a corporation to take the shares of a stockholder in discharge of his indebtedness. Now, the stockholder's liability to the corporation is an asset—an account or bill receivable. If he is solvent and able to pay, the bank would have no more right to exchange this asset for his stock than to buy the stock outright. What the court meant and in fact said was that to save itself from loss the bank might do this, though under a strict application of the rule it would violate section 309 of the Civil Code. In short, here was an exception to the rule.

Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 129 Pac. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013, was a case where, coincidentally with his subscription to the stock of defendant company, a written agreement was entered into between the latter and plaintiff that the company would repurchase the stock subject to the terms stated. The action was on the contract; plaintiff offering and being in a position to restore the shares. Defendant had judgment on its demurrer to the complaint, and plaintiff appealed. The Supreme Court reversed the judgment and ordered that the demurrer be overruled with leave to defendants to answer. As stated in the opinion:

> "The position of the respondent is that the contracts for the retaking by the corporation of its own shares are illegal and void, as in violation of the provisions of section 309 of the Civil Code, prohibiting directors of corporations from dividing, withdrawing or paying to the stockholders, or any of them, any part of the capital stock, or from reducing or increasing the capital stock, except as provided in the section."

After showing that the phrase "capital stock," as used in the section, means the assets and not the shares, and also pointing out that, "although the prohibition runs, in terms, only against the directors, the effect of the section is to deprive the stockholders as well of power to do the forbidden acts," citing cases, the opinion proceeds:

"In other jurisdictions the authorities show a sharp conflict over the question whether, in the absence of any statutory or charter restrictions, a corporation may employ its assets for the purchase of shares of its own stock. Cook on Corporations (6th Ed.) § 311. But, in view of the Code provisions to which we have referred, it cannot be doubted that in this state a corporation is not authorized to make such purchase, since the result would be to illegally withdraw, and pay to a stockholder a part of the 'capital stock.' Bank of San Luis Obispo v. Wickersham, 99 Cal. 655, 661, 34 Pac. 444. The want of power to buy its own stock does not prohibit a corporation from taking the stock in satisfaction of a loan, or when otherwise necessary to save itself from loss (Ralston v. Bank of California, 112 Cal. 208, 213, 44 Pac. 476), but the general rule is, as above stated, that the purchase is unauthorized. Thus this court has condemned, as in violation of section 309, a bylaw assuming to give to any stockholder the right, upon 60 days' notice, to withdraw from the corporation, and to receive, upon surrender of his stock, the amount paid therefor. Vercoutere v. Golden State L. Co., 116 Cal. 410, 48 Pac. 375."

It would serve no useful purpose to review all of the many cases, English and American, cited by counsel in their elaborate briefs. The entire field of the law upon the question seems to have been swept clean of cases and text-books bearing upon it. The inquiry is simmered down, we think, to the basic question: Does the general rule, as to which there is no controversy, admit of no exceptions? If not, the decision of the lower court was wrong. If the rule admits of exceptions, the question is: Do the facts here constitute an exception?

We need go no further than to Ralston v. Bank of California, supra, and Schulte v. Boulevard Gardens Co., supra, to find exceptions to the rule. In the Ralston Case the court said:

"If necessary to save itself from loss, the bank might have contracted for and have received the title to these shares in payment of Baum's debts to it, and the transaction would have been perfectly legal."

In the Schulte Case, after having stated the general rule, the court said:

"The want of power to buy its own stock does not prohibit a corporation from taking the stock in satisfaction of a loan, or when otherwise necessary to save itself from loss."

What did the court mean when it said that a corporation not only might take its stock in satisfaction of a loan or when otherwise necessary to save itself from loss? We feel authorized to assume that the court meant to say that circumstances might arise other than such as appeared in those two cases where the corporation would be justified in taking over the shares of one of its stockholders, and that each case must be governed by its own peculiar facts; that the general rule, though well settled in this state, is not inflexible and unyielding.

[3] The benefit or loss to the corporation in the present case must be determined from the situation of the parties and the property involved at the time the proposal of the Stewarts was accepted. The contract was fully executed, and no objection from directors or stockholders was suggested for nearly four years, and then only by the Detwilers, who, the court found, had notice of the contract shortly after it was entered into. And all liabilities existing at that time have been fully paid. Clearly the court, from its view of the contract, did not err in refusing defendants the right to go into the question of the profits and losses to the Stewarts in operating the Hotel Stewart. It is now quite impossible for defendants to place the parties back where they stood in May, 1908, and they do not offer to do so. They say that this is not required of them because the transaction was absolutely void ab initio. What, then, were the facts upon which the learned trial judge based his decision?

Briefly epitomized, the facts were as follows: The Stewart Hotel Company was operating the Hotel Jefferson at a large profit monthly. The net earnings for January, February, March, and April, 1908, amounted to about $8,000. Believing it could extend its hotel business profitably by operating the Hotel Stewart, it leased the premises from the owners, the Stewarts, and proceeded to equip the hotel at a cost of over $106,000. It opened the Hotel Stewart in the latter part of November, 1907, and operated it about five months at a loss of over $8,000. In April, 1908, it found itself indebted about $90,000 for furnishings, and one of its largest creditors, Sloane & Co., whose claim amounted to about $50,000 was pressing payment and threatening to close the hotel or otherwise proceed to collect its claim through suit. All efforts to obtain further extension of credit or obtain loans from banks had failed. The corporation also owed the Stewarts one month's rent and $2,000 on a promissory note past due. In this situation of its financial affairs the Stewarts made the proposal, which was consummated, to take over this lease and to assume the liabilities above referred to and surrender to the corporation their 2,000 shares of its stock, of the par value of $20,000. These shares were not extinguished nor were they distributed to the stockholders, but were placed in the treasury, and, as the court found, have since that time been "in whole or in part reissued or used by defendant Stewart Hotel Company." The testimony of Mr. Rich, manager of the Palace Hotel, was that the plant transferred to the Stewarts "might possibly have been worth $70,000." Mr. Woods, manager of the Hotel St. Francis, testified:

"In view of the conditions that obtained at that time, I would place the value of what the equipment cost, less 25 per cent. In other words, if the equipment cost $106,000, I would deduct from that 25 per cent, and I would call that the value of the entire plant, including the leasehold and everything of the kind."

There was evidence and the court found "that the leasehold of said Hotel Stewart had no value of any kind." The value of the equipment and the supplies on hand, according to the testimony of Rich and Woods, was several thousand dollars less than the amount of the liabilities which the Stewarts assumed and paid. The books of the company showed liabilities amounting to over $110,000, while the assets, as testified to by Woods and Rich, had a value of about $86,000. The Stewarts not only took over and subsequently paid these liabilities, but surrendered their 2,000 shares in the company. Had the Stewarts retained these shares, no possible question could have arisen as to the legality of the transaction; for it was within the powers of the corporation and apparently very beneficial. It is beyond question, too, that in the surrendering to the corporation by the Stewarts of their 2,000 shares the benefit to it was increased to the extent of their value. We cannot see that the transfer of this stock effected a diminution or reduction of the assets of the corporation, nor can it reasonably be said to have been a trafficking or bargaining by the company in its capital stock. The complexion of the transaction must be judged in its entirety. There was no evidence of overreaching or unfairness, no semblance of fraud in the transaction. Mr. Stewart, acting with other directors, made every reasonable effort without avail to obtain extensions of credit or effect a loan to tide over the emergency, and it was only by mortgaging the fee to the real property as well as the personal property that the Stewarts were able to make satisfactory arrangements with creditors. The principal asset of the corporation remaining after the transfer of the Hotel Stewart plant was the Jefferson Hotel, fully equipped and operating at a profit. The company was solvent. Its monthly profits about equaled its losses on the Hotel Stewart. Unquestionably the transaction not only brought a substantial benefit to the corporation, but was "necessary to save itself from loss" and threatened bankruptcy. The corporation relieved itself and its stockholders of a large indebtedness and of a losing venture, and had remaining its only asset of value, which value was increased by taking the Stewarts' shares. Without going further into the surrounding circumstances, we think the facts furnish an exception to the general rule and that the transaction was valid.

Other questions are presented in the briefs covered by the findings, but as all parties seem to agree that the case must turn upon the legality or illegality of the contract between the directors and the Stewarts, our conclusion on the point renders further consideration of the case unnecessary.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

32 Cal. App. 645

PEOPLE v. SWEETMAN. (Cr. 516.)

(District Court of Appeal, Second District, California. Feb. 1, 1917. Rehearing Denied by Supreme Court April 2, 1917.)

1. BURGLARY 🔑41(2)—EVIDENCE—SUFFICIENCY—CORPUS DELICTI.

Evidence which, exclusive of confession of defendant, shows without contradiction that fixtures were taken from premises of owner without his knowledge or consent and were afterwards found installed in another house, is sufficient to establish corpus delicti on a charge of burglary.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 95.]

2. CRIMINAL LAW 🔑1172(2) — APPEAL AND ERROR—HARMLESS ERROR.

Although it is the province of the court to determine whether a confession should be received in evidence, an instruction that jury should disregard confession if not voluntarily made is without prejudice to one indicted for burglary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3155.]

3. CRIMINAL LAW 🔑1172(2) — APPEAL AND ERROR—HARMLESS ERROR.

Conceding that there was no occasion for the instruction and no evidence showing that accused had stolen property in his possession, an instruction with reference to possession by defendant of stolen property unexplained and the effect of such proof *held* without prejudice to defendant charged with burglary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3155.]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

George Sweetman was convicted of burglary, and appeals from the judgment and an order denying his motion for a new trial. Judgment and order affirmed.

For opinion in Supreme Court denying rehearing, see 164 Pac. 628.

Wm. M. Morse, Jr., of Los Angeles, and S. M. Johnstone, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

SHAW, J. The defendant, having been convicted of the crime of burglary, appeals from the judgment and an order of court denying his motion for a new trial.

[1] The subject of the larceny was certain plumbing fixtures, consisting of two laundry tubs and a kitchen sink, which had been installed in a house at No. 1211 North Mariposa street, in the city of Los Angeles, which was owned by the prosecuting witness. The evidence, exclusive of a confession made by defendant, without contradiction shows that the tubs, which were installed upon an uninclosed porch of the house, and the sink installed in the kitchen, the door of which was locked, were, without the owner's knowledge or consent, by some person unknown to him, taken and removed therefrom between 4:30 o'clock p. m. on June 21st and 8 o'clock a. m. the next day. The tubs were found

installed in a house located at No. 803 North Wilcox avenue, in the city, the contract for the installation of plumbing fixtures in which had been let to defendant. This evidence was amply sufficient to show the commission of the crime (People v. Wagner, 29 Cal. App. 363, 155 Pac. 649); hence there is no ground for appellant's contention that the court erred in admitting evidence of his confession for the reason that the corpus delicti was not established.

Neither does any ground exist for the suggestion that the confession of defendant was procured by promise of reward or immunity. On the contrary, the evidence conclusively shows that defendant freely and voluntarily, and without menace, duress, or promise of any kind, made and subscribed a written confession wherein he stated that he entered the house at about 8 o'clock p. m. and took therefrom the tubs and sink, which he installed in the other house.

[2] The court instructed the jury:

> "That before an admission or confession of a defendant can be used against him as evidence it must appear that the statement was made voluntarily, and not under duress, menace, the hope of reward or the fear of punishment. If you find from the evidence that the confession admitted in evidence was made under the promise of reward, or menace, duress, or the fear of punishment, then you must disregard the confession entirely, and unless you find from the evidence, after disregarding the confession, that the defendant committed the offense charged against him, it will be your duty to acquit."

As an abstract proposition of law, the first sentence of the instruction is correct, but it is the province of the court, not the jury, to determine whether or not a confession offered in evidence should be received or rejected. People v. Cahill, 11 Cal. App. 685, 106 Pac. 115; People v. Gibson, 28 Cal. App. 334, 152 Pac. 316; People v. Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501. Hence it was error to submit to the jury the question as to whether or not the confession was obtained by promise of reward, menace, or duress, and to submit to the jurors the question as to whether or not it should have been admitted in evidence; for, if not voluntarily made, as determined by the court, it was inadmissible. Conceding the instruction to have been erroneous, in no event could it have prejudiced defendant in his substantial rights. On the contrary, the jury might have overruled the court by finding that the confession was extorted from defendant by unfair means, and in such case, following the instruction of the court, disregarded it entirely, and acquitted defendant for want of sufficient evidence.

[3] Complaint is also made that the court instructed the jury with reference to the possession by defendant of stolen property, unexplained, and the effect of such proof; the objection to this instruction being that there was no evidence showing that defendant had the stolen property in his possession. If it were conceded there was no occasion for giving the instruction, and that there was no evidence tending to show that defendant had the property in his possession, yet the giving of it could not be prejudicial.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

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32 Cal. App. 645

PEOPLE v. SWEETMAN. (Cr. 2075.)

(Supreme Court of California. April 2, 1917.)

In Bank. Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

On petition for rehearing.

For opinion, see 164 Pac. 627.

U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People. Wm. M. Morse, Jr., of Los Angeles, and S. M. Johnstone, of San Francisco, for respondent.

PER CURIAM. In denying the petition for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District we deem it proper to say that our opinion is not to be taken as an approval of that portion of the opinion which holds that the trial court erred in its instructions to the jury relative to the confession of the defendant. See People v. Thomson, 145 Cal. 717, 725, 79 Pac. 435; People v. Luis, 158 Cal. 196, 110 Pac. 580; People v. Profumo, 23 Cal. App. 378, 138 Pac. 109. The District Court of Appeal was undoubtedly correct, however, in holding that, assuming the instruction to have been erroneous in the respect referred to, the error was not prejudicial.

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174 Cal. 757

DEL MONTE RANCH DAIRY v. BERNARDO. (S. F. 6904.)

(Supreme Court of California. April 7, 1917.)

1. APPEAL AND ERROR 🔑1011(1)—FINDINGS OF COURT — CONFLICTING EVIDENCE — REVIEW.

Findings of the trial court, based on conflicting evidence, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988.]

2. SALES 🔑52(5)—FINDINGS OF COURT—EVIDENCE—SUFFICIENCY.

In an action to recover for breach of contract to deliver milk, in which defendant filed a counterclaim for milk delivered, evidence *held* to sustain a court finding that defendant sold to plaintiff 320 gallons per day for 13 days at 16 cents per gallon.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 136, 137, 139.]

3. PLEADING 🔑142—SUFFICIENCY OF PLEADING TO SUPPORT FINDINGS AND JUDGMENT.

Complaint having been filed in July, an averment in counterclaim, filed in December, that milk was furnished within two years last past, together with evidence that transaction occurred in June of the same year, is sufficient as a basis for judgment that plaintiff is indebted to defendant for milk, as against objection that answer failed to state that counterclaim was existing at commencement of action, as required by Code Civ. Proc. § 438, subd. 2, where there was no demurrer to answer, and evidence of delivery and price came from plaintiff's witness without objection.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 290, 291, 297, 300.]

4. Appeal and Error 🔑1056(4)—Exclusion of Evidence—Harmless Error.

Where court found against plaintiff on the contract set up, exclusion of evidence as to measure of damages for breach was without prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4190.]

5. Witnesses 🔑275(2)—Cross-Examination of Party—Scope—Assignment of Cause of Action.

Where defendant in his counterclaim relied upon a claim for goods sold, refusal to allow plaintiff to show, on cross-examination of defendant, that claim had been assigned, is reversible error.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 968, 974.]

In Bank. Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the Del Monte Ranch Dairy, a corporation, against J. S. Bernardo, in which defendant filed a counterclaim. From a judgment for defendant, and an order denying its motion for a new trial on bill of exceptions, plaintiff appeals, which appeal was ordered to be heard by this court after judgment of the District Court of Appeal. Judgment and order denying new trial reversed as to counterclaim, and affirmed in all other respects, and remanded, with directions.

Robert P. Troy, of San Francisco, for appellant. Randolph V. Whiting, of San Francisco, for respondent.

LAWLOR, J. The appeal was ordered to be heard by this court after judgment in favor of the defendant by the District Court of Appeal for the Third Appellate District. Upon considering the points made by the petioner, we have adopted the following portion of the opinion:

"Plaintiff charges in its complaint that defendant, on or about April 4, 1910, entered into a contract with plaintiff whereby he 'agreed to furnish to said plaintiff, in the city and county of San Francisco, 360 gallons of pure milk on each and every day of the year immediately following said 4th day of April, 1910'; that, in accordance with said contract, defendant furnished plaintiff with 320 gallons of pure milk for a period of 69 days, commencing on the 4th day of April, 1910, and ending on the 12th day of June, 1910, and that ever since said last-named date defendant has failed, neglected, and refused to deliver any milk to plaintiff, though frequently called upon so to do; that plaintiff has performed its part of said agreement; that plaintiff is engaged in the business of selling and delivering milk at retail in said city and county, and by reason of the said failure of defendant has been unable to supply its customers with milk, and 'has suffered loss to the extent of $5,000, which said sum is due and owing and unpaid from defendant.' A general demurrer was overruled, and defendant answered the complaint, denying 'generally and specially all and singular each and every allegation therein contained,' and for a 'further and separate defense and counterclaim' alleged that within two years last past plaintiff became indebted to defendant in the sum of $669.76 'for goods, wares, and merchandise sold and delivered to said plaintiff by said defendant, at said plaintiff's special instance and request, for which said goods said plaintiff agreed to pay said defendant the said sum of $669.76; that, though demand therefor has been made, said plaintiff has refused, failed and neglected to pay said amount to defendant, and the whole thereof is now due, owing, and unpaid to defendant.' Defendant prays judgment for said amount.

"The cause was tried by the court without a jury. The court found as facts: 'That it is not true that defendant entered into the contract as alleged in the complaint; that it is not true that plaintiff has been damaged in the sum of $5,000, or any other sum, by reason of any failure of defendant to furnish plaintiff with milk; that plaintiff is indebted to defendant in the sum of $669.76 for milk sold and delivered to plaintiff, at plaintiff's special instance and request, between the 1st day of June, 1910, and the 15th day of June 1910'; that said sum of $669.76 has not been paid, and the whole thereof is now due, owing, and unpaid 'from *defendant to plaintiff*' (sic). As conclusion of law the court found that defendant is entitled to judgment against plaintiff for the sum of $669.76 and his costs of suit. Judgment was accordingly entered. Plaintiff appeals from the judgment, and from the order denying its motion for a new trial on bill of exceptions.

[1] "Upon the question of the existence of the contract as alleged in the complaint, the evidence is conflicting. There was evidence sustaining the finding, which, under the familiar rule, we are not at liberty to disturb. There was evidence that the parties entered into an oral agreement by which defendant was to furnish plaintiff with milk to June 1, 1910, at an agreed price, and that all milk delivered to that date had been paid for. There was evidence that after June 1st the price was to be the going market value, but that the agreement was temporary, and for no stated period. Witness Kelly, secretary of plaintiff corporation, testified, 'Mr. Bernardo was supplying that milk at 16 cents per gallon after the 1st of June;' and again, 'I received 32 tanks of 10 gallons of milk each during the time we received milk from Mr. Bernardo; we received these 32 tanks up to the 13th or 14th of June.' Elsewhere he testified, 'Mr. Bernardo sent his last consignment of milk to us on the 13th of June.' The complaint alleges that defendant delivered milk for 69 days from April 4, 1910, which would imply delivery in June to nearly the 13th day.

[2] "Appellant claims that the evidence is insufficient to support the finding of the court that plaintiff is indebted to defendant in the sum of $669.76 for milk sold and delivered by defendant to plaintiff. The evidence might, and perhaps should, have been more specific; but such as it was went to the court uncontradicted, and was, we think, sufficient to establish a sale to defendant of 320 gallons of milk per day, at the rate of 16 cents per gallon, for 13 days—the last consignment being on June 13th, amounting in all, as we figure it, to $665.60, instead of $669.76.

[3] "Appellant makes the point that the averments in the answer fail to state that the counterclaim was 'existing at the commencement of the action,' as required by subdivision 2, section 438, of the Code of Civil Procedure. The averment was that the milk was furnished with-

in two years last past. The complaint was filed July 11, 1910, and the answer December 19, 1910, and the evidence was that the transaction occurred in June, 1910. There was no demurrer to the answer, and the evidence as to the delivery of the milk and the price to be paid came from plaintiff's witness without objection. Whether viewed strictly as a counterclaim, or as a common count by way of answer alone, as plaintiff claims it is, we think, under the circumstances shown, it was sufficient as a basis for the finding and judgment.

"Appellant makes the further point that the findings are contradictory; the last finding having stated that the amount 'is now due, owing and unpaid from *defendant to plaintiff*.' The findings show very clearly that this is a mere clerical error. * * *

[4] "Appellant reserved exceptions to a large number of rulings on the admission or refusal to admit certain testimony. Substantially all these rulings related to the measure of damages, and had reference to plaintiff's claim for damages arising out of defendant's breach of the alleged contract. The court found against plaintiff on the contract set out in the complaint. The question, therefore, as to the true measure of damages, had the contract as alleged been established, became immaterial. No such contract having been entered into, as the court found, there were no damages to be measured. * * *"

[5] It is claimed by the plaintiff that prejudicial error was committed by the trial court in rejecting its offer to prove that the defendant had assigned the claim constituting the counterclaim to one D. A. Curtin, who, subsequent to the commencement of this action, had sued the plaintiff for the amount thereof. It was because of this matter that the order of transfer was made. The defendant appeared as a witness in his own behalf and gave testimony tending to establish his counterclaim. On cross-examination, the plaintiff propounded several questions seeking to elicit that the assignment had been made to Curtin, to which the objection that it was not proper cross-examination was, in each instance, sustained. The offer of plaintiff was thus stated:

> "I offer to prove that * * * this witness sold and assigned and transferred a claim against the plaintiff in this action to Mr. Curtin, and that this witness is now attempting to recover in this action as a counterclaim against the plaintiff the very claim that under the oath of Mr. Curtin it appears was sold to Mr. Curtin."

The refusal to allow this line of proof was clearly error, for it was proper, in response to the testimony of the defendant tending to establish his counterclaim, to cross-examine him as to whether he had parted with the claim. The inquiry was material to the issues and proper cross-examination. The assignment was referred to during the trial, and, touching the identity of the counterclaim with the claim sued upon by Curtin, this occurred between the court and counsel for defendant:

> "The Court: You admit that the claim is the same?
>
> "Counsel: Yes; it is an assignment which we will offer in evidence later."

But the assignment was not offered in evidence, and, as we have seen, the plaintiff was not permitted to elicit proof concerning it. The record plainly shows that enough was elicited by one statement of defendant, and the admissions of his counsel, to indicate that an assignment of the claim had in fact been made by the defendant to Curtin. It is true that in the same connection defendant said substantially that the assignment was only for purposes of collection; but if it was absolute in terms, was in fact an absolute assignment, even though the unexpressed purpose was to obtain collection, it of course transferred the claim, and left defendant without any right of action thereon against plaintiff. Clearly, therefore, the plaintiff should have been permitted to show all the facts in this connection, as it endeavored to do. It must be kept in mind, too, that Curtin had commenced an action against plaintiff on this very claim, and that such action was pending, and was in fact being tried at the same time before the same judge, and with a stipulation that the evidence in one case might be considered as evidence in the other. But it is not shown that the cases were actually consolidated. Nor does it appear in the record what disposition was made of the Curtin case by the lower court, or what, if anything, has since become of that case. It seems clear that, if the evidence actually introduced sufficiently showed an absolute assignment, the finding of indebtedness to defendant is not sustained by the evidence, and that, if it does not show such an assignment, the court erred to the substantial prejudice of plaintiff in refusing to allow the showing in that behalf attempted to be made. In either event there must be a reversal as to the alleged counterclaim. It is conceivable that on a new trial such a state of facts may be developed as will warrant a recovery by defendant; but as to that, of course, we cannot now express any opinion.

The judgment is reversed, as is the order denying a motion for a new trial, in so far as the issues made in regard to the counterclaim are concerned. In all other respects the order denying a new trial is affirmed, and the cause is remanded, with directions to the trial court, after all issues regarding the counterclaim are determined, to enter judgment in favor of defendant on the cause of action set up in the complaint, upon the findings already made in regard thereto, and such judgment in regard to the matters set up in defendant's counterclaim as it may conclude to be proper in view of the showing made on the new trial.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

174 Cal. 769

O'BRIEN v. KING. (S. F. 7811.)

(Supreme Court of California. April 7, 1917. Rehearing Denied May 7, 1917.)

1. LIMITATION OF ACTIONS 🔑24(1)—STATUTE APPLICABLE—"FOUNDED ON INSTRUMENT IN WRITING."

A cause of action is "founded on an instrument in writing," within Code Civ. Proc. § 337, subd. 1, limiting such actions to four years, when the contract, obligation, or liability grows out of written instruments, not remotely or ultimately, but immediately.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 112, 115, 117.]

2. LIMITATION OF ACTIONS 🔑25(6)—INSTRUMENT IN WRITING.

An instrument reading, "Received from [plaintiff] * * * $450 in U. S. gold coin, at 5 per cent. interest," signed by defendant, is an instrument in writing, barred only after four years, under Code Civ. Proc. § 337, subd. 1.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 123.]

3. APPEAL AND ERROR 🔑1011(1)—SCOPE OF REVIEW—FACT FINDINGS.

The trial court's findings of fact, on which the evidence is in sharp and substantial conflict, will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988.]

4. WITNESSES 🔑275(5)—CROSS-EXAMINATION—SCOPE—LIMITATIONS.

Where defendant, on direct examination, went into certain matters, allowing cross-examination relating to the same matters did not show abuse of discretion, merely because defendant was thereby confused.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 971.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Hannah O'Brien against Jeremiah King. Judgment for plaintiff, with order denying new trial, and defendant appeals. Affirmed.

Rehearing denied; MELVIN, J., dissenting.

F. J. Kierce, of San Francisco (Walter Christie, of San Francisco, of counsel), for appellant. Daniel O'Connell, of San Francisco, for respondent.

SLOSS, J. The appeals in this case were originally taken to the District Court of Appeal for the First Appellate District. There the judgment of the trial court, and its order denying the defendant's motion for a new trial, were affirmed, on grounds stated in an opinion prepared by Richards, J. One of the questions discussed was the validity of the defendant's plea of the statute of limitations. There being some doubt in our minds regarding this point, an order was made transferring the cause to this court for hearing. Upon further examination, we are convinced that the District Court of Appeal made proper disposition of the appeals. While agreeing with all the conclusions reached by Mr. Justice Richards, we have thought it well to treat the point of the statute of limitations somewhat more fully than he did. With respect to all other subjects the following statement and discussion is taken almost verbatim from the opinion filed in the District Court of Appeal:

In this action the plaintiff recovered judgment against the defendant for the sum of $450, with interest and costs. The facts of the case, as shown in the plaintiff's proof and as briefly found by the court, are these:

The plaintiff is an unlettered working woman, who had saved up about $900 by working out. The defendant and one Cain Foley, the plaintiff's son-in-law, were desirous of becoming partners in the saloon business, but had no money. They went to the plaintiff, and persuaded her to let them have $900 with which to buy a saloon. She had the money in cash, and, dividing it into two piles of $450 each, delivered one of these to the defendant and the other to Cain Foley, taking from each a separate writing which they prepared in the following form:

> "San Fran., June 21st, '11.
>
> "Received from Miss Hannah O'Brien, on June 21st, 1911, $450 (four hundred and fifty dollars) in U. S. gold coin, at 5 per cent. interest.
>
> "[Signed] Jeremiah King,
> "987 Folsom St., San Fran."

The saloon was purchased, but its operation was not a financial success, and the plaintiff, as she testified and as the court found, was not repaid her money. Thereupon she brought suit against the defendant for the sum of $900. To her first complaint the defendant demurred, both generally and specifically, alleging a number of grounds of uncertainty, most, if not all, of which were good, and which demurrer the court sustained. The plaintiff then filed an amended complaint in three counts, which plunged the nature of the transaction between the parties into still profounder depths of uncertainty than before. The first two counts of this amended complaint were on motion stricken out by the court, which overruled a demurrer to the third count, although the latter was, if anything, more obscure as to the nature of the transaction than the former complaint or the counts which were stricken out of the amended complaint had been. The defendant then answered, and pleaded the bar of the statute of limitations. The case went to trial upon the issues as thus imperfectly framed, and the plaintiff and her witnesses testified in substance to the facts of the transaction as above set forth.

At the close of the plaintiff's case the defendant moved for a nonsuit, which the court refused to grant, a ruling which the defendant now asserts to be one of his grounds of error. Thereupon the plaintiff asked leave of the court to file a further amended complaint to make her pleading correspond with her proofs. The court granted this motion, and this the appellant also asserts was error. After some further testimony was taken the cause was submitted for decision, and the court presently filed its findings and judgment in plaintiff's favor, and also expressly found that the cause of action was not barred by the statute of limitations.

The first of the appellant's contentions is that his motion for nonsuit should have been granted. This motion was made by the appellant for the reason and upon the theory that, as he says, the action as originally outlined in the plaintiff's first complaint, and as more dubiously shadowed forth in the third count of her first amended complaint, was an action to recover against one of two partners and upon a partnership liability; whereas, the proofs proffered by the plaintiff went to show an individual liability upon the defendant's part. It must be admitted that the plaintiff's pleadings in this regard are pervaded with a degree of vagueness which would have rendered them properly subject to a demurrer upon the ground of uncertainty; but, notwithstanding this, we think that the original complaint and the third count of the first amended complaint do dimly foreshadow the idea that the obligation and liability of the defendant was an individual rather than a partnership one. This being so, we think the court was justified in denying the defendant's motion for nonsuit, and also in permitting the plaintiff to make her proofs and pleadings correspond through the filing at the trial of her second amended complaint. And, for the reasons above set forth, we are also of the opinion that the plaintiff's second amended complaint was not subject to the objection that it set forth a new and different cause of action.

[1] The next contention of the appellant is that the court erred in not finding in his favor upon his plea of the statute of limitations. The loan was made on June 21, 1911. The action was begun on December 20, 1913, more than two years after the accrual of the cause of action. The question is whether the action was brought upon a "contract, obligation or liability founded upon an instrument in writing executed within this state." If it was, the period of limitation was four years (Code Civ. Proc. § 337, subd. 1), and the action was not barred. If it did not fall within this description, the period was two years (Code Civ. Proc. § 339, subd. 1), and the plea of the statute should have been upheld. A cause of action is "founded upon an instrument of writing" when the contract, obligation, or liability grows "out of written instruments, not remotely or ultimately, but immediately." Chipman v. Morrill, 20 Cal. 130, 137; Ashley v. Vischer, 24 Cal. 322, 85 Am. Dec. 65; Louvall v. Gridley, 70 Cal. 507, 11 Pac. 777; Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115; McCarthy v. M. T. L. & W. Co., 111 Cal. 328, 43 Pac. 956; Thomas v. Pac. Beach Co., 115 Cal. 136, 46 Pac. 899; Scrivner v. Woodward, 139 Cal. 314, 73 Pac. 863. "A cause of action is not upon a contract founded upon an instrument in writing, within the meaning of the Code, merely because it is in some way remotely or indirectly connected with such an instrument, or because the instrument would be a link in the chain of evidence establishing the cause of action. In order to be founded upon an instrument in writing, the instrument must, itself, contain a contract to do the thing for the nonperformance of which the action is brought." McCarthy v. M. T. L. & W. Co., supra.

In Ashley v. Vischer, supra, there were two papers signed by the defendant. Action on one was held to be covered by the two-year statute, while the other fell under the statutory provision subsequently carried into subdivision 1 of section 337 of the Code of Civil Procedure. The first instrument read as follows:

> "Received of John Morrison, Esq., the sum of two thousand seven hundred and fifty dollars. San Francisco, February 24, 1855.
> "($2,750.) Edward Vischer."

The holding was that this was a mere receipt for the amount of money specified, and that it neither expressed nor imported any obligation to pay. It was pointed out that "the presumption of law is that money, when paid, is in liquidation of an antecedent debt."

[2] The writing in the present case is more than the mere receipt embodied in the first paper under consideration in Ashley v. Vischer. It reads:

> "Received from Miss Hannah O'Brien, on June 21st, 1911, $450 (four hundred and fifty dollars) in U. S. gold coin, at 5 per cent. interest."

The words "at 5 per cent. interest" import into the writing an additional and significant element. The paper is not a mere declaration that money has been received by the defendant from the plaintiff. It embodies the statement that it has been received at a given rate of interest. The reasonable—indeed, the only reasonable—meaning of these words is that the money was received as a loan at the specified interest rate. A loan being established by the writing, a promise to repay is implied by necessary inference of law and fact. Such promise is embodied in the language of the writing, although not expressed in the words "I promise to pay."

It is generally held, in states having statutes similar to our own, that under similar facts the action is covered by the period of limitation applicable to suits founded upon written instruments. Thus, in Indiana, it has been held that an instrument reading: "Received of L. $1,600, on deposit, in national currency. [Signed] S. Bros."—is a written contract for the payment of money, and that the statutory limitation for actions on such contracts was applicable. Long v. Straus, 107 Ind. 94, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87; De Vay v. Dunlap, 7 Ind. App. 690, 35 N. E. 195. The holding was likewise where the instrument read as follows: "Received of H. Doane for Samuel A. Reyburn, one hundred and eighty dollars. * * * [Signed] J. H. Casey." Reyburn v. Casey, 29 Mo. 129. "The broad and comprehensive language of the statute evidently embraces all kinds of written instruments, without regard to their mere form or phraseology, which imply a promise or agreement to pay money, and is not restricted to such as have the requisites of promissory notes, or to such instruments as contain an express promise or agreement upon their face to pay. It is sufficient if the words import a promise or agreement, or that this can be inferred from the terms employed." The theory of these cases was that the paper, in each instance, acknowledged the existence of facts necessarily and directly importing the obligation which was made the basis of suit, and this was held to be sufficient. See, also, Sannickson v. Brown, 5 Cal. 57; Ashley v. Vischer, supra.

None of the cases decided in this state, and cited above, will be found to conflict with this view. They all had to do with writings which did not, in and of themselves, express the obligation sued upon, or a state of facts from which such obligation necessarily and directly flowed. In each instance the obligation could be established only by evidence of facts and occurrences outside of those appearing on the face of the instrument. A situation of this kind was in the mind of the court when it said, in Scrivner v. Woodward, supra, that "promises merely implied by law, and not supported by any express promise or stipulation in the written instrument, do not fall within the provision of section 337, relating to contracts in writing," and that any language to the contrary in Ashley v. Vischer, supra, employed in discussing the second paper there involved, must be disregarded as in conflict with later decisions. We adhere to the declaration that promises "merely implied by law" from a situation evidenced by a writing—i. e., quasi contracts—are not within the statutory provision under discussion. The promise must be one arising directly from the writing itself, and included in its terms. But in determining whether the obligation is "supported by an express promise or stipulation in the written instrument," we must regard, as included in the terms of the writing, all obligations and promises which its words necessarily import. The distinction which we have tried to point out is well stated in Long v. Straus, supra, where the court, upon rehearing, discussed the question exhaustively. The following language from the opinion in that case is in point here:

> "Where there is an express contract there can be no implied one. An express written contract contains the only competent evidence of the agreement of the parties. There is here an express written contract, and therefore there is no implied one. But this written contract is to be given legal effect, and to give it effect the courts must consider it as embodying all the legal obligations implied from its language. These obligations, we repeat, are part of the written contract. The law imported into the contract does not create an independent agreement, but makes the instrument express the full agreement of the parties. * * * All contracts have imported into them legal principles which can no more be varied by parol evidence than the strongest and clearest express stipulations. * * * The authorities all agree that the regular indorsement of a promissory note is as perfect a contract as though the liability which the law implies were written out in full. * * * Into the contract before us the law enters and makes it an agreement to repay the money received on deposit. * * * Our conclusion reaches further than that there is an implied promise to pay the depositor his money, for it goes to the extent of affirming that this promise is created by law as an element of the contract, and as such enters into and forms part of the written agreement. We do not regard the promise as an independent one, existing outside of the written contract, but as a promise forming one of the terms of the contract."

[3] The appellant further contends that the evidence is insufficient to support the findings and the judgment of the court. The defendant in his answer to the second amended complaint admits the original indebtedness, and relies upon two defenses—the plea of payment, and the statute of limitations; and as to the first of these the evidence of the parties is in sharp and substantial conflict, and we shall not, for that reason, disturb the findings of the court.

[4] The appellant finally urges that the court erred in permitting the plaintiff's counsel to cross-examine the defendant at great length and with much iteration upon certain immaterial matters which were very prejudicial to him and to his case; but an inspection of the record discloses that this portion of the defendant's cross-examination relates to the existence or nonexistence of certain facts which the defendant had himself put forward in support of his plea of payment of his loan. We think that the court did not abuse its discretion in extending the scope of this inquiry, and that the mere fact that the defendant was unable to extricate himself therefrom with credit would not of itself warrant a reversal of the case.

The judgment and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.

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174 Cal. 743

PEOPLE v. RINDGE et al. (L. A. 3752.)

(Supreme Court of California. April 7, 1917.)

1. HIGHWAYS 🔑5—PUBLIC ROADS—PUBLIC USE.

A landowner's use of a beach road within the confines of defendant's property for the purpose of reaching his premises does not establish the beach road's character as a public road any more than his use of a private way.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 6, 7.]

2. DEDICATION ⟹20(5)—WHAT CONSTITUTES —USER OF HIGHWAY.

Where one owning a strip of land along a beach allowed property owners in the vicinity to use the beach as a road according to a custom of the country, there was no dedication of a highway.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 18, 26, 27.]

3. HIGHWAYS ⟹17 — ESTABLISHMENT — EVIDENCE—SUFFICIENCY.

In a suit to abate an alleged nuisance maintained by defendants upon and across a public highway, evidence *held* to warrant findings that no such highway had been established.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 24.]

Department 2. Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by the People of the State of California against May K. Rindge and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed.

Anderson & Anderson, Edward F. Wehrle, and O'Melveny, Stevens & Millikin, all of Los Angeles, for appellants. J. D. Fredericks, Dist. Atty., Hartley Shaw, Thomas Lee Woolwine, Dist. Atty., George E. Cryer, Chief Deputy Dist. Atty., and Haas & Dunnigan, all of Los Angeles, for respondent.

HENSHAW, J. This action was brought to abate alleged nuisances maintained by defendants upon and across a public highway in the county of Los Angeles. The nuisances were gates and fences. The purpose of the litigation is to obtain a decree declaring that a public highway exists through the Malibu ranch along the shore of the Pacific Ocean. The Malibu ranch is about 22 miles long and contains about 13,000 acres. Thus it is quite narrow, varying in width from 1½ miles to 2½ miles. Its length is easterly and westerly. Its southern front is bounded and washed by the waters of the Pacific Ocean. The inland boundary line extends along the southerly slope of a rugged, inhospitable mountain chain, cut by deep ravines and canyons. At the foot of these mountains is a stretch of country narrow and comparatively level and known as mesa lands. The "shore of the Pacific" along which it is declared this highway extends is a shore characteristic of many hundreds of miles of California's littoral. Nearest to the ocean is a gradually sloping sandy beach between the lines of high and low tide. At low tide this beach is uncovered and the sand wet and compacted affords a firm passageway for footmen and vehicles. Above this is a stretch of loose shifting sand, washed and blown above the line of ordinary high tide. This sand is dry, and passage over it, though possible, is difficult. The footman sinks to his ankles, the horse to his fetlocks, the vehicle which he is dragging half way or more to the hubs. Beyond this loose sand is a bluff varying in height from 30, 60, to 100 feet. Eroded from this bluff and lying at the foot of it is the talus. This bluff marks the seaward end of the comparatively level mesa lands of which we have spoken. These mesa lands in turn are channeled by ravines or arroyos, in winter carrying the mountain waters down the gulches to the ocean. In summer they are dry. Their banks usually are quite precipitous. The beach, of course, is likewise pierced in places by these short mountain streams, although in summer when these streams are not flowing the ocean frequently restores the sand washed away by the winter torrents. Still further the beach is broken by small promontories and rocky headlands jutting out into the ocean and by rocky outcrops here and there along its line. As is well known to any one at all conversant with the primitive life of California, these beaches afforded the customary routes of travel up and down the coast. They were smooth and level, as compared with the mesa lands, which were cut by numerous gullies, difficult of descent and equally difficult of ascent. Thus travel sought the beach and followed along the line of the hard sand uncovered by the ebbing tide. As a promontory was approached the traveler was compelled to leave the beach, climb to the mesa uplands, cross the promontory, descending to the beach on the further side. Where the winter rains converted the arroyos into torrential streams progress was impossible. When the rising tide covered the hard beach the traveler was compelled to make his laborious way through the soft sands above, or, as was usually the practice, he interrupted his journey and remained where he was until the tide had again ebbed. Little or no construction work was ever done upon these roads, if roads they could be called. The traveler, usually on horseback, when it became necessary to leave the beach, sought the least precipitous place in the bluffs up which he rode or led his horse. Where this was impossible, the earth bank of the bluff was graded down.

Such are the general characteristics of many such ancient shoreways along the Pacific Ocean; such were the general characteristics of this ancient way. In those early days the principal towns or pueblos to the north and west of that of Los Angeles were San Buena Ventura, in Ventura county, and Santa Barbara, in the county bearing the same name. Both of these counties, like the county of Los Angeles, are coast counties. There were several routes of travel between Los Angeles and these northerly pueblos through the mountain passes, in addition to the shore route just described. This shore route, beginning at a settlement on the ocean near the mouth of Santa Monica canyon ran about five miles through another grant, Boca de Santa Monica; then entered upon the Malibu grant, ran along its coast line, and a mile or two beyond it to a gulch known as Yerba Buena or Little Sycamore canyon, when it struck inland up this gulch and over the mountains and so to the towns in Ventura county. Travel over the whole of this route was possible only to the footman or to the horseman. Wheeled vehicles could not be dragged over it, and indeed there were in those early days but few wheeled vehicles, carretas, clumsy carts with solid wooden wheels, drawn by oxen.

The Malibu ranch was a Spanish grant, patent to which was issued to Matthew Keller in August, 1872. It was, as the foregoing description of its character at once makes plain, a stock range for the pasturing of sheep or cattle, and for this purpose it was used. Some of the surrounding lands were also Spanish or Mexican grants, but to the north of the Malibu was an unsurveyed strip of government land. In some of the upper reaches of the streams leading through the Malibu were small tracts of government land fitted for agriculture, and these were taken possession of by settlers. In the streams were trout, in the valleys quail, in the hills deer, and the country was therefore attractive to the fisherman and hunter. All of these people entering the ranch traveled, as it was necessary for them to travel, along the shoreway above described, until, reaching the gulch or canyon which they desired to ascend, they left the beach and struck inland. At the time when Matthew Keller received his patent and for some time thereafter the only persons actually living on the Malibu ranch were Matthew Keller and his family, with his overseer and vaqueros looking after his stock. Their home was in the Malibu canyon, off from the line of the beach road, which they themselves used in reaching their home. The Malibu canyon was about two miles westerly from the easterly boundary of the ranch. Further to the westward and about three miles from the western boundary of the ranch is Lechuza canyon. In this canyon lived the Tapias family in their adobe home. The Tapias were Spanish. They claimed ownership to a part of the Malibu ranch, and were there living under their assertion of right. Neither they nor their visitors were apparently interfered with by Matthew Keller. From Lechuza canyon eastward to Santa Monica it was possible to drag a carreta, and it had been done from time to time by the Tapias. They left the ranch in 1876. Nor did Matthew Keller's successors interfere with the settlers who used the beach road until they came to their selected canyons, either in their use of the beach road or of the primitive private trails or rough roads which they constructed to reach their locations. Very few of them made a pretense of residing on their selected lands. Nor did he interfere with the travel along this beach road which sought to traverse the ranch en route to Ventura county. He did, however, interfere with and restrict the use of the ranch, and, to a certain extent, of the road, to fishermen, hunters, and campers, and this because in many instances they killed his cattle, in others they made their camps near the springs which the cattle frequented for water, and so drove them away, and, finally, they occasioned not infrequent and destructive fires. The entry of the settlers came after Matthew Keller's death in 1881.

We have thus fairly epitomized the conditions existing when in 1875 Matthew Keller filed a petition with the board of supervisors of Los Angeles county offering to dedicate a public highway over his lands. This offer, upon which great reliance is placed by respondents, demands, therefore, somewhat detailed consideration. In November, 1875, a petition was filed by Matthew Keller purporting to come from the owners of the lands along the route of the proposed highway, asking the supervisors "to lay out a public road along the beach fronting on said ranchos, being the only possible way said ranchos can be approached. Said projected road runs for the greater part along the beach of the Pacific Ocean, but at intervals is found impassable by reason of projecting points and rocks that make said highway impassable at high water. The necessity for such a road for the convenience of public travel will be quite obvious to any one authorized to view the same, as well as the nature of the improvements to be made." By way of description the petition set forth that "from the city of Santa Monica the road is a natural road along the beach for a distance of about six miles. The first obstruction to travel commences at the point of an arched rock, within half a mile of the canyon, called Topanga, fronting on the Santa Monica ranch. The other obstructions to the public travel for wagons are found at intervals only between the aforesaid arched rock and the range line between 17 and 18 west township," etc. (this range line runs a little to the west of Malibu canyon where was Mr. Keller's home), a distance of about six miles in length. "This road will connect the city of Santa Monica with an immense body of agricultural and horticultural lands, partly government land, for a distance of twenty miles along the beach, and to fishing grounds of great value to the community. The probable cost is about $300." This proposed road, as shown by its description, was merely the old beach road which we have described. Viewers were appointed and their report followed. It declared that the road from Santa Monica for a portion of the distance westerly was in good condition. It followed the beach. Certain obstructions were then noted, the necessity in one case of grading from the beach to the mesa lands, in another for blasting out obstructing rock in the line of the beach proper. Arriving at the Malibu ranch, the viewers declare that there are two places along the beach between the easterly line of the ranch and Malibu lake (at the mouth of Malibu canyon) that need improvement, "and then the passage along the beach from Santa Monica City will be open to travel for a distance of 25 miles, opening thereby a scope of country fit for settlement to the amount of over 4,000 acres. We estimated the whole cost of improvement at $650 in all so as to make the road passable in all seasons of the year." The report then recommended the adoption of the petition and the immediate improvement of the road as suggested. The field notes accompanying this report showed, as does the report itself, that the doing of no work was contemplated west of Malibu lake. The field notes were carried no further than Malibu lake and concluded, after fixing the easterly line of Malibu ranch, with "and following the beach to the lake in said rancho." The bond accompanying the Keller petition and executed by Keller was conditioned on "the opening of a road from Santa Monica to the rancho Topanga Malibu."

There is one conspicuous infirmity in the Keller petition which impairs its legal effect as an offer of dedication, and that is that his offer contemplates a road from Santa Monica westward to (or through) his ranch. But in fact he did not own the land between the easterly line of his ranch and the town of Santa Monica, and had no authority to offer a right of way as and for a public highway over those lands. Nor yet did the owners of those lands ever join in his petition. But let it be assumed that the offer at least was an expression of willingness and desire upon the part of Matthew Keller to dedicate a public road or highway across his whole ranch; the question remains: What resulted from this? It appears from the report of the viewers that they contemplated only the construction of a way from Santa Monica to Malibu canyon; that this way was to follow the beach, saving in one place where it was necessary to leave it to cross a headland. The projecting rocks in the beach sands were to be blasted out. The talus in some places was to be graded. Something of this work was to be done within the boundaries of the Malibu ranch to the west of Malibu canyon. The major portion of it was to be done to the westward of Malibu ranch. Keller was interested in securing a road on his ranch at least up to Malibu canyon, where the ranch buildings were situated. But nevertheless it is fairly deducible, and the court originally found, that Keller's offer contemplated a beach highway through his ranch, his petition, it will be noted, setting forth the "obstructions to the public travel for wagons," and declared that such obstructions existed only between Santa Monica and Malibu lake. At this time, however, there were no settlers whose rights call for consideration. The entries which they later made upon the public domain did not begin until 1882–1885, after Keller's death. Nor does it appear that the viewers' report was ever adopted, or that there was ever any formal acceptance of the Keller offer, and the situation thus presented is and can only be that which respondent adopts, namely, that the "offer of dedication contained in the Keller petition was of a road already in existence, used and traveled throughout the entire length of the ranch." Under this view respondent contends that the petition should be regarded rather as one for the improvement of an existing road than as an offer to dedicate a new road.

This elimination of the Keller offer from the consideration of the case leaves it for present purposes as though that offer had not been made; that is to say, we are brought back to a contemplation of the question as to whether or not, within the meaning of our law, there was at the time of Keller's offer, or thereafter, a public highway across the Malibu ranch.

Under the findings which the court originally made and the judgment which it first gave, the existence of such a highway was declared and decreed, the court basing its conclusions, in part at least, upon the fact that this route was a recognized mode of access to the settlements in Ventura and the other northern counties. Upon motion for a new trial the court's views suffered a modification in that it granted the motion as to the existence or nonexistence of such a highway from the westerly line of Malibu to Lechuza canyon, where the Tapias formerly resided. It denied the motion as to the remainder of the asserted highway, and from its order this appeal is taken.

Matthew Keller, as has been said, died in 1881. In 1874 Louis Sentous was on the ranch as foreman and overseer. In the following year he leased the ranch, and he and his brother remained as tenants for 17 years. There were no settlers upon the government land to the north and west of the ranch until after Matthew Keller's death. This is conceded. The Tapias had departed, and, aside from the occasional traveler who passed along the beach and through the rough trail over the Ventura mountains, travel on the beach road there was none, saving that which pertained to the operations of the ranch and the activities of hunters and fishermen, who were, of course, either licensees or trespassers, with rare visits from peace officers in pursuit of offenders against the law. Moreover, no change was made in the road. No public improvements of any kind were constructed. Whatever may have been done to facilitate access to the ranch houses in Malibu canyon was done by the owner and his tenants, Louis Sentous, testifying as to road conditions west of Malibu canyon as late as 1879, when he as tenant controlled the ranch, tells that he was assisting in establishing windmills which he had ordered at certain places on the ranch. He says:

> "From Malibu canyon and Ramirez canyon [some six or seven miles westward from Malibu canyon] we traveled on the beach, and at Ramirez canyon the vaqueros assisted with their lar-

iats in pulling the wagon up the bluff. There was a trail on the mesa which we followed wherever we could, but at places it was too steep to follow. A man went ahead on horseback and picked the way for us. This is the first and last trip I ever made with a wagon beyond Malibu canyon. Before that time I had never seen a wagon traveling beyond that canyon, but I have seen them since. During those early years I did not see any travelers on the ranch. We gave strict orders not to allow any one to go through there without permission either from Mr. Keller or ourselves. I know the order was carried out. Those orders were given a few years after I rented the ranch upon receiving information that some cattle had been shot by hunters."

In 1882 Guthrie and Harris, coming over the Ventura mountains, located on government land west of the Malibu. In 1884, three years after Matthew Keller's death, they drove a wagon across this beach road from Santa Monica, and thereafter went back and forth on several and perhaps numerous occasions. While Keller was alive his tenant, Sentous, asked him if he might prevent strangers from going onto the ranch, and was told that he could do so. He asked because he had heard something about a county road, but "Keller told me that nothing had been done in the way of an agreement between himself and the county. I told him I was going to stop people passing through, and he said that I might do so."

Neither during the period of the Sentous tenancy nor thereafter, when the title to the ranch passed by purchase to Mr. Rindge, whose widow is the defendant in this action, was there any interference (saving as hereinafter noted) with the use of the beach road by the settlers upon the government domain and those who had business with them. After 1884 a number of locations were made upon the government lands. It is within the facts to say that the public had absolutely no use for this beach road, since it led to an impasse in the Ventura mountains, saving as that public was represented by these settlers. The conduct of the owners of the Malibu was certainly not unneighborly, since they freely allowed these settlers the use of this beach road, and, more than that, permitted them to construct their roads and trails from the beach road over the lands of the Malibu to their locations on the government land to the north. The first of these settlers beginning at the westerly line end of the ranch were Harris and Guthrie. To make possible a means of communication between their lands to the west of the ranch and the town of Santa Monica, and thus to avoid the necessity of crossing the almost impassable Ventura mountains to the north, they did some work of grading in the arroyos, barrancas, and canyons on the western part of the ranch, and in 1884, for the first time in its history, they drove, as has been said, a two-horse wagon from Santa Monica to their locations. They lived upon their claims until the year 1900, when they sold to Mr. Rindge, the then owner of the Malibu. Thereafter there was no location and no settler on the lands immediately to the west and to the north of the westerly end of the Malibu. In 1886 one Sweeney made his location on government land in the upper reaches of Nicholas canyon, some two or three miles east of the westerly line of the ranch. He sold to Nicholson, and in 1904 Nicholson's holdings passed by purchase to Mr. Ringe. There has since been no occupancy nor need of use for this beach road by any person west of Encinal canyon. Between Encinal canyon and Nicholas canyon lies Lechuza canyon, but, as has already been said, the Tapias, there located, moved away in 1876, and there has been no settlement in Lechuza canyon, either on or off the ranch. In 1886 Marion Decker located upon a claim in Encinal canyon immediately to the north of the line of the ranch. He came to his location over the Ventura mountains. After establishing himself he built his private road down the canyon to the beach road. Decker retains his holdings, and is one of the principal witnesses for the plaintiff in its contention for a public highway. Decker testifies to the purchase by Mr. Rindge, beginning in 1895, of the settlers' claims until by 1901 "there were left only myself and Drake."

[1] Decker's road to the beach road was unquestionably a private way, constructed with the acquiescence of the owners of the Malibu, and his use of the beach road to Santa Monica would no more establish its character as a public road than would the use of his road from his claim to the beach road fix the character of that as a public highway. United States v. Rindge (D. C.) 208 Fed. 611. Las Trancas canyon lies a little over three miles east of Lechuza canyon, at which latter canyon, under the order granting a new trial, the public highway in the present state of the record now ends. Claims were taken up in this canyon by two men, who, in turn, sold to Mr. Rindge. The testimony of Mr. Decker is that there are claims on government land in Escondido canyon, which lies approximately half way between Lechuza canyon and Malibu canyon, owned by Schumacher, Mellus, Gillis, and Diss, and that they have done some work constructing a private road from their claims to the beach road. No one of these presented himself as a witness in the case. It appears, then, that even before the commencement of this action Decker and Drake were the only two persons who had any use for the beach road, and the contention of appellant is that the use which they have made and are making of it is precisely the use which they have made and are making of the private road from their claims to the beach road —a permissive use for a private way under the sanction of the owners of the ranch.

Appellants further rely upon the failure of the county of Los Angeles ever to declare this road a public highway, or ever to exercise any dominion or control over it, or ever to expend any money in its maintenance, care or betterment. It was not declared a public highway by the court of sessions under the statutes of 1850 (Stats. 1849–50, p. 200). It did not become a public highway under the provisions of the act of 1855 (Stats. 1855, p. 192), which declares public highways to be those so designated by the court of sessions or board of supervisors, or which may be hereafter so declared by the board of supervisors. Nor yet did it become a public highway by virtue of the provisions of sections 2618 and 2619 of the Political Code as they read when that Code took effect in January, 1873. Nor, finally, did it become a highway by virtue of the special road laws applicable to the county of Los Angeles, found in the statutes of 1877–78 (Stats. 1877–78, pp. 6 to 17), both of which acts contemplate that the supervisors, before any such road shall be or be decreed to be a public highway, shall "cause said roads to be properly located and declared as public or county roads," and in this connection reference also is made to section 2621 of the Political Code, which declares that "no route of travel used by one or more persons over another's land shall hereafter become a public road or way by use, or until so declared by the board of supervisors, or by dedication by the owner of the land affected."

The testimony of the settlers, whose occupancy of the government lands began about 1884, is to the general effect that they were not disturbed by the owners of the Malibu ranch in their use of the beach road; that in many places it was, of course, no road at all. The settlers themselves, for their own convenience, made improvements in the natural conditions where it was necessary to leave the beach. The mesas were not cultivated, and one could drive over them at pleasure. "In the early years there was nothing but a bridle trail. We drove where we pleased. There was no injury done. We first found a road or way marked by wagon tracks west of Encinal canyon about 1888 or 1889. During the early years we traveled practically all the way from Malibu to Ramirez on the beach. Whatever patches of road there are which are not in hard sand have been built since that time. There were miles of the way along the Malibu ranch where, during the time we lived there, the only convenient way to travel was where the sand was made hard by the water." Such, and much more to like effect, is the concurrent evidence of plaintiff and defendants. It is to be noted that all such parts of the road as ran along the beach between high and low tide—and this was much the greater part of it—was not on the ranch at all. It was on tidelands owned by the state. These natural conditions, with the slight improvement which the settlers made in them for their own convenience, continued until after Mr. Rindge acquired title to the ranch and in 1894 erected gates—one at the easterly entrance to the ranch, the other at Malibu canyon. From the first Mr. Rindge insisted that there was no public way upon the ranch; that the road was only a private road, permission to use which had been accorded to the settlers. He gave to them keys to the locked gates. They, or some of them, insisted that the road was a public highway, and, being advised by their attorneys that the acceptance and use of keys might militate against this position, they caused Mr. Rindge to be cited before the board of supervisors for obstructing a public highway, the citation being that Mr. Rindge show cause "why a certain gate described in said summons should not be removed from an alleged public highway." Mr. Rindge at this time had spent large sums of money in building a road from the eastern boundary of his ranch to Malibu canyon. He made answer that the gate which he was maintaining was on this privately constructed and privately owned road. He conceded the existence of the beach road as a public highway from the eastern boundary of the ranch "to a point on the beach opposite the Malibu lagoon." He declared that none of the neighbors "had ever been hindered or their friends from passing through, and many privileges had been given them." The result of the hearing under this citation was most inconclusive and unsatisfactory. No official action was taken by the supervisors other than an indefinite continuance. It is asserted by plaintiff that this indefinite continuance was the result of a compromise agreement by which, in effect, Mr. Rindge admitted the road through the ranch to be a public highway. On behalf of the defendants it was stoutly insisted that his admission went only to the road from the easterly line to Malibu canyon, and that under this admission he ceased to lock the gate at the entrance to the ranch, but maintained a locked gate at Malibu canyon. He persisted in this for some time, and the settlers, upon the other hand, broke the lock and frequently destroyed the gates. He posted signs and warnings at and near the gates. He published similar warnings in the newspapers. The form of such signs and notice was:

> "No passing through the Malibu ranch is allowed. No camping thereon under penalty of the law. Shooting and hunting forbidden."

Mr. Rindge, and Mrs. Rindge after him, continued these interruptions and protests with pertinacity until finally this action was brought.

[2] It is manifest that, if a public highway exists at all, it exists by prescriptive user, and not by official acceptance of an offer of dedication, nor by any official recognition of the existence of the highway. Indeed, it is quite plain that any county would be extremely slow to take into its charge and burden itself with the care of such a strip of ocean beach, which from the very nature of the country would have slight use and less value. In opening the water front of their ranch to the travel of foot and horsemen the

owners were but following the custom of the country. When that travel of necessity sought the mesa uplands, it would have been unneighborly to the last degree to have checked it or turned it back, and the owner's failure to do so no more established an intent to dedicate a public highway than would his reception and entertainment of such a traveler overnight have established his intent that he should take up a permanent residence with him. Dedication under such conditions is not to be lightly inferred. Harding v. Jasper, 14 Cal. 642; Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417; Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190. It is quite understandable that the settlers, upon the one hand, because their passage was not interfered with, may have come to the conclusion that they were traveling as of absolute right over a public way, but their belief is not at all inconsistent with the position and proof of the defendants that throughout the history of this primitive trail it was but a private way, which developed into a more or less efficient road, in the construction of which the public took no part, and the burden of which construction was largely borne by the owners of the ranch, the settlers, for their own manifest advantage, contributing some of their labor.

[3] It follows herefrom that the findings of the court decreeing the existence of a public highway across the Malibu ranch cannot be sustained, and that the order refusing to grant defendants' motion for a new trial must be reversed. In this connection it is to be noted that the Rindges had constructed upon the uplands and away from the tidal beach a new road to Malibu canyon. Apparently it is conceded that the beach road as far as Malibu canyon is or may be regarded as a public highway. But this admission or concession will not justify in and of itself a finding or declaration that the newly constructed private road is a public substitute for the original beach road.

The order denying a new trial is reversed.

We concur: MELVIN, J.; LORIGAN, J.

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174 Cal. 776

In re WALDEN'S ESTATE. (L. A. 5105.)

(Supreme Court of California. April 12, 1917.)

EXECUTORS AND ADMINISTRATORS ⚿216(2)—CLAIMS—COSTS—"PARTY INTERESTED."

In a succession controversy, an attorney for litigants claiming heirship, who by the final decree were denied participation, was not a "party interested" in the estate, and could not recover against the estate for the costs and attorney's fees in attempting to establish heirship, though their witnesses gave testimony aiding in reaching the decree for distribution in favor of a particular set of claimants, under Code Civ. Proc. § 1720, or any other statute.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 757.

For other definitions, see Words and Phrases, First and Second Series, Party Interested.]

Department 2. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Proceeding in the estate of Matilda Walden, deceased, wherein Elon G. Galusha, for William Latimer and others, filed a claim for costs. From an order disallowing the claim, claimants appeal. Affirmed.

Elon G. Galusha, of Los Angeles, for appellants. Neighbours, Hoag & Burke, C. White Mortimer, Mott & Dillon, Ball & Ball, and Trusten P. Dyer, all of Los Angeles, for respondents.

PER CURIAM. Upon the death of Matilda Walden, intestate, a controversy over kinship and heirship to her and the consequent right of succession to her estate arose. There were three sets of claimants, who for convenience may be designated the Monro claimants, the Latimer claimants, and the American claimants. The contest was decided in favor of the Monro claimants to the exclusion of the Latimer and the American claimants. From the decree determining heirship against them, the Latimer claimants appealed and were unsuccessful on their appeal. Estate of Walden, 166 Cal. 446, 137 Pac. 35. The result of necessity was that the decree determining heirship in favor of the Monro claimants became and is final and conclusive. Thereafter and in the matter of the estate of Matilda Walden, Elon G. Galusha filed a petition and claim which he entitled "claim against the costs of administration of the estate of Matilda Walden, deceased." His petition and claim asserted that he is the attorney at law for the Latimers, and presents to the administrator of the estate "his claim against the costs of administration of said estate; and states that the testimony of the witnesses produced by the defendants Latimer have materially contributed to the finding by the court that Martha Monro and her sister's children are entitled to the estate of the decedent." The petition and claim proceeded further to expound that the Latimers expended about $2,000 in securing the attendance of witnesses upon the trial of the contest to determine heirship, and that the testimony of these witnesses was valuable to the Monros' case; still further, that his own services to the Monros' case were worth about $6,000. He then demanded payment to him of this sum.

The court refused to entertain the petition, refused allowance to the claim, and this appeal followed. The bare statement of the facts above given demonstrates the correctness of the court's determination, and before this court the case presents rather one for the imposition of costs for the taking of a frivolous appeal than for the allowance of the costs contended for.

This claim is presented in his own name and on his own behalf by the attorney for litigants claiming heirship, whose heirship by final decree has been conclusively denied. This attorney is not a "party interested" in the estate (Briggs v. Breen, 123 Cal. 657, 56 Pac. 633, 886; Estate of Kruger, 143 Cal. 141, 76 Pac. 891), nor are the Latimers, the unsuccessful claimants to heirships, parties interested in the estate (Estate of Blythe, 108 Cal. 125, 41 Pac. 33; Estate of Walden, supra). Upon the merits, the curious contention is advanced that the estate of Matilda Walden, deceased, became liable for these costs and these attorney's fees incurred by the unsuccessful litigants because the evidence which they produced and the services which this attorney rendered aided in defeating the claims of the American pretenders. If this be so, it forms no just basis of any legal claim under section 1720 of the Code of Civil Procedure, nor under any other provision of the law. And if these Latimers have any equitable standing it cannot in the nature of the case arise from any service which they rendered to the estate of Matilda Walden, deceased, but solely from the services which they may have rendered to the Monro claimants to that estate. If such services were in fact rendered, under convention or agreement of the parties, the claim, whatever may be its validity, is no more than a private demand against the Monro heirs. So plain must this be that it would be a waste of time to continue the discussion.

The order appealed from is affirmed.

175 Cal. 762

In re MARX'S ESTATE. (S. F. 7623.)

(Supreme Court of California. April 7, 1917. Rehearing Denied May 7, 1917.)

1. WILLS 🔑179—REVOCATION—EXECUTION OF LATER WILL.

A later will, containing no express revocation of the earlier, but disposing of the entire estate, revokes the earlier.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 456, 457.]

2. WILLS 🔑183—REVOCATION—EXECUTION OF LATER WILL—INVALID PROVISIONS.

Where testatrix made two wills, but the later did not revoke the earlier expressly and contained charitable bequests in excess of one-third of the estate, and the excess was sufficient to pay all bequests of the first will not repeated or cut off in the second, both instruments would stand as the will, and the invalid bequests of the second would be applied to the valid gifts of the first, and any balance would go as intestate property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 461.]

3. WILLS 🔑183—REVOCATION—EXECUTION OF LATER WILL.

Invalid dispositions in a subsequent will do not revoke valid dispositions in the earlier will, not expressly revoked, and are ineffective for any purpose.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 461.]

4. WILLS 🔑221—PROBATE—TWO INSTRUMENTS.

Where a later will is probated, and thereafter an earlier will is discovered, but the valid provisions of the two do not conflict, the probate of the later will should not be revoked, since, so far as it is valid, it is conclusive, and the earlier will should be admitted only when invalid provisions of the later would, in the absence of earlier, permit partial intestacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 539–541.]

Angellotti, C. J., dissenting.

In Bank. Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Proceedings in the estate of Johanne Augusta Emily Marx, deceased. From an order admitting two instruments to probate as the last will of deceased, Stephanie Henke, a niece, appeals. Affirmed.

Rehearing denied; ANGELLOTTI, C. J., and HENSHAW, J., dissenting.

Wm. Loewy and Walter Loewy, both of San Francisco, and Wallace Rutherford, of Napa (Garret W. McEnerney, of San Francisco, amicus curiæ), for appellant. Clarence N. Riggins and U'Ren & Beard, all of Napa (Edmund Nelson, of San Francisco, amicus curiæ), for respondent.

SHAW, J. The record presents an appeal by Stephanie Henke, a niece of the decedent, and her only heir at law, from an order admitting to probate, as constituting together the last will of the decedent, two documents testamentary in character, executed at different dates.

The decedent died on May 14, 1914. One of the documents in question was dated March 8, 1910, the other March 26, 1913. The latter was found immediately after her death, and, on petition of the persons named therein as executors, was duly admitted to probate on June 8, 1914. Several months after their appointment as executors, upon examining the other papers and effects of the decedent, they discovered the document dated March 8, 1910. Being in doubt whether the document of 1910 constituted a part of the will of the decedent, or was revoked by the will already admitted to probate, they filed a petition, upon which the order appealed from was made, alleging the probate of said will of 1913, the subsequent discovery of the will of 1910, together with the other facts made essential by the Code to a petition for the probate of a will, and praying, in the alternative, that the two documents be admitted to probate together as the last will of the decedent; or, that the will of 1910 be admitted as the last will, or that the will of 1913 alone be declared to constitute the will; also that if the court found that the will of 1910 constituted any part of the will of the decedent, it revoke the order previously made admitting the will of 1913 to probate. Upon the hearing of this petition the court made an order declaring that the decedent left the said two wills dated, respectively, March 8, 1910, and March 26, 1913, that they together constituted the last will of the decedent, and admitting the same to probate as such last will. The order also declared that the previous order of June 8, 1914, admitting to probate the document of March 26, 1913, alone, as the last will of the decedent, "be vacated and set aside, and that all proceedings thereunder be vacated and set aside."

The will of 1913 contained no declaration as provided in section 1292 of the Civil Code revoking the will of 1910. The appellant contends that it was wholly inconsistent therewith, and consequently operated as a revocation by implication, under the rule prescribed by section 1296 of the Civil Code, which is as follows:

> "A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will."

[1] The authorities support the proposition that a later will containing no express revocation of former wills, but which, in fact, disposes of the entire estate, leaving nothing upon which the former will could operate, is, in effect, a revocation thereof. If the later provisions were carried out it would consume the entire estate, and the prior will could have no effect. On this point Mr. Jarman says that in all cases where a later will is adequate to the disposition of the entire property of the deceased the case "rests on the true construction of the contents of the two instruments, and the complete disposition contained in the second must, unless controlled by the context, wholly revoke the first." 1 Jarman on Wills (6th Ed.) *138; other authorities to the same effect are Page on Wills, § 269; 1 Underhill on Wills, § 251; 1 Redf. on Wills, *362, *365.

[2] The respondent in answer to this proposition presents the point that although the dispositions of the will of 1913, if carried out literally, would consume the entire estate, yet that because of the fact that the charitable gifts therein far exceed one-third of the estate, there is a considerable portion thereof which is not lawfully disposed of because of the invalidity of the disposition as to such excess, and, consequently, that the rule that a later will adequate to the complete disposition of the estate revokes a prior will does not apply. The facts support this contention. The gifts to charitable uses in the will of 1913 amount to $113,610. The value of the estate as shown by the appraisement filed was $149,141.68. One-third of the estate would, therefore, be $49,713.89, and this is the full extent of the valid charitable gifts. The gifts not charitable amount to $61,018.40. As the valid gifts of this will, therefore, amount to $110,732.29, the balance of $38,409.29 remains undisposed of by that will. The gifts of the will of 1910 to persons who are not mentioned in the will of 1913 amount to only $25,100. The balance undisposed of by the will of 1913 would therefore satisfy the disposition of the will of 1910, if the respective dispositions of the two wills are not to be cumulated, and the two wills may be probated together, under this theory without any complications arising from the overdisposition of the estate.

[3] The authorities support the proposition that an invalid disposition in a subsequent will does not operate to revoke a disposition in the prior will, and is ineffective for any purpose. In Austin v. Oakes, 117 N. Y. 577, 23 N. E. 193, the testatrix having only a restricted power to appoint by her will the persons to take under her husband's will, executed a will containing a lawful exercise of the power. Afterwards, by a codicil, she attempted to declare a different appointment as to one share by giving it to persons who were not within the class to which, by the terms of the power, she was confined. The court said:

> "A revocation of an earlier disposition of a will by a later one, or by a codicil, * * * is never anything but a rule of necessity, and it operates only so far as is requisite to give the later provision effect. * * * But no revocation could give effect to this codicil."

And, referring to the fact that the later disposition of the codicil was invalid, it further said:

> "No violence is done to her intention if, that failing, the disposition of her will is suffered to stand; for I deem it beyond a reasonable doubt that if she had known what we now know, that an appointment to the daughter's children was not within her authority, she never would have made it, but would have suffered the disposition of her will to remain."

So in Altrock v. Vandenburgh (Sup.) 25 N. Y. Supp. 851, the testator had devised his land to his son for life with remainder to his son's children. The son died, and he then, by a codicil, devised the land to the same children, but in a manner which was void, being in violation of the law of New York against perpetuities. The court held that the codicil did not revoke the former devise of the remainder in fee, saying:

> "It would be strange, indeed, if a wholly inoperative attempted disposition should nevertheless have the effect of destroying a prior valid devise, especially when, as in this case, it is apparent that the testator did not wish to die intestate as to his real estate, and that, if he had known he could not lawfully make the disposition last attempted, he would have been content with the first."

The case is analogous to those where a testator, having made a will and desiring to make a new one, cancels the first will preparatory to making the second and thereafter fails lawfully to execute the same or makes therein an invalid disposition of his property. In such cases it is held that the attempted cancellation of the old will is ineffectual because the full intent is wanting, it being conditional upon the execution of a valid new will. Mr. Underhill, on this subject, says:

> "It will be presumed (and the presumption is sanctioned by reason and good sense) that the testator meant the cancellation to operate as a revocation only in the event of the will which he had intended to make being valid. If, therefore, he is prevented from executing any will, or the one he intends to make, or if he executes a will which turns out to be invalid, the will which has been revoked will revive." 1 Underhill on Wills, § 252.

It will perhaps be more accurate to say that the prior will does not revive, but that the attempted revocation will be deemed ineffectual.

These principles apply to the present case. The prior will can be deemed to have been revoked only by reason of the fact that the subsequent will is wholly inconsistent therewith, and would be a revocation if it were effectual to the disposition of the entire estate. But it appears that a large portion of the dispositions made is invalid, and by reason of that invalidity the entire estate is not disposed of. The will of 1913 is inadequate to the disposition of the estate, and to that extent it is not inconsistent with the prior will. Consequently, it is not wholly inconsistent therewith, and does not completely revoke it. It is not necessary upon this consideration of the case, and hence it would be improper, to determine to what extent the legacies given in the prior will are revoked, or whether they are revoked at all by legacies given to the same legatees in the subsequent will. The court below did not err in admitting the two wills as constituting together the last will of the decedent.

[4] The appellant further contends that the portion of the order purporting to vacate the order of June 8, 1914, admitting the will of 1913 alone to probate, and vacating all proceedings thereunder, is erroneous. This contention, we think, is well taken. After a will has been probated and another paper of an earlier date is found which constitutes a part of the last will of the decedent, together with that already probated, it is not necessary to revoke the former order of probate. A different question would be presented if the earlier will had been the one first discovered and probated. In that case, the later will, if admitted to probate, would partially supersede and revoke the prior will if inconsistent in part only, or wholly revoke it if entirely inconsistent. Within the year from the first probate, the later will could be offered for probate in connection with a petition to revoke the probate of the earlier one, if it was inconsistent therewith, on the ground that the later will substantially affected the validity of the will probated, as provided in subdivision 4 of section 1312, Code of Civil Procedure. Code Civ. Proc. §§ 1327, 1328, 1329, 1330. After that period perhaps the probate of the earlier will would be conclusive so far as it disposed of the estate. Code Civ. Proc. § 1333; State v. McGlynn, 20 Cal. 233, 81 Am. Dec. 118. The present petition was filed within the year, and therefore the precise question last mentioned does not arise. Nor is there a question presented affecting the validity of the will of 1913 already probated. That will is the later will. If it lawfully disposed of the entire estate, it would be the only valid will. So far as it does so, it is final and conclusive against any prior will; it cannot be affected thereby. The will of 1910, when probated, takes effect and can take effect only because the will of 1913 is not effective to dispose of the whole estate, and it takes effect only upon property not disposed of by the will of 1913 and as to which that will left the decedent intestate. The will of 1913 must stand unaffected, and must prevail over that of 1910, in any event. It was therefore unnecessary to revoke the probate of the will of 1913 and immediately readmit it to probate. And as rights may have accrued under the proceedings taken in the meantime, it was improper to vacate the previous proceedings. The proper practice was to admit the earlier, but later found, will to probate, as constituting, so far as may be, a part of the decedent's last will. Proceedings already taken would remain effective so far as rights may have vested under them. The facts stated in the petition showed no cause for the revocation of the former probate and did not require or justify the issuance of the citation required by section 1328, Code of Civil Procedure, where a petition to revoke the probate of a will is filed. The part of the order appealed from purporting to revoke the previous probate of the will of 1913, and vacating the proceedings had under the previous order of probate, should not have been inserted therein. This conclusion, however, does not render it necessary to reverse the entire order. All that need be done is to modify it by striking out the objectionable portion. It is therefore ordered by this court that the order appealed from be modified by striking therefrom the following words:

> "That the order made and filed herein on the 8th day of June, 1914, admitting the document dated March 26, 1913, to probate alone as the last will and testament of said deceased and appointing Percy S. King and J. E. Beard (also known as Edgar Beard) as executors thereof, and ordering that letters testamentary be issued to them without bonds be vacated and set aside, and that all proceedings thereunder be vacated and set aside."

And that as so modified the order be affirmed; appellant to recover costs of appeal.

We concur: SLOSS, J.; LORIGAN, J.; MELVIN, J.

I dissent: ANGELLOTTI, C. J.

174 Cal. 778

In re STONE'S ESTATE.

GREEN v. STONE.

(L. A. 4955.)

(Supreme Court of California. April 13, 1917.)

1. **WILLS** 🔑360—**WILL CONTEST—ASSERTING NEW GROUND OF RELIEF.**
Where the sole question was whether the will was the product of undue influence, the contestant could not on appeal raise the question whether the will was duly and formally executed.
[Ed. Note.—For other cases, see Wills, Cent. Dig. § 825.]

2. **JUDGMENT** 🔑282 — **ENTRY — REQUISITES —SIGNATURE OF JUDGE.**
Where a will was contested on the ground of undue influence, the mere fact that the judgment and order admitting the will to probate was signed by a judge other than the one who presided at the trial was not fatal, since the judge who signed could conceivably have heard proof of execution.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 554–556.]

3. **WILLS** 🔑164(7) — **PROBATE — EVIDENCE —ADMISSIBILITY.**
In a will contest on the sole ground of undue influence, evidence as to the soundness of mind and sanity of the deceased was properly excluded.
[Ed. Note.—For other cases, see Wills, Cent. Dig. § 414.]

4. **WILLS** 🔑324(3)—**PROBATE—DIRECTION OF VERDICT.**
Where on the first appeal the evidence was held insufficient to warrant denying probate, and the contestant on the second trial introduced no further evidence, direction of verdict for the proponent was proper.
[Ed. Note.—For other cases, see Wills, Cent. Dig. § 769.]

Department 2. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Proceeding by Fannie E. Stone for the probate of the will of John Newton Stone, deceased, contested by Leo Stone Green and another. From a judgment on directed verdict for the proponent, contestant appeals. Affirmed.

See, also, 161 Pac. 258.

Ingall W. Bull, of Los Angeles, for appellant. Kemp, Mitchell & Silberberg and Hartley Shaw, all of Los Angeles, for respondent.

PER CURIAM. This is the second appeal in the contest of Leo Stone Green over the admission to probate of the will of her deceased father. The decision of this court upon the first appeal will be found reported in 172 Cal. at page 215, 155 Pac. 992. There the verdict of the jury finding that the will was the product of undue influence exercised over the husband by his wife was reversed as unsupported by the evidence. A second trial was had, a jury was impaneled, and after trial the court instructed the jury to return its verdict in favor of the proponent of the will. The jury did so, and from the judgment which followed this appeal has been taken.

[1] The propositions advanced upon appeal will be considered seriatim. The first of these is that the evidence fails to show that the will was ever executed by the deceased in the manner required by law. Sections 1308, 1315, 1318, Code Civ. Proc. The sole question before the court and jury in the trial of the contest was as above indicated, whether or not the will (the due execution of which for the purposes of the contest was thus admitted) was or was not the product of undue influence exerted upon the mind of the testator. The record upon this appeal therefore does not disclose, as it would not be expected to disclose, the proceedings in probate touching the due execution of the will. They may either have preceded or may have followed the determination of the contest. In either case they had no place in this record, and appellant's argument as directed to this point is frivolous. Estate of McCarty, 58 Cal. 335; Estate of Dombrowski, 163 Cal. 290, 125 Pac. 233.

[2] It is said in appellant's brief that the judgment and order admitting the will to probate was signed by a judge other than the judge who presided at the trial of the case. Conceding this bare statement of fact to be true—and the brief contains nothing more than this bare statement of fact—it does not follow that this was error or even irregularity. It is quite conceivable, for example, that after the determination of the contest the purely formal evidence in proof of the due execution of the will was heard by another judge sitting in probate, in which case it would have been strictly regular for that judge to have made the final order admitting the will.

[3] It is said that it was error for the court not to submit to the jury "the question of the soundness of mind and sanity of the deceased." But the contestant at the opening of the trial formally abandoned the ground of contest based upon insanity, and declared that there was only one question at issue—the question of undue influence. Still further it is said that the court erred "in excluding testimony regarding the mental condition of the deceased at the time the will was made." But for the reason just above indicated the ruling was strictly proper.

[4] It is finally said that the court erred in directing a verdict. But, as the contestant is not at the slightest pains to show wherein the evidence differed in any respect more favorable to contestant's view from the evidence which had been admitted on the previous trial, which had been passed upon by this court and which had been held to be insufficient, we are bound to conclude that contestant's failure to point out by reference

to the transcript of evidence any specific instance of such difference is a confession that the difference itself does not exist.

The decree appealed from is therefore affirmed.

174 Cal. 789

SWEET v. FRESNO HOTEL CO.

BRANDT BROS. v. SAME.

(S. F. 7268.)

(Supreme Court of California. April 19, 1917. Rehearing Denied May 17, 1917.)

1. Mechanics' Liens 🔑104 — Building Contracts—Time of Payment.

A building contract, merely providing when 75 per cent. of the contract price is payable, does not conform substantially to Code Civ. Proc. § 1184, providing in effect that such contracts must, by their terms, declare that at least 25 per cent. of the contract price shall be payable at least 35 days after final completion; and so others than the contractor furnishing labor and material are entitled to lien for the full amount thereof.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 136.]

2. Mechanics' Liens 🔑134 — Form of Claim.

A claim of lien by another than the chief contractor, containing a statement of the particulars required by Code Civ. Proc. § 1187, with nothing contradictory or destructive thereof, is sufficient.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 208.]

3. Mechanics' Liens 🔑277(6)—Claims—Variance.

There is no variance between claim of lien of subcontractors for value of work and material up to cessation of labor, estimated at contract price, stated also to be the value thereof, and evidence that this was the value of the work and material, plus 20 per cent. for their profits as subcontractors.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 553, 554.]

4. Mechanics' Liens 🔑141—Claim of Subcontractors—Giving Name of Employer.

Statement in claim of lien by subcontractors, that the contract made by them with F. & Co., the contractor, was made by the latter "on behalf of and for said owner," does not vitiate the claim as not giving the name of the person by whom they were employed; the quoted phrase being manifestly inserted on the theory of the principal contract being void for failure to make 25 per cent. of the contract price payable 35 days after completion, in which case Code Civ. Proc. § 1184, provides that work and material by others than the principal contractor shall be deemed done and furnished at the instance of the owner.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 243–245.]

5. Mechanics' Liens 🔑135—Lien Claims.

It is no ground for objection to claim of lien by S., stating that the work done by him was under contract between him and the contractor, that the contract, made a part of the claim of lien, though signed in his name, purported to be a contract of S. & Co., it appearing by the evidence that S. & Co. was merely a name under which S. was doing business, and that no one else was interested therein; it not being necessary that the claim make this explanation, but enough that it asserts the ultimate fact that he made the contract.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 209.]

6. Mechanics' Liens 🔑51—Loans to Contractor.

One merely paying the wages of a building contractor's employés, under agreement to do so and to be repaid the same with a commission, cannot have a lien for their labor; he in effect loaning money to the contractor to enable him to carry on the work, for which there can be no lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 53.]

7. Mechanics' Liens 🔑39 — Contract to Bestow Labor.

Contract of S. with F., building contractor, whereby S. agrees to furnish all common and carpenter labor for completion of building, and to pay all wages that may become due the carpenters and common laborers, and F. agrees for such labor furnished to pay to S. each month, with commission, the amount of wages S. has paid to such laborers during the preceding month, is one to bestow labor on the building, entitling S. to a lien for labor furnished thereunder; and not a contract for loan of money, though it is provided F. shall make out and deliver to S. weekly pay rolls, and that it is understood that all men employed shall be satisfactory to F., and that he shall have the right to discharge any unsatisfactory to him, and to replace them with others selected by him.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 43.]

8. Mechanics' Liens 🔑39 — Subcontractors—Amount of Lien—Value of Labor.

The value of the labor furnished by a subcontractor under contract to furnish the carpenter and common labor to complete the building, and see that such laborers worked when wanted, and attend to paying their wages, for which the subcontractor is entitled to a lien, is the amount of the reasonable wages paid to the men, with an additional sum for the value of the subcontractor's services, which the contract requires him to perform.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 43.]

9. Mechanics' Liens 🔑161(4)—Interest.

A contractor cannot increase the burden of the owner by an agreement with the lien claimant, made after the work is done, to pay interest at an increased rate; but in such case, as in any other, there is right to interest at the legal rate, the amount owing, as well as the time of payment, being fixed and certain.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 283, 606.]

Department 1. Appeals from Superior Court, Fresno County; H. Z. Austin, Judge.

Two actions, one by Isaac Sweet, the other by Brandt Bros., both against the Fresno Hotel Company. From a judgment after consolidation of cases, plaintiff Sweet and defendant appeal. Reversed and remanded, with directions.

Frank H. Short, F. E. Cook, and Short & Sutherland, all of Fresno (Carl E. Lindsay, of Fresno, of counsel), for appellant Fresno Hotel Co. Milton M. Dearing, of Fresno, for appellant Sweet. Johnston & Jones, of Fresno, and C. W. Miller, of Stockton, for respondent.

SHAW, J. The cases here presented are actions to foreclose mechanics' liens. All the parties appealed. The appeal of the plaintiffs Brandt Bros. was presented in case No. 6915, and has been decided; the judgment having been held good against their attacks. Brandt Bros. v. Fresno Hotel Co., 173 Cal. —, 159 Pac. 434. The appeals of the other parties are presented by the record in this case (No. 7268) and will now be considered.

The contract was made and filed and the work was begun prior to the enactment of the amendments of 1911 to the Mechanics' Lien Law. The rights of the respective parties are therefore dependent on the law existing before those amendments took effect, and our references to Code sections are to be understood as referring to them in their pre-existing form. The Fresno Hotel Company contracted with H. C. Farley & Co., a corporation, for the erection of a building by said Farley & Co., on certain lots in the city of Fresno belonging to the hotel company. The hotel company therein agreed, in consideration of the erection of said building, "to pay, or cause to be paid, to the contractor," the sum of $199,500 "at times and in the manner following, to wit, 75 per cent. of the completed work done during the preceding month to be paid on the first of every succeeding month." It was also provided that at the final completion of the work the architect should certify to that fact in writing to the contractor, stating therein the amount then due. There were no provisions or agreements for the payment of the remaining 25 per cent. of the contract price, other than those above set forth, nor any statement that the same should be "payable at least thirty-five days after the final completion of the contract," as required by section 1184 of the Code of Civil Procedure. This contract was duly filed in the office of the county recorder on December 17, 1910, before the work thereunder was begun. The contractor proceeded with the erection of the proposed building until November 15, 1911, at which time it ceased work thereon and never resumed the same. On December 21, 1911, the hotel company, pursuant to the first clause of section 1187 of the Code of Civil Procedure, filed in the recorder's office a notice of cessation of labor on the building.

On January 12, 1912, the plaintiff Sweet filed in the recorder's office his claim of lien against the property for certain labor performed and materials furnished for and used in the building, under agreements with the original contractor. On January 15, 1912, plaintiffs Brandt Bros. filed their claim of lien against the property for certain work performed and materials furnished by them therefor and used therein, under agreements with the contractor. The present actions are for the foreclosure of these liens. The court found that the balance owing to Sweet for the materials furnished and labor performed by him in the erection of the building was $3,231.06, and that the balance owing to Brandt Bros. for the labor performed and materials furnished by them in the erection of said building was $5,585.65. Judgment of foreclosure was duly rendered in favor of the respective plaintiffs for these sums.

[1] We will first consider the appeals of the hotel company. The judgment of the court below was given upon the theory that the contract was invalid as to third persons because of its failure to provide that one-fourth of the contract price should not be payable until 35 days after completion, and that, consequently, the plaintiffs were entitled to a lien for the full amount unpaid of the value of their labor and materials furnished, although the balance unpaid from the owner to the contractor was not sufficient to pay such claims in full. Section 1184 expressly declares that if a building contract does not "conform substantially" to its provisions, "the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof." Our decisions uniformly hold that where such substantial conformity is wanting the contract price does not limit the amount of the liability as to liens. San Diego L. Co. v. Wooldredge, 90 Cal. 578, 27 Pac. 431; Willamette, etc., Co. v. Los Angeles, etc., Co., 94 Cal. 234, 29 Pac. 629; Merced L. Co. v. Bruschi, 152 Cal. 374, 92 Pac. 844; Burnett v. Glas, 154 Cal. 256, 97 Pac. 423; Nofziger L. Co. v. Solomon, 13 Cal. App. 625, 110 Pac. 474. The hotel company claims that this defect in the contract is not a lack of substantial conformity with section 1184. The argument is that inasmuch as the contract does not declare that the final one-fourth shall be paid prior to the expiration of the 35 days after completion, but is silent as to the time of such payment, it does not expressly violate the section, and that the law itself becomes a part of the contract, with the result that, by force of the statute, that installment would not be payable until 35 days after completion. We do not so understand the provision in question. The part of the section to which all contracts must substantially conform reads as follows:

> "No part of the contract price shall, by the terms of any such contract, be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work, but the contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work, or on the completion of specified portions of the work, or on the completion of the whole work: Provided, that at least twenty-five per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract."

This language is mandatory. It does not, as the argument assumes, declare the legal effect of such contract; it relates to the terms of the contracts and prescribes what such terms shall be; its declaration is, in effect, that such contracts must, by their terms, declare that at least 25 per cent. of the contract price "shall be payable at least thirty-five days" after final completion. There is a reason for this requirement. The contract must be filed in the recorder's office so that all laborers and other persons interested may see it and learn therefrom at first hand the time of payment. The purpose was to have it expressed on the face of the contract and not left to implication founded on principles of construction not universally understood. This purpose would be defeated if a failure to speak were held innocent on the theory proposed by the defendant. This contract contains an express agreement to pay the whole price, $199,500. By the general principles of law whatever of this sum remained unpaid on final completion would be immediately payable. A contract which so completely disregards the express provisions of the section, which is silent where it is commanded to speak, and which defeats one of the important objects sought to be attained by section 1184, cannot be said to conform substantially thereto.

[2] We can see no substantial objection to the form of the respective claims of lien. They each state clearly the demand of the claimant, less just credits and offsets, the name of the owner of the property and of the contractor by whom the claimant was employed and to whom he furnished the material, the terms, the time given and conditions of the contract to do the work and furnish the materials and a description of the property charged with the lien. Section 1187, which prescribes the form of such claim, requires nothing more than the particulars above enumerated, and a claim which conforms to these requirements must be held sufficient. They contain nothing that is contradictory or destructive of the essential particulars above enumerated.

[3, 4] There was no variance between the claim of lien of Brandt Bros. and the proof in support of their claim. Their claim, though inaptly expressed, in effect was for the value of the work done and material furnished by them up to the time of the cessation of labor, estimated at the contract price which, the claim also states, was the value thereof. There was evidence that this amount was the actual value of the work and materials, plus 20 per cent. for their profit as subcontractors. The court below allowed nothing for the profit, but did allow for the value less the profit. This was sufficient to support the claim and the judgment. The statement in the claim of Brandt Bros. that the contract made by them with Farley & Co. was made by the latter "on behalf of and for said owner" does not vitiate the claim. The name of the contractor is plainly given, and the phrase quoted was manifestly inserted to give point to the theory that the contract was void because of the failure to make 25 per cent. payable 35 days after completion. In such case the statute declares, as before stated, that the work and materials shall be deemed to have been done and furnished at the instance of the owner. It cannot be said that because of this phrase the name of the person by whom the claimants were employed is not given.

[5] The claim of Isaac Sweet states that the work bestowed by him on the building was done under three written contracts between him and H. C. Farley & Co., the contractor. The technical objection is made that these contracts, which were made a part of the claim of lien as filed, purport to be contracts of "Isaac Sweet & Co." or "I. Sweet & Co.," while they are signed only by Isaac Sweet and H. C. Farley & Co., and that they do not support a claim of lien by Isaac Sweet alone. The claim of lien directly asserts that the contracts mentioned were each made by Isaac Sweet. They are signed by Isaac Sweet, not by Isaac Sweet & Co. This is fully explained by the evidence that "Isaac Sweet & Co." was merely a name under which Isaac Sweet was doing business, and that no one else was interested in that business. They were therefore the contract of Isaac Sweet alone, and were correctly described as such in the claim of lien. It was unnecessary to make the explanation a part of the statement of the claim. The assertion of the ultimate fact that Isaac Sweet made the contracts was sufficient.

[6] One of these contracts was made on April 1, 1911, upon which the court below allowed a lien for $628.30. After reciting the previous contract of February 1st, which Sweet had partly performed and by which he had earned $358.58 more than had been paid to him and declaring that the same was canceled, saving the debt for $358.58 and a lien to Sweet on the building therefor, this contract proceeds as follows:

> "In consideration of the above release and cancellation, and of the further payments and considerations hereinafter mentioned, Isaac Sweet hereby assumes and agrees to pay all of the wages due to carpenters and common laborers employed in the erection of the Fresno Hotel, until the same is completed; which said amount shall be returned to Isaac Sweet in the manner as follows: Seventy-five per cent. of the amount of the pay rolls each month, together with 10 per cent. commission on each weekly pay roll, payable on the following month between the 1st and 5th of the month and the balance 25 per cent. thirty-five days after the acceptance and completion of the building, weekly pay rolls to be made out by Farley & Co. and signed by them and delivered to said Isaac Sweet each week. Farley & Co. to have the right to hire and discharge any and all men, but their names shall be placed on the pay rolls when employed. Sweet to act in the capacity of superintendent, and to see that the work progresses."

This, on its face, is not a contract by Sweet to perform labor on the building or to have labor performed thereon by others in his employment. It is on his part an agreement to assume and pay all wages due to certain classes of laborers employed on the building and on the part of Farley & Co. an agreement to return to him the money advanced for that purpose. The laborers to be paid thereunder were to be hired and discharged by Farley & Co., who was to make out weekly pay rolls for Sweet's information as to the amount to be paid to the men. So far as the work is concerned, Sweet's only function was to act as superintendent, and to pay the wages due from the contractor to the men. He was not the employer. In effect he was loaning money to the contractor and performing service as superintendent of the work, for which service he was to receive an amount equal to 10 per cent. of the wages earned by the men. The law does not allow a lien for money loaned to a building contractor to enable him to carry out his contract. Godeffroy v. Caldwell, 2 Cal. 489, 56 Am. Dec. 360. The lien claim states, with respect to this contract, that it is for "carpenter labor and common labor" performed under it. This must be understood to refer to the labor performed by the men employed by Farley & Co. and whose wages Sweet paid. It does not cover compensation for his own services as superintendent. It follows, therefore, that the claim did not embrace anything for which he was entitled to a lien, and none should have been allowed thereunder.

[7] The defendant claims that the same rule should apply to the contract made on June 1, 1911. By the contract of June 1st Sweet expressly "agrees to furnish all common labor and carpenter labor necessary to the construction and completion of said building, and to pay all wages that may become due to the carpenters and common laborers, * * * paying such laborers weekly or at such other times as their wages may become due." Farley & Co. agreed "for such labor furnished in the erection of said building" to pay to Sweet, between the first and fifth days of each month, the amount of the wages Sweet had paid to such laborers during the preceding month. The contract further declares that Farley & Co. shall make out weekly pay rolls and deliver the same to Sweet at the end of each week, and that it was "understood that all men employed upon, in, and about said building shall be satisfactory to said" Farley & Co., "and that they shall have the right at any and all times to discharge any one not satisfactory to them, and to replace the same by persons selected by themselves." We cannot agree to the proposition that this contract was a mere reiteration or renewal of the previous contract of April 1, 1911. Its language was different from the previous contract in a very important particular, and was presumably made so with the purpose of changing its effect.

It may be true, as contended by the defendant, that the actual mode of carrying on the work and paying the men after June 1st did not differ materially in appearance from that practiced before June 1st. But this similarity was not fatal to the validity, or destructive of the effect, of the new contract. The old contract was in effect an agreement by Sweet to advance money to pay the debts owing by Farley & Co.; the new one was an agreement by him to bestow labor upon the building, hiring the men himself and paying their wages. It was a lawful contract, for a lawful purpose. He had the lawful right to make it, notwithstanding the fact that the effect was to give him a right to a lien under the Mechanics' Lien Law which he did not have under the contract of April 1st. The evidence showed that he actually did select and hire the men and superintend them in the work under the contract of June 1st. The provision that Farley & Co. should have the right to discharge men that were not satisfactory to it and to replace them by other persons selected by itself did not make it the employer of the new men thus selected; it merely empowered it to make the selection of the men to be employed by Sweet. We think the plaintiff Sweet was entitled to a lien for the value of the labor furnished under this contract.

[8] The main point urged in support of the appeal of Sweet is that the court erred in refusing to allow him a lien for the 10 per cent. upon the pay rolls which he was to receive by virtue of his contracts with Farley & Co. of April 1st and June 1st, respectively. As we have concluded that Sweet was entitled to nothing under the contract of April 1st, the objection is immaterial with respect to that contract. We are of the opinion that the point is well taken with regard to the labor bestowed under the contract of June 1st. It appears from what we have already said that Sweet's relation to Farley & Co. under that contract was that of a subcontractor to furnish labor of certain kinds for the erection of the building. The contract contemplated some services by him. He was obliged to hire the men, see that they worked on the building, when wanted, and attend to the paying of their wages. For the labor furnished in this manner he was to receive a sum equal to the amount of the monthly pay roll, plus 10 per cent. He was entitled, under the law, to the value of the labor furnished. Under a contract of that kind the true value of the labor furnished would be the amount of the reasonable wages paid to the men, with an additional sum for the value of the services of the subcontractor which, as above stated, it required him to perform. For this aggregate value he was entitled to a lien. His right thereto is as clear as would be that of a subcontractor for construction to claim a lien for more than the actual market value of the materials purchased by him and used in the building. There was evidence to the effect that

10 per cent. of the pay roll was a reasonable charge for the contractor under such contract. The defendant does not point out any evidence to the contrary. It also appeared that the wages paid were the usual wages current in that vicinity. The court should have found the reasonable value by adding 10 per cent. to the amount of the pay roll as the contract provided. It concluded, as matter of law, that Sweet was entitled to nothing more than his actual outlay for wages, and in pursuance of that theory it found that the reasonable value of the work done under that contract was $2,244.10, being the amount of the wages paid to the men. The amount should have been $224.41 more.

[9] In October, 1911, after the labor claimed for by Sweet had all been furnished, he made a settlement with Farley & Co., whereby the latter agreed to pay him 10 per cent. interest on the balance due him. The court properly refused to allow interest at this rate. The lien is statutory, and it extends only to the value of the labor and materials bestowed upon the building. A contractor has no authority to increase the burden of the owner by an agreement with a lien claimant, made after the work is done, to pay interest at an increased rate. The court, however, erred in refusing to allow any interest. The amount owing to Sweet, as well as its time of payment, was fixed and certain. Interest at 7 per cent. should have been allowed thereon from the time it became due up to the time of judgment. Burnett v. Glas, 154 Cal. 260, 97 Pac. 423; Pacific, etc., Co. v. Fisher, 106 Cal. 233, 39 Pac. 758.

The result of our conclusions is that the judgment is correct so far as the lien of Brandt Bros. is concerned; that the lien of Sweet was unwarrantably increased by including therein the sum of $628.30 under the contract of April 1, 1911; that the amount allowed under the contract of June 1, 1911, should be increased by adding the sum of $224.41, making a total of $2,468.51; and that the court should have allowed interest thereon at 7 per cent. from August 5, 1911, and interest on the sum of $358.58 admitted to be due under the contract of February 1, 1911, from August 1, 1911. This day, it may be explained, was fixed by the parties in a subsequent agreement as the date on which interest should begin on the February contract, otherwise it would have begun at an earlier date. The facts appear with sufficient certainty in the findings to authorize a judgment to be entered in accordance with these conclusions. There is, therefore, no necessity for remanding the case for another trial. The proper result can be reached by directing a modification of the judgment. Since both parties succeed in part on their appeals, the costs should be divided equally between them. Although the judgment in favor of Brandt Bros. is upheld, we think that as the cases were consolidated and the judgment for both parties was made in one entry, the entire judgment should be recast by the court below.

The judgment is reversed, and the case is remanded, with directions to the court below to enter a judgment of foreclosure in favor of Brandt Bros. for the amount found due them, including interest up to the date of such judgment, and in favor of the plaintiff Sweet in accordance with this opinion. It is further ordered that the plaintiff Isaac Sweet and the defendant shall each pay one-half of the costs of these appeals.

We concur: SLOSS, J.; LAWLOR, J.

174 Cal. 799

REMSBERG v. HACKNEY MFG. CO.

(L. A. 3842.)

(Supreme Court of California. April 19, 1917.)

1. APPEARANCE ⊂⇒24(5)—WAIVER OF DEFECTIVE SERVICE.

By answering and going to trial on the merits, a defendant makes a general appearance waiving any defects in the service, although he first appeared specially and moved to set aside the service.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 126.]

2. SALES ⊂⇒23(3)—REQUISITES OF CONTRACT—ACCEPTING OFFER TO BUY.

A written offer to buy, signed by the buyer alone, becomes binding upon both parties when accepted and acted upon by the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 46.]

3. EVIDENCE ⊂⇒441(9) — PAROL EVIDENCE — WARRANTY.

Prior oral negotiations are merged into a written sales contract complete upon its face, where no fraudulent representations were made to induce its execution.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2035.]

4. PLEADING ⊂⇒264—AMENDED ANSWER—ADMISSIONS IN ORIGINAL ANSWER.

That defendant's original answer admitted making certain representations regarding goods sold is immaterial, where the amended answer asserted its purpose of standing upon a subsequent written contract.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 803-805.]

5. SALES ⊂⇒273(2) — IMPLIED WARRANTY — FITNESS FOR PURPOSE INTENDED.

Civ. Code, § 1770, providing that articles manufactured for a particular purpose are impliedly warranted reasonably fit, etc., is inapplicable to a plow purchased by description and not produced under an order or for a particular purpose.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 773.]

6. SALES ⊂⇒268(2) — IMPLIED WARRANTY — LATENT DEFECTS.

A finding that a machine sold was defective in material and workmanship does not bring the case within Civ. Code, § 1769, providing that articles are impliedly warranted to be free from latent defects, and that improper materials were not knowingly used in their manufacture.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 765.]

7. SALES ⚷272—IMPLIED WARRANT—MERCHANTABILITY.

A finding that a plow when tested upon certain land failed to work, except to make a few irregular furrows, and to scratch the surface of the soil, does not establish a general unfitness equivalent to a want of merchantability, within Civ. Code, § 1771, declaring that the merchantability of goods is impliedly warranted.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 747.]

Department 1. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by E. E. Remsberg against the Hackney Manufacturing Company. Judgment for plaintiff, and defendant appeals. Reversed.

Collier & Clark and James E. Shelton, all of Los Angeles, for appellant. E. E. Keech, of Santa Ana, for respondent.

SLOSS, J. Plaintiff is the owner of 160 acres of farm land in Los Angeles county. The defendant is a corporation organized under the laws of Minnesota, and engaged in the manufacture and sale of the "Hackney Auto Plow," a gas engine tractor advertised and sold for the purpose and use of plowing, hauling, and operating farm machinery. In 1912 the parties entered into a contract for the purchase by plaintiff of one of these implements. The auto plow was shipped to plaintiff who paid the full purchase price. Finding that the machine did not give the service which, as he contended, he had a right to demand, he undertook to rescind the contract, and brought this action to enforce the rescission. He was given judgment for the purchase price paid by him, with interest. The defendant appeals.

[1] Before answering to the merits, the defendant appeared specially and moved to set aside the service of summons, on the ground that there had not been such service as is required by the Code of Civil Procedure. Section 411, subd. 2. The motion was denied. We need not inquire whether the attempted service was, in fact, defective. By answering and going to trial on the merits, the defendant made a general appearance and submitted itself to the jurisdiction of the court. It thereby waived any right it may have had to insist that jurisdiction of its person had not been obtained. Although some of the earlier decisions in this state declare that a defendant who has appeared for the sole purpose of questioning the service of process upon him, and whose motion in this behalf has been denied, does not, by subsequently answering to the merits, lose his right to stand upon his objection to the jurisdiction (Deidesheimer v. Brown, 8 Cal. 339; Lyman v. Milton, 44 Cal. 630; Kent v. West, 50 Cal. 185), the contrary rule has been firmly established by a number of more recent cases. "If a defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only, and must keep out for all purposes except to make that objection." Olcese v. Justice's Court, 156 Cal. 82, 87, 103 Pac. 317. In Re Clarke, 125 Cal. 388, 58 Pac. 22, the court, speaking through Temple, J., refers to Deidesheimer v. Brown and Lyman v. Milton, supra, and, in effect, overrules these cases. It is argued by appellant that the point was not necessarily involved in the Clarke Case. The declaration of Mr. Justice Temple has, however, received our approval in several cases (Security, etc., Co. v. Boston, etc., Co., 126 Cal. 418, 58 Pac. 941, 59 Pac. 296; In re Yoell, 131 Cal. 581, 63 Pac. 913; Olcese v. Justice's Court, 156 Cal. 88, 103 Pac. 317), and is in harmony with other rulings of this court, both before and since the decision of In re Clarke (Desmond v. Superior Court, 59 Cal. 274; Sears v. Starbird, 78 Cal. 225, 20 Pac. 547; Zobel v. Zobel, 151 Cal. 98, 90 Pac. 191).

[2-4] The basis of the right of rescission asserted by the plaintiff was the breach of warranties accompanying the sale. On January 12, 1912, the plaintiff gave to the defendant a written order reading as follows:

> "Los Angeles, Cal., 1/12/12.
>
> "Hackney Mfg. Co., Los Angeles, Calif.—Dear Sirs: Please deliver to me one Hackney Auto Plow equipped with disc plows at as early date as possible, it being understood that I am to receive same out of the first shipment you receive from your factory after this date, and for which I agree to pay the sum of $1650.00, f. o. b. St. Paul, Minn., subject to a cash discount of 5 per cent. as per agreement entered into with and by Mr. L. S. Hackney.
>
> "Yours truly, E. E. Remsberg."

At the same time he paid $500 on account. Pursuant to this order, the defendant shipped the machine, and delivered it to plaintiff at Palmdale, in Los Angeles county, on February 18, 1912, at which time the plaintiff paid the balance then due on the purchase price. This order, though signed by the plaintiff alone, was, when accepted and acted upon by the defendant, a written contract binding upon both parties. 9 Cyc. 300; Luckhart v. Ogden, 30 Cal. 547; Bloom v. Hazzard, 104 Cal. 310, 37 Pac. 1037; Gallagher v. Equitable Gas Light Co., 141 Cal. 699, 75 Pac. 329. The plaintiff's complaint declared upon a number of oral representations and warranties. The defendant in his answer set up the writing. The court found that the written contract had been made after the alleged oral representations. At the trial the defendant objected to the introduction of any evidence to show the making of any oral representations precedent to the final consummation of the written agreement. This objection, based upon the ground that all prior oral negotiations were merged in the written contract, was sustained. The ruling was correct, the contract being complete upon its face, and there being no claim that the prior representations had been fraudulently made to induce the execution of the written agreement. Harrison v. McCormick, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469; Gardiner v. McDonogh, 147 Cal. 313, 81 Pac. 964. But, notwithstanding its exclusion of this evidence, the court found that the defendant had made a number of representations and warranties touching the fitness of the Hackney Auto Plow for the purposes for which it was designed, the degree of skill and knowledge required to operate it, the simplicity and strength of its devices, its power, and its ability to do work. These findings cannot afford any support to the judgment. They must be disregarded, either on the ground that they are unsupported by evidence, or that, as matter of law, they cannot affect the written contract, entered into after the making of all of these alleged representations and warranties. It is unimportant, if it were the fact, that the making of some of these representations was admitted in the original answer. By the amended answer, the defendant plainly asserts its purpose of standing upon the written contract, to the exclusion of any prior representations.

The rights of the parties must, therefore, be measured by the terms of their written agreement. The only warranties implied in a contract of sale of personal property are those declared in article 3 of chapter 2 of title 1 of part 4 of the Civil Code. "Except as prescribed by this article, a mere contract of sale or agreement to sell does not imply a warranty." Civ. Code, § 1764; Sutro v. Rhodes, 92 Cal. 117, 123, 28 Pac. 98; Browning v. McNear, 145 Cal. 272, 280, 78 Pac. 722. The article defines a number of warranties, but the only ones that can have any application to the present case are those declared by sections 1769, 1770, and 1771. These sections read as follows:

> 1769. "One who sells or agrees to sell an article of his own manufacture thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein."
>
> 1770. "One who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose."
>
> 1771. "One who sells or agrees to sell merchandise inaccessible to the examination of the buyer, thereby warrants that it is sound and merchantable."

[5, 6] At the trial, the plaintiff seemed to place his reliance, in part at least, upon section 1770. His rejection of the machine was based upon its failure to do the work for which plaintiff desired to use it. But the contract was not such as to bring the case within the purview of section 1770. The article was not manufactured for the plaintiff under an order for a particular purpose. It was not manufactured under order at all. The defendant was in the business of manufacturing and selling an article known as the Hackney Auto Plow, and the plaintiff bought one of these articles by description. The warranties defined in section 1769, i. e., that the implement was free from any latent and undisclosed defect arising from the process of manufacture, and that the manufacturer had not knowingly used improper materials therein, were implied in the contract, but there is neither allegation nor finding that these warranties were broken, and the evidence would not support such a finding. The finding that the machine was "defective both in material and workmanship" does not meet the requirements of section 1769. Furthermore, the evidence does not sustain the finding.

An examination of the decisions in other jurisdictions will show that the Code sections are in substantial accord with the generally accepted rules of the common law. The prevailing doctrine applicable to cases like the present is laid down in the following passage, found in 1 Parsons on Contracts, p. *586, quoted with approval by this court in Bancroft v. S. F. Tool Co., 120 Cal. 228, 232, 52 Pac. 496, 498:

> "If a thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose. This principle has been carried very far. It must, however, be limited to cases where a thing is ordered for a special purpose, and not applied to those where a special thing is ordered, although this be intended for a special purpose. For, if the thing is itself specifically selected and ordered, there the purchaser takes upon himself the risk of its effecting its purpose."

This doctrine is supported by a wealth of authority. In Fuchs & Lang Mfg. Co. v. Kittredge & Co., 242 Ill. 88, 89 N. E. 723, the court said:

> "In a contract for the sale of an article under its patent or other trade name there is an undertaking that the article delivered shall be of the kind ordered but not that it shall be fit for any particular purpose. If the buyer gets what he bargained for, there is no implied warranty, though it does not answer his purpose."

In Cosgrove v. Bennett, 32 Minn. 371, 20 N. W. 359, the court laid down the rule in these words:

> "Where * * * the article ordered was to be of a particular design or pattern, well defined and understood between the parties, and the article made and delivered in pursuance of the contract conforms to the pattern or model, there is no warranty implied further than [that] it should be of good workmanship and material."

We cite a few of the many decisions which declare the principle in similar terms. Thompson v. Gunderson, 106 Wis. 449, 82 N. W. 299, 49 L. R. A. 859; Manufacturing Co. v. Cuming, 35 App. Div. 376, 54 N. Y. Supp. 818; Gachet v. Warren, 72 Ala. 288; Mason v. Chappell, 15 Grat. (Va.) 572; Lombard, etc., Co. v. Grt. Northern Paper Co., 101 Me. 114, 63 Atl. 555, 6 L. R. A. (N. S.) 180; Scott v. Vulcan Iron Wks. Co., 31 Okl. 334, 122 Pac. 186; La Crosse Plow Co. v. Brooks, 142

Wis. 640, 126 N. W. 3; Ehrsam v. Brown, 76 Kan. 206, 91 Pac. 179, 15 L. R. A. (N. S.) 877.

Though somewhat sweeping language was used in some of these cases, the question under consideration was whether the sale implied a warranty that the article was suitable for the special purposes of the buyer. The holding that there was no such warranty is not to be understood to exclude a warranty of general suitability or usefulness. This modification has been expressed in a number of well-considered cases. While recognizing that the sale, by the manufacturer, of an article of a specified kind by name or description does not carry with it an implied warranty of fitness for the particular purpose to which the purchaser designed to put it, these decisions declare, in effect, that there is an implied warranty of fitness for the general purpose for which articles of the kind are designed to be used. In Seitz v. Brewers' Refrigerator Co., 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837, the court used this language:

> "In the case at bar the machine purchased was specifically designated in the contract, and the machine so designated was delivered, put up and put in operation in the brewery. The only implication in regard to it was that it would perform the work the described machine was made to do. * * *"

Similarly, in Davis Calyx Drill Co. v. Mallory, 137 Fed. 332, 69 C. C. A. 662, 69 L. R. A. 973, the opinion of the court contains this language:

> "The extent of the implied warranty in such a case is that the machine, tool, or article shall correspond with the description or exemplar, and that it shall be suitable to perform the ordinary work which the described machine is made to do."

See, also, Hawley Furnace Co. v. Van Winkle Gin Wks., 4 Ga. App. 85, 60 S. E. 1008.

[7] Mr. Williston, in his work on Sales, suggests, and, we think, rightly, that the implied warranty of fitness for the general purposes for which the article is made and sold is a phase of the warranty of merchantability. "The principle already laid down that a manufacturer impliedly warrants his goods to be merchantable includes, therefore, the doctrine sometimes stated in this way—that the manufacturer of goods impliedly warrants that they are reasonably fit for the general purpose for which they are manufactured." Section 235. As we have already pointed out, section 1771 of our Civil Code declares that a warranty of soundness and merchantability attaches to a sale of goods "inaccessible to the examination of the buyer." It may well be that an allegation that the article here in question was not merchantable would have been supported by evidence that the machine was useless for the general purposes—principally plowing—for which it was designed and sold. But it is not alleged or found in terms that the Hackney Auto Plow purchased by plaintiff was not merchantable, and the findings made do not necessarily import want of merchantability. It is not found that the machine would not plow under ordinary conditions of soil, or that it was not capable of plowing at all. The findings are that it did not do the work in accordance with the antecedent representations set up in the complaint, and that, when tested upon specific pieces of land, it failed to operate successfully or to plow said land, "except a few irregular furrows of uneven depth or to do any plowing except only to scratch merely the surface of the soil." This is not a finding of such "general" unfitness as to amount to a want of merchantability. While there is a finding that the auto plow was not "reasonably fit for the purposes for which it was designed and built," there was no issue to which this finding is responsive, the allegation of the complaint being that the machine was not reasonably fit "for the purposes for which it was ordered." Furthermore, we fail to find in the evidence any support for the finding which was made. In fact, the case was not tried on the theory that there had been a breach of warranty that the machine was merchantable. Plaintiff relied on the failure of the auto plow to comply with the specific representations made by the seller, and upon its want of fitness for the particular purposes to which the plaintiff intended to put the implement. This is shown not only by the complaint, but by the statements of the plaintiff himself in the letter relied upon as a notice of rescission.

The judgment is reversed.

We concur: **SHAW, J.; LAWLOR, J.**

175 Cal. 807

WALSH v. STANDART et al. (S. F. 7152.)

(Supreme Court of California. April 20, 1917. Rehearing Denied May 17, 1917.)

1. Frauds, Statute of 🔑150(1)—Pleading—Demurrer.

Allegation that defendants executed a written contract means that all of them executed it, and the defense that the contract was within the statute of frauds because not signed by all cannot be taken advantage of under general demurrer, though the copy attached as an exhibit did not show the signature of one defendant.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 360.]

2. Frauds, Statute of 🔑152(1)—Availability under General Denial.

Defense that contract sued on is within statute of frauds because not signed by one defendant is available under answer denying generally execution.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 363, 364, 371, 372.]

3. Frauds, Statute of 🔑115(2)—Memorandum — Sufficiency — Later Contract Referring to Previous Contract.

Although the contract sued on is not signed by one defendant, a later contract, reciting that the previous contract between defendants named should be void only in case this contract is completed, signed by defendants named, is a memorandum of the previous contract sufficient to satisfy statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 247–249.]

4. CONTRACTS 🔑332(1)—PLEADING—RESCISSION.

An allegation that plaintiff notified defendants that by reason of their failure and refusal to perform contract, plaintiff has elected to rescind and cancel contract, is not an allegation that contract has been rescinded.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1616–1618, 1619½, 1620.]

5. CONTRACTS 🔑324(1)—NATURE OF ACTION —LOSS OF PROFITS — PLEADING — SUFFICIENCY.

In an action for breach of contract allegations of performance up to time of breach by defendants, of willingness to continue performance, of damages by reason of breach, together with allegation that plaintiff notified defendants that by reason of their failure and refusal to perform he has elected to rescind, states a cause of action for loss of profits; there being no averments of return or offer to return necessary in quantum meruit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1549, 1550.]

6. APPEAL AND ERROR 🔑882(12) — INVITED ERROR—GRANTING ERRONEOUS INSTRUCTION.

Party requesting erroneous instruction cannot complain that it was given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3602.]

7. APPEAL AND ERROR 🔑1004(1)—REVIEW—EXCESSIVE DAMAGES.

A verdict will not be set aside on ground of excessive damages, where amount awarded is not without substantial support in evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3944.]

Department 1. Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by W. H. Walsh against John W. Standart and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Robt. L. Hargrove, of Madera, for appellants. Everts & Ewing and M. G. Gallaher, all of Fresno, for respondent.

SHAW, J. This is an action for damages for breach of contract. A demurrer to the complaint was overruled, and after answer filed the case was tried by a jury, and a verdict of $5,000 returned in favor of the plaintiff. This amount was reduced to $4,000 by order of the trial court, on motion for new trial. The defendants appeal from the judgment and from an order denying a new trial.

The contract sued on was dated April 4, 1911, the material portions thereof being as follows: The defendants agreed to cut and sell to plaintiff certain standing timber situate upon lands owned by the defendants, during the years 1911 to 1914, inclusive, the timber to be cut into logs by defendants and delivered by them to plaintiff upon the logway to the sawmill to be erected on said premises by the plaintiff, the total amount so delivered in the four years not to exceed 6,000,000 feet. At the beginning of each season the plaintiff was to notify the defendants at least 15 days prior to the time he intended to start operating the mill for that season. The agreement further provided that plaintiff "is hereby granted a mill site, together with all lands necessary to be used in connection with the proper running of said mill" on the above land. The price of the lumber was fixed and other terms were stated which are not material to the questions presented. Upon certain contingencies, the defendants were to purchase the mill placed on the premises by the plaintiff as above specified. The preamble to the contract states that it is made "between George R. Standart, John W. Standart, and Lowell Standart, * * * parties of the first part, and W. H. Walsh, * * * party of the second part." The contract is signed by all parties except Lowell Standart.

The complaint alleges: That in pursuance of said contract the mill site was selected on said lands, and the plaintiff constructed the mill thereon, and was ready to receive said timber from the defendants and saw the same into lumber during the month of October, 1911. That during the month of October, 1911, "the defendants delivered to said mill certain logs, most of said logs being logs cut from dead timber on said lands by the defendants, and said dead logs not being of growing timber standing on said lands." That plaintiff continued to saw said logs until the closing season of the year 1911, but that plaintiff "in said month of October, 1911, did notify defendants that said logs so delivered by defendants were not in accordance with the terms and conditions of said contract and were not all logs cut from growing" timber on said lands, but were mostly dead logs of an inferior quality. That on or about the 15th day of March, 1912, as provided by said contract, the plaintiff notified the defendants that plaintiff was ready to proceed with the sawing for the season of 1912, demanding that defendants deliver to said mill, in accordance with the terms of said contract, the logs cut from the standing and growing timber on said described lands, but that the defendants refused to deliver any logs whatsoever in accordance with the terms of the contract, but filled the logway with decaying and dead timber cut from dead trees. That plaintiff thereupon refused to accept such logs, and demanded that defendants deliver logs cut from standing and growing timber, all of which defendants refused to do. That plaintiff prior to the commencement of this action notified the defendants that because of said refusal to perform their part of the contract plaintiff had elected to rescind and cancel said contract. It is further alleged that plaintiff had performed said contract on his part up to the time of the breach thereof by the defendants, and was ready and willing and able to perform all of said contract to be performed by him, and that by reason of the breach of contract by defendants the plaintiff was damaged in the sum claimed.

[1] The appellants first insist that the court erred in overruling the demurrer to the complaint, the contention being that the contract sued on is one relating to the sale of real estate, and, further, that said contract, by its terms, was not to be performed within one year, and that inasmuch as it was not signed by Lowell Standart, one of the defendants, it is within the statute of frauds and void.

The allegation that the defendants executed the written contract means that all of them, including Lowell Standart, executed it. The demurrer admits the truth of the statement. The fact that the copy attached as an exhibit to the complaint does not show his signature thereto is not an allegation. At most it merely creates an uncertainty on the subject, a defect that cannot be reached by a general demurrer. There is no demurrer on the ground of uncertainty or ambiguity. The general demurrer was therefore properly overruled.

[2, 3] The defense of the statute of frauds is available, however, under the answer denying generally the execution of the contract. Feeney v. Howard, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162. Upon the trial the defendants objected to the admission of the contract in evidence, on the ground that it was not executed by Lowell Standart. This properly presented the questions attempted to be raised by the demurrer. But in a cross-complaint filed by the defendants a contract is set forth, dated July 29, 1911, and signed by all parties, including Lowell Standart, wherein reference is made to the contract sued on in the following manner:

> "When this contract is completed and payments being made the previous contract between W. H. Walsh and George R. Standart, John W. Standart, and Lowell Standart will become void, but not if this contract is not carried out."

The answer to the cross-complaint expressly admits the execution of this contract. The evidence also shows that Lowell Standart executed the said contract of July 29th, and that it was not carried out. The passage quoted constituted a sufficient note or memorandum in writing of the previous contract of April 4th to satisfy the statute of frauds. This answers the objection.

[4, 5] The appellants next insist that even if the validity of the contract be conceded the plaintiff is entitled to recover, not under the contract, but only upon a quantum meruit, citing McConnell v. Corona City Water Co., 149 Cal. 64, 85 Pac. 929, 8 L. R. A. (N. S.) 1171, wherein the court said:

> "One who has been injured by a breach of contract has an election to pursue any of three remedies. He may treat the contract as rescinded, and may recover upon a quantum meruit so far as he has performed; or he may keep the contract alive, for the benefit of both parties, being at all times ready and able to perform; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In this last case the contract would be continued in force for that purpose."

The complaint is not wholly consistent on the subject of rescission. In one paragraph it alleges that:

> "The plaintiff notified the defendants and each of them that by reason of their failure and refusal and neglect to carry out the said contract and to perform the same on their part to be performed the plaintiff has elected to rescind and cancel said contract."

This is not an allegation that the plaintiff had rescinded the contract, or that the contract had been rescinded. It merely alleges that the plaintiff gave the defendants the notice described. The complaint proceeds to allege that plaintiff had fully performed his part of the contract up to the time of the breach thereof by the defendants, and has been ready, able, and willing to continue its performance, that defendants have refused, and still refuse, to perform the contract, or any part thereof, and that by reason of the said breach of said contract by the defendants the plaintiff has been and is damaged in the sum of $25,000. There are no averments of the return or offer to return by the plaintiff of the things he had received under the contract, or of a demand for the restoration to him by defendants of that which they had received under it, or of the reasonable, or any, value thereof, all of which should appear in a complaint on the quantum meruit, unless the common count is used, which is not the case here. Civ. Code, § 1691. The previous allegations show clearly that the plaintiff is complaining of the refusal of defendants to go on and of the consequent deprivation of the profits that would have accrued to him if logs sufficient to make the 6,000,000 feet of lumber had been delivered by the defendants to him within the four years, as they had agreed to do. The complaint is to be construed as stating a cause of action under the third alternative mentioned in McConnell v. Corona, etc., Co., supra. It is of the same character as the actions considered in Hale v. Trout, 35 Cal. 229, Fountain v. Semi Tropic, etc., Co., 99 Cal. 681, 34 Pac. 497, and Alderson v. Houston, 154 Cal. 10, 96 Pac. 884.

[6] The court, at the request of the defendants, repeatedly instructed the jury that if it should find that the contract had been rescinded and canceled before the action was begun, the plaintiff could not recover damages for a breach thereof. Whether this instruction is correct or not, the defendants cannot complain of it, since they requested it, and the verdict for the plaintiff is to be taken as a finding by the jury that the contract was not rescinded and canceled in the

manner contemplated by the instructions. There was no evidence of rescission by mutual consent. It is not claimed that there was any evidence that either party ever restored, or offered to restore, to the other everything or anything of value which he had received from the other under the contract, or of any actual rescission. The evidence showed a continual demand by plaintiff for the proper performance of the contract. There is no merit in the objection relating to the question of rescission.

[7] The only remaining question requiring notice is the contention that the evidence does not support the judgment for the amount of damages given. In view of the conflict in the evidence it is sufficient answer to such objection to point out that there was testimony on the part of witnesses for both plaintiff and defendants that the logs delivered by defendants were not in accordance with the terms of the contract, but were cut from dead and decaying logs, some of them being "worse than rotten," to quote one of defendants' witnesses. Considering the amount of timber to be cut under the contract, the testimony as to the market value of the same, and the probable profits to be made by the plaintiff, it cannot be said that the amount of damages awarded is without substantial support in the evidence.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

(175 Cal. 1)

ARNOLD et al. v. SAN FRANCISCO-OAKLAND TERMINAL RYS. (S. F. 7251.)

(Supreme Court of California. April 20, 1917. Rehearing Denied May 17, 1917.)

1. STREET RAILROADS 🔑99(7)—COLLISIONS—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Where deceased, driving an automobile, saw the street car while he was 40 feet from the track and could have turned in two directions or stopped and avoided danger, his driving the car directly against the street car was such contributory negligence as to bar recovery.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 214.]

2. MUNICIPAL CORPORATIONS 🔑706(7)—COLLISIONS—AUTOMOBILE—CONTRIBUTORY NEGLIGENCE.

If a person does not have ordinary skill in driving an automobile, it is lack of ordinary care to attempt to do so, and such conduct is contributory negligence barring recovery for injuries.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.]

3. STREET RAILROADS 🔑99(7)—COLLISIONS—DRIVING AUTOMOBILE—CONTRIBUTORY NEGLIGENCE.

That deceased, driving an automobile, was surprised by proximity of a special car to the rear of the regular car does not excuse his contributory negligence in driving his automobile against said car, where he actually saw the special car when he was 40 feet away from the track and with due care could have avoided injury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 214.]

4. STREET RAILROADS 🔑114(19)—COLLISIONS—LAST CLEAR CHANCE DOCTRINE—EVIDENCE.

Evidence *held* insufficient to show liability of street railway for death of automobile driver upon the last clear chance doctrine.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 246.]

5. NEGLIGENCE 🔑83 — COLLISIONS — "LAST CLEAR CHANCE DOCTRINE."

The "last clear chance doctrine" applies where the injured party by his own negligence has placed himself in a position of danger from which he cannot extricate himself, or of which he is obviously unconscious, and the other party, seeing or knowing his peril, or the facts from which a reasonable man would believe him to be in peril, and being able by the use of ordinary care to avoid injuring him, fails to use such care and thereby causes injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115.

For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

6. STREET RAILROADS 🔑99(7) — USE OF STREETS—RIGHT OF WAY.

It is the duty of an automobile driver on approaching a street railway crossing to give way to a street car about to pass at the same time, if necessary in order to avoid a collision.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 214.]

7. STREET RAILROADS 🔑93(4) — USE OF STREETS—DUTY OF MOTORMAN.

A street railway motorman is not required to presume that an automobile driver will fail in his duty to give way to the car approaching the crossing at the same time as himself.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 197.]

8. STREET RAILROADS 🔑103(3)—COLLISIONS—LAST CLEAR CHANCE DOCTRINE.

The doctrine of last clear chance does not apply in favor of heirs of a deceased automobile driver whose car was struck by a street car, where when the deceased's peril could have been discovered, the collision and consequent injury were unavoidable.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219.]

Department 1. Appeal from Superior Court, Contra Costa County; H. D. Gregory, Judge.

Suit by Elsa U. Arnold, for herself and as guardian ad litem for her minor children, against the San Francisco-Oakland Terminal Railways. From judgment for plaintiffs and order denying motion for new trial, defendant appeals. Reversed.

Geo. W. Mordecai, of San Francisco, and W. H. Smith, of Oakland (Chapman & Trefethen, of Oakland, of counsel), for appellant. Jay Monroe Latimer and J. E. Pemberton, both of San Francisco, for respondents.

SHAW, J. On the 23d of April, 1913, Joseph C. Arnold was killed by a collision between an automobile, which at the time he was driving, and a car run by the defendant on its San Pablo avenue line. The plaintiffs, being the widow and children of Arnold, began this action to recover the damages which they have suffered from his death, alleging that the collision was caused by the negligence of the defendant. The cause was tried by a jury, a verdict was returned for the plaintiffs in the sum of $30,000, and judgment was given accordingly. The defendant appeals from the judgment and from an order denying its motion for a new trial.

For the purposes of our consideration of the case it will be assumed that the evidence was sufficient to sustain a finding that the negligence of the defendant was an operative cause of the collision and injury complained of. The defendant claims that the evidence showed, as matter of law, that the negligence of Arnold contributed to the injury which caused his death.

The evidence as to the controlling facts on this question is not substantially conflicting. The defendant was maintaining and operating a double track street car line on San Pablo avenue running from Oakland to Richmond. Schmidt lane, a street 60 feet wide, runs from the east into San Pablo avenue at a point in Contra Costa county about a mile north of the Alameda county line. It does not extend west beyond San Pablo avenue. The western track is used for south-bound cars and the eastern track for north-bound cars. Its grade for about 300 feet south of the junction ascends toward the north 1 foot in 100. At the southeastern corner of the junction there is a two-story building, known as Timm's saloon, which obscured the view from the lane southward. For a distance of about 500 feet east from the junction other objects obscured the view from the lane southward. Schmidt lane descends toward the avenue for that distance at a grade of about 1 foot in 100. The part of San Pablo avenue south of Schmidt lane and east of the street car tracks, including the sidewalk, was 31.4 feet wide. North of Schmidt lane it was 50 feet wide. In front of Timm's saloon and extending around the corner was an awning supported by five posts, one on the north end and the others on the avenue front. This occupied 13 feet of the avenue, leaving 18 feet between it and the street car tracks. It projected 8 feet north of the south property line of the lane. The ground all about was practically level, and automobiles could travel the avenue either to the north or south. Arnold was 36 years old, mentally and physically sound, and in possession of his usual faculties at the time. He was familiar with the conditions at the junction. Driving westerly on Schmidt lane at about the center thereof he approached the junction at a speed of about 10 miles per hour, intending to cross the tracks and turn south on the avenue on the west side of the tracks. As he reached a point in Schmidt lane from 45 to 55 feet east of the eastern car track he saw a north-bound car coming on the track at a distance from 65 to 85 feet south of the intersection of the projected line of Schmidt lane with the car tracks. Its speed was estimated at from 12 to 25 miles per hour. The automobile was a short, five-passenger machine, occupied by himself and three other persons, 11 feet in length over all and weighing about 1,600 pounds. The evidence was that with the use of ordinary care and skill it could be stopped within a space of 15 or 20 feet when going at the rate he was traveling, and that a person of ordinary skill, even when going much faster than he was going at the time, with ordinary care, could have turned from the lane, either to the north or to the south, on San Pablo avenue east of the car tracks without coming in dangerous proximity to a car passing thereon. Upon seeing the car Arnold first swerved slightly to the left or south and then swerved slightly to the north, and finally attempted to cross the tracks in front of the coming car. The result was that he collided with the car at a point about opposite the center of Schmidt lane.

[1, 2] The bare statement of the facts proves beyond question that the lack of ordinary care or skill on the part of Arnold was a directly contributing cause of his injury. He saw the car coming when he was not nearer than 40 feet from the tracks. He had abundant time and space to turn to the south, or to the north, or to stop, and avoid danger, if he had possessed ordinary skill and had used ordinary care. No other conclusion follows than that by the lack of ordinary skill or ordinary care he failed to take either course. The only thing that will excuse him of lack of ordinary care is the admission that he did not possess ordinary skill. If the latter be true, it was lack of ordinary care for him to trust himself to drive an automobile in a place of that kind. In either case his contributory negligence is established.

[3] The argument that Arnold was excusable because he was surprised by the close proximity of the special car to a car that had just passed the junction, and that he was not expecting another north-bound car so soon, is deprived of all force by the fact that he actually saw the special car in ample time to have avoided it. To say that the unexpected appearance of a car on the track was sufficient to startle him so as to deprive him of the use of his reason and senses is to convict him of being incompetent to drive an automobile at all on the public streets. There is no evidence that he was unskillful in driving an automobile. But, as we have said, if he was unskillful, it was negligence for him to undertake to drive it at such a place. The evidence proves beyond doubt that he saw the car in time to have avoided it with the use of ordinary care.

[4, 5] The evidence does not sustain the

plaintiff's contention that the defendant is liable under the doctrine of the last clear chance. This doctrine applies where the injured party by his own negligence has placed himself in a position of danger from which he cannot extricate himself, or of which he is obviously unconscious, and the defendant, seeing or knowing his peril or seeing or knowing facts from which a reasonable man would believe him to be in peril, and being able by the use of ordinary care to avoid injuring the plaintiff in his perilous position, fails to use such care and thereby causes the injury. Thompson v. Los Angeles, etc., Co., 165 Cal. 755, 134 Pac. 709; O'Brien v. McGlinchy, 68 Me. 552; Holmes v. South P., etc., Co., 97 Cal. 169, 31 Pac. 834; Sego v. S. P. Co., 137 Cal. 407, 70 Pac. 279; St. Louis, etc., Co. v. Schumacher, 152 U. S. 77, 14 Sup. Ct. 479, 38 L. Ed. 361; Illinois Central Ry. Co. v. Ackerman, 144 Fed. 959, 76 C. C. A. 13; Denver City Tramway Co. v. Cobb, 164 Fed. 41, 90 C. C. A. 459; Green v. Los Angeles, etc., Co., 143 Cal. 41, 76 Pac. 719, 101 Am. St. Rep. 68.

> "A street car cannot go on the street except upon its rails, and hence it has the better right to that space, to which others must yield when necessary." Scott v. San Bernardino, etc., Co., 152 Cal. 610, 93 Pac. 677; Clark v. Bennett, 123 Cal. 279, 55 Pac. 908; Bailey v. Market Street Ry. Co., 110 Cal. 327, 42 Pac. 914.

[6, 7] It was the duty of Arnold, upon approaching the crossing, to give way to a car of the defendant which was about to pass at the same time, if necessary to avoid a collision, since he could give way while it could not. The defendant's motorman was not required to presume that Arnold would not perform this duty. He had the right to presume that Arnold would stop or turn aside, until the conduct of Arnold was such as should reasonably have led him to apprehend the contrary. So long as it appeared that Arnold, with reasonable care, could stop his automobile, or turn it to one side or the other, so as to avoid a collision, and there were no obvious indications that he might not do so, the motorman had the right to assume that he would do so and upon that assumption to proceed along the track. Thompson v. Los Angeles, supra. He could have stopped the automobile, or turned it aside, in safety if he had begun to do so when he was 25 feet away. He displayed no obvious intention to cross the track ahead of the car until the moment when, after swerving to the south, apparently in an attempt to pass south to the eastward of the tracks, he again swerved to the north, apparently with the purpose of turning northerly east of the track, or of passing in front of the street car. The latter swerve did not occur until Arnold had proceeded beyond the east property line of San Pablo avenue several feet. The evidence indicates that it took place when he arrived opposite the corner of the awning, which was 13 feet west of the property line and 18.4 feet east of the car track. The motorman testified that as soon as he saw Arnold coming out of Schmidt lane he did everything that could be done to stop the car, and that he stopped it as quickly as it could have been stopped after that moment. This indicates that he started to stop the car even before he had reasonable cause to believe that Arnold would attempt to cross the track in front of the car. There is no substantial evidence contradictory of this.

[8] The doctrine of the last clear chance could not become applicable until Arnold's negligence had brought him so close to the track that he could not by ordinary care either stop or turn aside so as to avoid a collision, or until his conduct showed that he intended to hazard a crossing ahead of the car, and when these conditions became apparent the utmost care by either party would have been unavailing to prevent the accident.

There are no other errors complained of which in our opinion require consideration.

The judgment and order are reversed.

We concur: SLOSS, J.; LAWLOR, J.

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174 Cal. 781

FISHER v. OLIVER. (L. A. 4008.)

(Supreme Court of California. April 16, 1917.)

1. APPEAL AND ERROR 🔑607(1) — PREPARATION OF TRANSCRIPT—STATUTE.

The provisions of Code Civ. Proc. §§ 953a, 953b, 953c, relating to preparation of transcript on appeal, substituted for bill of exceptions under the new or alternative method, are not jurisdictional; hence delays in preparation and presentation of transcript caused by negligence of reporter and clerk did not invalidate the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2665.]

2. APPEAL AND ERROR 🔑864 — EXTENT OF REVIEW — EVIDENCE TO SUPPORT "DECISIONS."

Code Civ. Proc. § 939, subd. 1, providing that exceptions to "decisions" defined by section 1033 as "assigning and filing of the findings of fact and conclusions of law," because not supported by evidence may be considered on appeal, when taken within 60 days from judgment entry, applies to appeals taken under section 940 as well as those under sections 941a, 941b, 941c, providing the new or alternative method.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1765–1767, 3456–3461.

For other definitions, see Words and Phrases, First and Second Series, Decision.]

3. DEEDS 🔑61—DEPOSIT FOR DELIVERY ON GRANTOR'S DEATH—ABSOLUTE DELIVERY.

The validity of a deed deposited with a third person to take effect at grantor's death requires absolute delivery, so as to place it beyond grantor's power to recall or control it in any event.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 140, 141.]

4. DEEDS 🔑208(2) — VALIDITY — DELIVERY—RETENTION BY GRANTOR DURING LIFETIME—EVIDENCE.

Evidence showing that deceased made deed to sister and told her the property was hers and showed the property to her, and while in the hospital handed deed to a brother with instructions to deliver and record it upon his death, but later took the deed back and retained possession of it until he died, *held* insufficient to establish valid delivery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 626.]

5. DEEDS 🔑56(4)—VALIDITY—NECESSITY OF DELIVERY.

Save under exceptional circumstances, transfer of property by deed necessitates a delivery of the deed to terminate grantor's title, and where a deed remains in grantor's possession to be delivered and to take effect after his death, it is void for want of delivery during his lifetime.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 120.]

6. DEEDS 🔑200—DECLARATIONS OF GRANTOR —DISPARAGING TITLE.

While after parting with title grantor will not be permitted to disparage the title which he has conveyed, since a parting with title accompanies delivery of the deed, where issue is whether grantor actually parted with title and made valid delivery, evidence of his acts and declarations made after time of alleged delivery are admissible.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 601.]

Department 2. Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Harriet A. Fisher against L. D. Oliver, administrator of William J. Fisher. Judgment for plaintiff, and defendant appeals. Reversed.

Hulme & Eckman and Elmer B. Sanford, all of Los Angeles, for appellant. Murphey & Poplin, of Los Angeles, for respondent.

HENSHAW, J. Plaintiff, sister of William J. Fisher, deceased, brought this action against the administrator of his estate to quiet her title to certain lands in the county of Los Angeles. Plaintiff's title admittedly rests upon an asserted conveyance to her of the lands by deed of her brother and his wife. The deed was never recorded, and it was found amongst the personal effects of the brother after his death. The question in the case is whether or not there was a legal delivery of the deed made by deceased in his lifetime. The court found that such delivery was made. From the judgment which followed defendant has appealed.

[1] Respondent interposes two preliminary objections to the hearing of this appeal upon its merits. Under the first she insists that in this appeal, taken under the new or alternative method, the reporter's transcript was not prepared and filed in time. Delays had occurred after the preparation of the transcript and its presentation to the judge for his approval and settlement and respondent had objected to the settlement by the trial judge for these reasons, and herein it is said that the phonographic reporter consumed 38 days in the preparation of his transcript instead of the 20 days allowed by law; that instead of giving notice immediately the clerk wasted 22 days before giving notice to the attorneys. Respondent contends that the provisions of sections 953a, 953b, and 953c, Code of Civil Procedure, are jurisdictional as to the preparation of the transcript, which is a substitute for the bill of exceptions, in thus relying on Boling v. Alton, 162 Cal. 297, 122 Pac. 461. But respondent's contention in this regard is fully answered by Smith v. Jaccard, 20 Cal. App. 280, 128 Pac. 1023, 1026, the decision in which case came under the review of this court and was here affirmed.

[2] Respondent next contends that, as this appeal is taken only from the judgment, the sufficiency of the evidence to sustain the findings cannot be considered, without regard to the question as to whether or not the reporter's transcript of the evidence was properly settled and certified. Herein she relies upon such cases as Pico v. Cuyas, 47 Cal. 174, which case has been frequently cited with approval. The decisions in all these cases, however, were directed to the law of appeals under the old method. This appeal, as has been said, is under the new or alternative method. The attack here made is that the "decision," as defined in section 1033, Code of Civil Procedure, is not supported by the evidence. Section 939, subd. 1, Code of Civil Procedure, provides that exception to the decision upon the ground that it is not supported by the evidence may be considered upon an appeal from the judgment when taken within 60 days from the entry of the judgment. In Cortelyou v. Imperial Land Co., 166 Cal. 17, 134 Pac. 982, it is said:

> "The appeal having been taken from the judgment within sixty days after its rendition and entry, the sufficiency of the evidence to support the findings may be reviewed on that appeal, as effectually as upon the appeal from the order refusing a new trial. And this is so where the appeal is taken under section 940 of the Code of Civil Procedure, as well as where it is taken under the new method prescribed by sections 941a, 941b, and 941c, of the Code of Civil Procedure."

It follows that neither of the preliminary objections by respondent to the hearing of this appeal upon its merits is well founded.

[3, 4] The evidence offered by respondent to establish delivery to her of the deed conveying title to the property in question may be briefly summarized. The written instrument, signed and acknowledged by the deceased and by his wife, was, as has been said, found amongst his personal effects after his death. In October, 1903—so testifies the brother of the deceased—the deceased went to a hospital in Los Angeles to undergo an operation of so serious a nature that the patient thought he might not survive it. While at the hospital awaiting the operation he handed a package of papers to the witness and said:

> "'Here are my papers. I want you to put them in your safe. In this package is a deed

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

to Harriet [respondent] for the Seventh street property. Now, if I pass over the river [to use his own phraseology], you go and record that deed as soon as you can.' I took the papers and put them in my safe. My brother was in the hospital about two weeks, and after he had been out three or four months he asked for his papers, and I handed the package to him just as I had received it. I did not open the package and did not see the deed to Hattie, and do not know that it was in the package except that brother said it was. He had often stated to me that he wanted to do something for Hattie, because she had taken care of our invalid mother; but he had never stated to me that he intended to give her any particular property. He also stated that he wanted to provide for his own folks too, referring to his wife. Subsequent to the making of the deed, he referred to it just in an ordinary way. I can't give his language, but he referred to his having already deeded that property to her."

Plaintiff's own testimony was that she resided in New York City and frequently received letters from her deceased brother, and three or four weeks after he had left the hospital she received one such letter "stating that he had deeded the valuable property to me." She did not have this letter, as she destroyed all which she received. About a year after he had left the hospital she visited him at his home near Los Angeles, in response to his invitation. While on that visit her brother said to her on a trip which they were making to Los Angeles:

> "'I am going to take you to the property which I deeded to you.' He did so, and stopped in front of the property and said: 'Hattie, I have deeded it to you; I have deeded it outright to avoid lawyers' fees. It is valuable property and I have placed a small mortgage on it. I will take care of it.' * * * Of course, it was understood that I was not to have the property until his death. He often spoke of his property in his letters, and about a year before his death he wrote me that he had just been to look over the property and said, 'I have had two conservative judges appraise the Seventh street property which I deeded to you. They have appraised it at $100,000.'"

The foregoing facts present an epitome of all the evidence for respondent, and upon that evidence the court found that in taking plaintiff to view the property and in declaring to the plaintiff, as above quoted, that "this is the property I deeded; I have deeded it outright," etc., the deceased "then intended that said delivery of said deed should be and it was complete and absolute." The court further found that the withdrawal of the deed by the deceased from the custody of his brother and the taking of it into his own possession was "without the knowledge or consent of plaintiff," and "that such possession of said deed ever after the same was so returned to the deceased was held by him for the said Harriet A. Fisher, grantee therein, and so treated by him, and said deed was by him so recognized and treated as having been absolutely delivered to plaintiff and the title in and to said property vested in her." As against these findings of delivery appellant places reliance upon the two appeals in Moore v. Trott, which are reported, the first in 156 Cal. 353, 104 Pac. 578, 134 Am. St. Rep. 131, the second in 162 Cal. 268, 122 Pac. 462. At the same time respondent urges that the law and reasoning of these cases fully support the findings which the trial court made. These cases then call for consideration. Upon the first appeal this court was called upon to review a finding of delivery of a deed growing out of the following facts: Pat Moore, the grantor, was about to go to a hospital in Los Angeles to undergo a serious operation. He turned over certain deeds to one Tietzen, his friend, with an accompanying letter, from which the following are extracts:

> "I am sending you some deeds to lands that I have made to be delivered to the parties in case of my not returning from the California Hospital, Los Angeles, where I am going for to have an operation performed. * * * The deeds that I am sending you you will please lock them in your safe, and in case I should die to immediately hand them to the parties named, telling them to put them of record as soon as possible. * * * You will please keep to yourself the names of the parties named in those deeds until you deliver them after I pass in my checks and take flight for the other world from whence none return."

Moore recovered from his operation, returned home, pursued his usual vocation for some time thereafter, and died without ever having retaken possession of the deeds which he had thus placed in escrow. Upon those facts the trial court found a perfected delivery to the grantees named in those deeds. This court in bank, after reviewing the evidence, reversed the finding as being unsupported by sufficient evidence, declaring that the evidence failed to establish the essential condition to the validity of such transfers, namely, that the delivery is absolute, "so that the deed is placed beyond the power of the grantor to recall or control it in any event." Manifestly the evidence to support the asserted delivery in this case, in so far as it may rest upon the instructions to the escrowee, the deceased's brother, at the time when the deceased delivered to that brother the package said to contain this deed, is far less strong than that which was before this court in the Moore Case, and which was by this court found to be insufficient. And this for the very obvious reason that in the present case the grantor actually took back and into his possession the deed which he had deposited with his brother, while in the Moore Case the grantor allowed the instruments to remain in escrow and they were in the possession of the escrowee at the time of the grantor's death. But it will be noted that the findings of the court, as above quoted, base the delivery upon the conduct and speech of the grantor after his withdrawal of the deed from his brother and while he continued in possession of it; respondent's contention being that herein this case presents the precise situation tendered to the consideration of this court upon the second appeal of Moore v. Trott. Upon the second appeal, bearing in mind that the deeds of

Moore remained in the hands of the escrowee up to the time of the grantor's death, much evidence was offered showing that after his return from the hospital he repeatedly affirmed that he had disposed of his property by deed, that he had left the deeds with Mr. Tietzen to be delivered when he should pass away, and that the deeds would be delivered when he would not be present. To certain of the grantees named in the deeds he said in terms that he had left their deeds with Mr. Tietzen, and that "Mr. Tietzen would give her the deeds after he [Moore] passed in his checks." This court was called upon to review the sufficiency of a finding of delivery under this added evidence, and held that this added evidence, coupled with the fact that the grantor had never recalled the deeds from the possession of the escrowee and had in all respects treated the deeds in the possession of the escrowee as conveying an immediate and irrevocable title, was sufficient to support the finding, saying that it is "fairly inferable that after his, [Moore's] return from the Los Angeles hospital, finding himself in failing health, he intended that the deeds which he had left with Tietzen should absolutely be delivered without power of revocation upon his part, and that he expressed this intent to the grantee under such circumstances as to perfect the delivery." But there still remains the all-important distinction between the second Moore appeal and the case here presented. In the latter the grantor did take possession of the deed and retained it and the management and control of the property until his death, and, as will be seen hereafter, he exercised such dominion over the property as to preclude the conception that he believed that he had parted with the ownership of it. His declarations that he had deeded the property, while he yet retained possession of the deed, had no efficacy to establish the delivery of a deed of gift such as this. The gift was as incomplete as would be the declaration by a donor that he had given away a specific article of personal property while he continuously thereafter retained the possession, dominion, and control of that personal property, using it with every indicia of ownership.

[5] For, saving under exceptional circumstances which do not here arise, ownership of real estate so far as that ownership is to be parted with by deed necessitates a delivery of that deed to terminate the grantor's title. And it is unquestionably the general rule that, where a deed remains in the possession of a grantor, to be delivered and to take effect after his death, the deed is void for want of delivery during his lifetime. Moore v. Trott, supra; Denis v. Velati, 96 Cal. 223, 31 Pac. 1; Devlin, Deeds, par. 279; Stevens v. Hatch, 6 Minn. 64 (Gil. 19); Stilwell v. Hubbard, 20 Wend. (N. Y.) 44; Walter v. Way, 170 Ill. 104, 48 N. E. 421.

We have thus far considered the case presented by the evidence of respondent alone, and the conclusion is unavoidable that that evidence, without regard to any conflict raised by the evidence of defendant, is insufficient to establish a delivery and so a conveyance of title to respondent. But it is pertinent to point out that the evidence on behalf of defendant, both that admitted and that erroneously refused admission by the trial court, wholly supports the view expressed that the deceased did not at all understand that he had parted with title during his lifetime. Thus it was shown that the deceased owned and continued in the use and occupancy of this property for eight years after his return from the hospital and after his conversation with his sister. Five years after this conversation with his sister he made application to the Germania American Trust Bank of Los Angeles for a loan of $20,000, upon the property. The application was signed by the deceased, who therein stated that he was the owner of the property. The loan was granted, and he executed a mortgage to the bank for the amount of the loan, and in this mortgage covenanted that "there were no outstanding secret equities in the property and that the said William J. Fisher was the owner and the sole owner of the said property." Still further, the grantor sold a part of the land described in the original deed, and by other writings and declarations asserted the full ownership over the property which actually he exercised. Much, if not all, of this evidence was refused admission by the court, which based its rulings upon Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186.

[6] It has been pointed out by this court that Bury v. Young has been misunderstood, and the principle governing the admission and rejection of such evidence has been elaborately set forth in Williams v. Kidd, 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E, 703, and Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708. It is unnecessary to do more than to say that the purport of these decisions is that, while it is true, as it always has been true, that a grantor, after parting with title, will not be permitted to disparage the title which he has conveyed, and while it is true that a parting with title accompanies the delivery of his deed, yet, when the very question in issue is whether the grantor has parted with title and whether in fact he has delivered his deed to this end, evidence of his acts, including herein his declarations after the time when it is contended he had so parted with title, is admissible and of great weight in the determination of this question. The view thus adopted and expressed by this court is not in contrariety with any well-adjudicated decision, but is distinctly affirmed as in such cases as O'Brien v. O'Brien, 19 N. D. 713, 125 N. W. 307.

We have held that respondent's evidence of delivery, standing alone and by itself, is insufficient to sustain the court's finding to that effect. Upon the assumption that this evidence is all that respondent can produce, it follows that upon the reversal which must here be ordered the court will make its finding of nondelivery and enter its decree accordingly. In the possible event of a new trial, the court will admit the evidence of the acts and declarations of the grantor which upon the first trial it excluded.

The judgment appealed from is reversed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.

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33 Cal. App. 239

SOUTHERN PAC. R. CO. v. BLAISDELL et al. (Civ. 2220.)

(District Court of Appeal, Second District, California. March 15, 1917. Rehearing Denied by Supreme Court May 10, 1917.)

1. DEEDS 🔑166 — CONTRACT RESTRICTING SALE OF INTOXICANTS — ENFORCEMENT OF FORFEITURE—REPUDIATION BY VENDOR.

Where purchaser was about to breach contract restricting sale of intoxicants on land and paid balance on purchase price before same was due, vendor's return of the money was not such repudiation as would prohibit enforcement of the forfeiture, since the vendor was not then obliged to receive payment, and was justified in declining to proceed until it could be assured that purchaser would not carry out his threatened violation.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 522–525.]

2. INJUNCTION 🔑62(1)—BREACH OF RESTRICTION IN LAND CONTRACT.

Where purchaser had forfeited land by breach of a restriction against sale of intoxicants, an injunction against further breach was proper, since purchaser had no further right to occupy the land after forfeiture and cannot suffer any prejudice from injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 124, 125, 129.]

3. VENDOR AND PURCHASER 🔑92—CONTRACT RESTRICTING SALE OF INTOXICANTS — ENFORCEMENT OF FORFEITURE.

Upon breach of contract provision forfeiting land if used for sale of intoxicants, a vendor may refuse to execute deed and may quiet title against purchasers' claims, in view of Civ. Code, § 1109, providing that, where a grant made upon condition subsequent is defeated by a nonperformance, the purchaser must reconvey property to grantor.

4. DEEDS 🔑150—RESTRICTING SALE OF INTOXICANTS—CREATION OF MONOPOLY.

Provision in deed forfeiting land if premises are used for sale of intoxicants, where made to secure to vendor a monopoly of such business, is void as against public policy, although otherwise such condition is valid.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 450, 480.]

5. DEEDS 🔑150 — CONTRACT RESTRICTING SALE OF INTOXICANTS—CREATION OF MONOPOLY—EVIDENCE.

The fact that a vendor prohibited sale of intoxicants on all parcels of land conveyed under penalty of forfeiture does not imply that he was contemplating a monopoly of the business in absence of evidence to that effect, although not inconsistent with such claim.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 450, 480.]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Southern Pacific Railroad Company against H. W. Blaisdell and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Rowen Irwin, of Bakersfield, for appellants. Frank McGowan, Frank Thunen, and Wm. M. Singer, all of San Francisco, for respondent.

CONREY, P. J. Under date of January 28, 1910, a contract was entered into between the plaintiff as vendor and the defendant H. W. Blaisdell as vendee, whereby the plaintiff sold to Blaisdell lots 15 and 16 of block 2 of the town of Moron in Kern county, which town afterwards was incorporated as the city of Taft. It was agreed that the conveyance when made should include a condition that the premises should never be used as a place of business for the sale of intoxicating liquors and that the title conveyed should revert to the vendor upon breach of that condition. The complaint asked for an injunction restraining the defendants from selling or keeping for sale intoxicating liquors upon the said lots, sought to quiet title to the same premises, and that plaintiff recover possession thereof. The appeal is from that portion of the judgment which granted the desired relief. No recovery was had as to lot 15. One-third of the contract price was paid at the execution of the agreement. The second payment was to become due January 28, 1911, and the final payment on January 28, 1912. The purchaser was permitted to take possession when the contract was made. On January 16, 1911, Blaisdell entered into a contract of lease with defendants Dover & Wilson for five years. The lease did not state the purpose for which the lessees were to use the premises. On the same day the same parties entered into a collateral contract that Dover & Wilson would discontinue the sale of intoxicating liquor on those premises within five days after demand made upon them in writing so to do. By that agreement Blaisdell stipulated that he would not molest or cause any trouble to Dover & Wilson with reference to the sales of liquors on said property, "unless compelled by the Southern Pacific Railroad Company under penalty of forfeiture," etc. The lessees proceeded to furnish the room located on lot 16 as a saloon, stocked it with intoxicating liquors, and commenced to do business there on the 13th day of March, 1911. On or about January 18, 1911, defendant Blaisdell paid to the agent in charge of the sale of plaintiff's land at Taft the full balance due upon the purchase price of said lots, and a few days later this money was returned to him. It does not appear that Blaisdell declined to receive this money, or that he ever made any demand for a deed. As soon as the actual business of the saloon was commenced, notices declaring forfeiture of the contract were served by the plaintiff. Service was made on Dover and Wilson on the 13th day of March, 1911, and on Blaisdell on March 16, 1911, and on the other defendants within a few days thereafter.

[1] Defendants claim that the plaintiff repudiated its contract before any violation of the condition had occurred, and that, the plaintiff having thus failed to fulfill all conditions precedent thereto imposed upon itself, it is not entitled to enforce a forfeiture of Blaisdell's rights under the contract. This contention should not be sustained. First, it may be noted that on January 18, 1911, no money was due and the plaintiff was not obliged to receive payment. And if it be admitted that the money was returned because plaintiff had learned of the preparations which were being made to violate the conditions of the contract which provided against the sale of intoxicating liquors on the premises, then the vendor was justified in declining to proceed further with the contract until it could be assured that the purchaser would not carry into effect this threatened violation of his covenants.

[2] Appellants next urge that the plaintiff is not entitled to the permanent injunction which it seeks. Under this head, they say that the plaintiff has a plain, speedy, and adequate remedy at law; that plaintiff will not be irreparably damaged by failure to issue an injunction; and that equity will not lend its aid to bring about or enforce a penalty or a forfeiture. It seems unnecessary to go into this question. If the contract has been forfeited and if the plaintiff is entitled to a decree quieting its title as against the contract equities of the purchaser, it would seem that the defendants cannot suffer any recognizable or legal prejudice by the injunction, since they have no further right to occupy the lot on which the saloon business was conducted.

[3] We do not observe that appellants contend against the proposition that conditions designed to prevent the use of sold or conveyed premises as a place of business for the sale of intoxicating liquors are enforceable.

> "Where a grant is made upon condition subsequent, and is subsequently defeated by the nonperformance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors, by grant, duly acknowledged for record." Civ. Code, § 1109; Firth v. Marovich, 160 Cal. 257, 116 Pac. 729, Ann. Cas. 1912D, 1190; Quatman v. McCray, 128 Cal. 285, 60 Pac. 855.

And since a reconveyance may be compelled where the grant has been made and the condition subsequent has been broken, it follows, of course, that, upon like breach of conditions subsequent as provided for in a contract to convey, the vendor may refuse to make the deed and may quiet his title against the purchaser's claims under the contract.

[4, 5] Counsel for appellants insists that it was incumbent upon the plaintiff to establish that the restrictive clause was applied impartially to all lots sold by it in the town of Moron, and that no forfeiture can be granted without proof of this fact. They rely upon Burdell v. Grandi, 152 Cal. 376, 92 Pac. 1022, 14 L. R. A. (N. S.) 909, 125 Am. St. Rep. 61. That was an action to recover possession of a lot for an alleged violation of a condition subsequent. The decision states that a condition of that character providing for a forfeiture in case of breach is valid; and holds that where the owner of land designed as the site for a town inserts in all deeds made by him a condition against the sale of intoxicating liquors on the land conveyed, solely for the purpose of reserving to himself a monopoly of such business, the condition is void as against public policy, and its breach will not work a forfeiture of the estate granted. In that case, the court had found, presumably upon sufficient evidence, that the purpose of the vendor in imposing the condition was to reserve in himself such monopoly. In the present case, the evidence shows that a great many sales by contract were made by the plaintiff, and that like conditions were incorporated in every contract and deed covering lots in the town that have been issued by the company. While the evidence thus shows that the plaintiff was making these conditions in all sales, such evidence is not inconsistent with the claim that the plaintiff may have intended to reserve a lot or lots for itself on which it alone might conduct the inhibited business. It would seem, however, that the defense that plaintiff was contemplating such monopoly cannot be implied from the facts proved herein; nor was any evidence introduced by the defendants tending to show such design to create a monopoly.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

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33 Cal. App. 243

SOUTHERN PAC. R. CO. v. BLAISDELL et al. (Civ. 2221.)

(District Court of Appeal, Second District, California. March 15, 1917. Rehearing Denied by Supreme Court May 10, 1917.)

DEEDS 🔑175—RESTRICTING SALE OF INTOXICANTS — ENFORCEMENT OF FORFEITURE — RETURN OF MONEY.

A vendor was not estopped from enforcing forfeiture for breach of contract restricting sale of intoxicants on the land because it accepted payment in ignorance of violations, and the case is no different from that of a breach of such condition discovered after executing deed, in which case a reconveyance would be ordered, since, upon the purchaser's breach, his rights under the contract are at an end, and he cannot ask return of his money.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 545, 548.]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Southern Pacific Railroad Company against H. W. Blaisdell and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Rowen Irwin, of Bakersfield, for appellants. Frank McGowan, Frank Thunen and Wm. M. Singer, all of San Francisco, for respondent.

CONREY, P. J. This action in substance is one to enforce forfeiture of the interest acquired by the defendants or some of them under a contract of sale of real property; the cause of action being based upon defendants' breach of a condition providing against the sale of intoxicating liquors upon the sold premises. The contract is in like form and the complaint is in substance the same as in Southern Pacific Railroad Co. v. Blaisdell et al. (No. 2220 of this court) 164 Pac. 804, wherein judgment in favor of the plaintiff has been this day affirmed. The contract in this case provided for the sale and conveyance to H. W. Blaisdell of lots 26 to 30 in block 2 in the town of Moron in Kern county. It was dated January 28, 1910, at which time one-third of the purchase price was paid, and the second and third payments were to be made on January 28, 1911, and January 28, 1912, respectively. We will confine our discussion to the one proposition urged as a ground for reversal herein, not included in the other case. The judgment quiets the plaintiff's title to lot 29 only, and enjoins the defendants from selling intoxicating liquors upon that lot. The appeal is from that judgment.

Appellants claim that the plaintiff is estopped to enforce a forfeiture because it received from Blaisdell money on account of the contract price after a saloon had been opened in which the business of selling intoxicating liquors was conducted. There is evidence tending to show that on January 13, 1911, a saloon was opened on lot 29 under a lease from Blaisdell. Final payment on the contract was made by Blaisdell at about that time. The receipt given by plaintiff company for that money bears date January 24th. The witness McAllaster, who was in charge of the land business of the plaintiff in its office at San Francisco, testified:

> That the money came to that office three or four days before the date of the receipt; that "the money was credited on the contract covering lots 26 to 30 because we did not know of any violation. Subsequently we learned of the violation, and learned of it before the deed was finally executed, and did not deliver the deed."

The answer of the defendants did not attempt to state a defense upon the ground that plaintiff had commenced and prosecuted its action without offering to return to Blaisdell the money paid by him. The defense most nearly touching this matter is found in the allegation that on or about November 25, 1910, plaintiff consented that a saloon for the purpose of selling alcoholic and other liquors might be conducted upon the sold premises; that upon the faith of that consent the defendant Woods had expended a large sum of money; and that therefore the plaintiff should be estopped from enforcing the anti-saloon condition of the contract. There was a total failure to prove consent so alleged to have been given by the plaintiff, and there is no evidence that the defendant Blaisdell, or any one claiming under him, has ever demanded or offered to receive from the plaintiff any money on account of this contract.

If the deed had been executed, and then the grantor had sought to obtain a reconveyance because of a subsequently discovered breach of the condition stated in the deed, such action could have been maintained without returning to grantee the consideration paid for the property. We perceive no reason why the purchaser has any better right to claim return of money which he has paid on his contract, where no deed has been made, and where he is guilty of breach of a like condition and is made defendant in an action to have it declared that, by reason of such breach, his rights under the contract are at an end.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

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33 Cal. App. 236

PEOPLE v. YIP SING. (Cr. 630.)

(District Court of Appeal, First District, California. March 15, 1917.)

1. CRIMINAL LAW ⚷1159(3)—REVIEW—CONFLICTING EVIDENCE.

Where conflicting evidence sufficiently supports conviction, the judgment will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076.]

2. CRIMINAL LAW ⚷943 — NEW TRIAL — NEWLY DISCOVERED EVIDENCE—CONTRADICTORY TESTIMONY.

Refusal to grant a new trial was proper where the alleged newly discovered evidence would merely contradict statements of certain witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2333, 2334.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Yip Sing was convicted of assault with intent to commit murder, and appeals from judgment and from order denying new trial. Affirmed.

B. V. Sargent, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant in this case was convicted of the crime of assault with intent to commit murder. The appeal is from the judgment, and an order denying the defendant a new trial.

The record before us does not support the contention that the trial judge was guilty of misconduct, prejudicial or otherwise, during the course of the trial.

[1] The evidence adduced upon the whole case, which was conflicting, sufficiently supports the verdict and judgment.

[2] The alleged newly discovered evidence would have done no more than contradict the statements of some of the witnesses who testified at the trial. This being so, the trial court committed no error in refusing to grant a new trial because of the discovery of such evidence.

The judgment and order appealed from are affirmed.

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33 Cal. App. 193

Ex parte DRENNAN. (Cr. 395.)

(District Court of Appeal, Third District, California. March 9, 1917.)

HABEAS CORPUS 🔑22(1)—GROUND OF RELIEF.

Judgment of conviction of assault to commit rape is not void on its face, because under an indictment charging statutory rape, and so cannot be nullified through habeas corpus, even if there was error in admitting evidence of force, which question can be reviewed only on appeal.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 19½.]

Application of Robert Drennan for writ of habeas corpus. Petition denied.

Robert F. Drennan, in pro. per.

PER CURIAM. The petition for the writ must be denied. Inasmuch as the petitioner is confined in the penitentiary, is not represented by counsel, but has, in propria persona, made this application and is not an attorney, it is deemed proper to state briefly the ground of our refusal to grant the application or to issue the writ.

The petitioner was convicted of, and is now undergoing punishment for, the crime of an assault to commit the crime of rape. He claims that the judgment of conviction was and is void, because the crime of which he was found guilty was not within the crime charged in the information. The point is that he was therein charged with statutory rape, or carnally knowing a female incapable under the law of consenting to such an act, in which case force is not a necessary element, and which, where committed even with the actual consent of the female, is, under the law, a crime, and that, therefore, an assault is not a necessary ingredient of the crime. He cites and relies on the case of People v. Akens, 25 Cal. App. 373, 143 Pac. 795.

We considered this precise question when the petitioner's case was before this court on appeal. People v. Robert Drennan, 25 Cal. App. 645, 145 Pac. 106. The case was not argued before this court, either orally or by briefs; but it was submitted on the record. We, nevertheless, examined the record, although, under the rule, we would have been authorized and justified in dismissing the appeal without any consideration of the record. In the opinion therein filed, however, we stated that there was disclosed by the record evidence tending to show that the female child upon whom the crime was alleged to have been committed objected to and protested against the conduct of the defendant, and from this testimony we said the jury were warranted in finding that there was an assault, and that the verdict as returned was therefore sustainable, notwithstanding that the prosecutrix was under the age of consent. In this connection, we cited the case of People v. Akens, supra, relied upon by the petitioner.

Whether testimony showing that the crime charged or the attempt to commit said crime was accompanied by force and against the will of the prosecutrix was inadmissible under the information was not pointed out by the defendant when his case was before us on appeal. But whether it was or was not inadmissible is a question which cannot be reviewed or considered to any purpose in a proceeding on habeas corpus. The remedy for the correction of errors occurring in the course of the trial of a case, either criminal or civil, lies wholly in an appeal, unless the judgment is absolutely void upon its face, in which case it may be nullified through the operation of a jurisdictional writ; but where it is not void upon its face, it is conclusive against the party against whom it is rendered until it is set aside on appeal for errors occurring at the trial. The judgment of conviction against the petitioner is not void upon its face, and the error of which he complains cannot be reviewed in a proceeding of this character.

The petition must, as stated, be denied; and it is so ordered.

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33 Cal. App. 187

SIMMONS et al. v. FIRTH et al. (Civ. 2213.)

(District Court of Appeal, Second District, California. March 8, 1917.)

1. APPEAL AND ERROR 🔑1170(3)—HARMLESS ERROR—RULING ON DEMURRER.

Any error in overruling demurrer to contractor's complaint, for uncertainty in making no reference to engineer's certificate, did not affect defendant's substantial rights, and so under Code Civ. Proc. § 475, and Const. art. 6, § 4½, is not ground for reversal; the evidence received without objection showing that the engineer refused the certificate for alleged noncompliance with the contract, and the issuance of compliance, making the withholding of certificate unwarranted and no defense, being tried.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4066, 4075, 4098, 4101, 4542.]

2. MECHANICS' LIENS 🔑288(3) — PERFORMANCE OF WORK — TRIVIAL IMPERFECTIONS — QUESTION OF FACT.

Whether omissions from work of items in specifications constitute trivial imperfections, which Code Civ. Proc. § 1187, provides shall not be deemed lack of completion preventing lien, but shall be allowed for to the owner, is a question of fact for the trial court, to be determined in each instance from the evidence and circumstances.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 585, 586.]

3. MECHANICS' LIENS 🔑93 — DEFECTS IN STRUCTURE—FAULTY SPECIFICATIONS.

Contractor claiming lien is not responsible for defects in structure resulting from faulty specifications furnished by owner's engineer.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 124.]

4. MECHANICS' LIENS 🔑93 — TIME OF COMPLETING WORK.

Failure of contractor claiming lien to complete work in specified time is not a defense, being due to owner's failure to deliver water according to contract, necessary for prosecution of work.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 124.]

5. EVIDENCE 🔑441(7) — PAROL EVIDENCE — VARYING WRITING.

Terms of written contract merely providing for supplying water for mixing concrete and mortar are not varied by evidence of oral agreement to deliver through a pipe near place of work.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1772–1777, 2042.]

6. CONTRACTS 🔑245(2)—MERGER OF STIPULATIONS IN WRITING.

Rule that written agreement supersedes all prior or contemporaneous oral negotiations or stipulations concerning its matter has no application to a collateral agreement on which the instrument is silent, and which does not purport to affect the terms of the instrument, as place of delivery of what the instrument merely provides shall be furnished the contractor for the work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1130.]

7. APPEAL AND ERROR 🔑1050(1)—HARMLESS ERROR—RULINGS ON EVIDENCE.

Judgment for subcontractor being ordered to be paid out of amount found due the principal contractors from the owner, and lien only being declared in favor of the principal contractor, the owner was not prejudiced by any error in admission of evidence to sustain the claim of the subcontractor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157.]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by Albert Simmons and another, partners as Simmons & Simmons against Emil Firth and others. From an adverse judgment, the named defendant appeals. Affirmed.

Sheldon Borden and George H. Moore, both of Los Angeles, for appellant. Purington & Adair, of Riverside, Geo. C. Mansfield and Shankland & Chandler, all of Los Angeles, and A. H. Winder, of Riverside, for respondents.

SHAW, J. In this action plaintiffs as original contractors sued to enforce a mechanic's lien for an unpaid balance alleged to be due them upon a contract made with Emil Firth, pursuant to which they constructed a concrete reservoir at an agreed price of $5,995. The defendants other than Firth filed answers and cross-complaints, whereby they sought judgment against plaintiffs and the enforcement of liens upon the same property for materials furnished to plaintiffs as such original contractors for use and used in the construction of the reservoir. After a demurrer interposed by Firth to the complaint was overruled, he filed an answer thereto, which, among other things, contained a counterclaim against plaintiffs for a sum in excess of the amount of plaintiffs' alleged lien, and also filed answers to the cross-complaints. Upon the issues thus joined a trial was had, which resulted in a judgment in favor of plaintiffs and against Firth for a balance of $2,259.61, which was declared a lien upon the property described in the complaint, all as prayed for therein, and gave judgment against plaintiffs in favor of cross-complainants, payment of which was ordered to be made from the proceeds of the judgment so rendered in favor of plaintiffs and against defendant Emil Firth. From the judgment so entered, Firth, adopting the alternative method in presenting the record, has appealed.

[1] Conceding the court erred in overruling defendant Firth's demurrer to the complaint for uncertainty (Wyman v. Hooker, 2 Cal. App. 36, 83 Pac. 79), in that it failed to make any reference to the engineer's certificate of completion of the reservoir required by the contract as a prerequisite condition to plaintiffs' right to final payment, or allege any excuse for not producing the same (Coplew v. Durand, 153 Cal. 278, 95 Pac. 38, 16 L. R. A. [N. S.] 791, and cases there cited), nevertheless, since it appears from the evidence received without objection that the engineer refused such certificate upon the ground that plaintiffs had not, as alleged by them, completed the reservoir in accordance with the terms of the contract and performed all the conditions thereof, the substantial rights of defendant were not prejudiced by the ruling, without which this court should not reverse the judgment (section 475, Code Civ. Proc.; section 4½, art. 6, Const). The issue presented to the court for trial was whether or not plaintiffs in constructing the reservoir had complied with the contract, since if they had, the withholding of the certificate as evidence thereof was unwarranted, and want thereof could not be urged as a defense to plaintiffs' right to recover.

[2] Appellant attacks the finding of the court to the effect that, notwithstanding the fact that five items called for by the specifications of the aggregate cost of $62.85 (which

the court held to be trivial and an allowance for which was made) were omitted, the reservoir was substantially completed on November 8, 1912, and on November 9th it was occupied and thereafter continually used by Firth. Section 1187, Code of Civil Procedure, provides that trivial imperfections in the construction of a building, improvement, or structure shall not be deemed such a lack of completion as to prevent the filing of a lien; and in Schindler v. Green, 149 Cal. 752, 87 Pac. 626, it is said:

> "If the omission or imperfection is so slight that it cannot be regarded as an integral or substantive part of the original contract, and the other party can be compensated therefor by a recoupment for damages, the contractor does not lose his right of action."

The question is one of fact to be determined by the trial court in each instance from the evidence and circumstances in the case. Compared with the entire structure called for by the contract, it cannot be said upon the evidence presented by the record that these items were other than as found by the court to be trivial omissions for which defendant could be and was compensated in damages. To the same effect are Harlan v. Stufflebeem, 87 Cal. 508, 25 Pac. 686, and Perry v. Quackenbush, 105 Cal. 299, 38 Pac. 740.

[3] It is also claimed that the reservoir was defective in that it was not impervious to water, but constantly leaked; that the roof thereon constructed by plaintiffs was defectively constructed, by reason of which fact a large part thereof was blown off by the wind some time in December. It appears from the record that at the trial not only the specifications, but detail plans for the construction of the roof, were offered in evidence. These plans and details of construction, however, are not brought up in the record, and without them some of the specifications are incomplete. The contention of respondents is that not only the walls of the reservoir, but the roof constructed thereon, were in strict accordance with the plans and specifications, and there is evidence disclosed by the record which clearly tends to sustain such contention. That the walls of the reservoir were not impervious to water, is conceded; but the evidence of experts introduced on behalf of plaintiffs is to the effect that such leakage was due, not to faulty construction, but to the fact that the walls of the reservoir as called for by the specifications were not such as were calculated to render the reservoir impervious to water without the interior thereof being plastered, and that no reservoir built in accordance with the specifications furnished by defendant's engineer would hold water without more or less leakage. That the evidence sustains this contention admits of no doubt. The same observations are true with reference to the alleged defective construction of the roof, which it seems did not blow off until after the completion of the structure and use thereof by defendant. The evidence tends to show that it was constructed in accordance with the detailed plans, not before us, and specifications furnished therefor by defendant's engineer, and that its failure to withstand the force of the wind was due to faulty specifications which did not provide for proper anchorage, and not to failure on the part of the contractors to construct the same in accordance therewith. One of the omissions claimed to exist was the alleged fact that plaintiffs did not install check valves in accordance with specifications. The specifications refer to detail No. 1 for method of outlet and inlet, and while this detail of plan is not incorporated in the record, we gather from the opinion of the trial judge it described the device as "a 10-inch check valve or flap valve." At all events, plaintiffs called upon the engineer for a design of valve to be used, and he drew a sketch and delineation of a valve the use of which he authorized and in accordance with which plaintiffs had the two valves made and installed the same. These valves, by reason of the leather cushion becoming hard and dry, though constructed as required by the engineer, leaked. But here, again, in the absence of any specifications therefor, plaintiffs appear to have followed the detailed drawing furnished them by the engineer, and, having done so, they should not be held responsible for such defect.

Appellant strenuously contends that the evidence was insufficient to justify the finding that the owner occupied and used the reservoir from November 9, 1912. Here again there appears to be a conflict of evidence; but there is testimony to the effect that defendant did exercise dominion over the reservoir by doing work upon the roof, other than that called for by the specifications, deemed necessary to protect the paper covering of the same from blowing off in case of storms, and on November 22d filled the same with water, and immediately upon taking possession commenced erecting a fence around the same; indeed, the testimony of defendant's inspector of the work is that he, as defendant's employé, built a fence around the edge of the reservoir, painted the ladders, and did other odd jobs deemed necessary, and filled the same with water to a depth of four or five feet, at which time he observed no leaks other than in the check valve, designated a flap valve. It may be conceded that as to all questions of fact submitted to the court for determination, there was a conflict of evidence, a large part of which offered on behalf of defendant was that of the engineer who prepared the specifications and who very naturally insisted that if followed they were sufficient fr the purpose for which the reservoir was intended. It is likewise clear that the trial court regarded his testimony as unsatisfactory. Without discussing the evidence further, suffice it to say that it is ample to support the findings attacked for want of sufficient evidence.

[4-6] The contract, dated May 31, 1912, provided that the reservoir should be completed within 60 days thereafter, and one of the grounds of the counterclaim and defense was plaintiffs' failure to comply with this provision. The court, however, held that defendant was estopped from availing himself of such defense for the reason that he neglected and failed to furnish plaintiffs a supply of water for mixing concrete and mortar. As to this, the specifications contained a provision that:

> "Water for mixing concrete and mortar will be supplied by Emil Firth, the contractor to take same from nearest standpipe or pipe line."

It appears that at the time of entering into the contract, defendant had in course of construction a pipe line leading from his pumping plant to the site of the proposed reservoir, distant a mile and a half therefrom, a map of which line he at the time exhibited to plaintiffs, and in response to the inquiry as to when he would have the water there, told plaintiffs that it would be within a week and for them to assemble their tools and material for doing the work, and by the time they were prepared to commence the work he would have the water there; all of which, together with other evidence, tending to show there was an oral agreement made between plaintiffs and defendant Firth whereby the latter was to supply the water, not at the pumping plant, but from a standpipe or pipe line, the outlet of which was to be constructed to a point at or near the proposed reservoir. Appellant insists that the admission of all such evidence was erroneous in that it tended to vary the terms of the written contract. We are not in accord with this contention. While the agreement provided that Firth should supply water, it is silent as to the point at which he was required to deliver the same; hence the oral agreement covered a subject as to which the contract was silent. In our opinion, it was competent for plaintiffs to show by parol that the water which defendant agreed to supply for use in the construction of the reservoir was to be delivered by him through the pipe line then in course of construction at or near the proposed site of the reservoir. The written contract contained no provision fixing the point where the water should be delivered; thence the evidence adduced touching a subject as to which the contract was silent did not tend to vary any provision thereof. "The rule that an agreement in writing supersedes all prior or contemporaneous oral negotiations or stipulations concerning its matter has no application to a collateral agreement upon which the instrument is silent, and which does not purport to affect the terms of the instrument." Savings Bank of So. Cal. v. Asbury, 117 Cal. 96, 48 Pac. 1081; Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571; Bradford Investment Co. v. Joost, 117 Cal. 204, 48 Pac. 1083; Wolters v. King, 119 Cal. 172, 51 Pac. 35. In our opinion, the court did not err in admitting the testimony, the effect of which was to show that the delay complained of was due to defendant's failure to deliver a supply of water necessary in the prosecution of the work.

[7] The record discloses no prejudicial error upon which this court would be justified in disturbing the judgment in favor of plaintiffs and against Firth, for which it is declared a lien exists in favor of the former, the foreclosure of which is ordered.

This being true, the alleged erroneous rulings of the court in admitting evidence to sustain the claim of a lien in favor of Hook Bros., for which they were given a judgment against plaintiffs in the sum of $730.61, in no wise concerns appellant, since such judgment is ordered to be paid out of the amount found due to plaintiffs from defendant Firth, for which a lien is declared, and, therefore, conceding the court erred in reaching the conclusion that Hook Bros. were entitled to judgment, defendant is not prejudiced thereby.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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33 Cal. App. 198

LIPPERT et al. v. PACIFIC SUGAR CORP.
(Civ. 1633.)

(District Court of Appeal, Third District, California. March 12, 1917. Rehearing Denied by Supreme Court, May 10, 1917.)

1. MASTER AND SERVANT 🔑265(5) — ACTION FOR INJURY—RES IPSA LOQUITUR.

In an action for the death of a mechanical engineer caused by the explosion of the steam boiler, a "preheater" in a "sugar house" which it was not his duty personally to operate and which he had been told would carry nearly twice as much steam it was in fact calculated to carry, the doctrine of res ipsa loquitur is applicable, and it was competent for the jury to infer as a proposition of fact, either that there was some negligence in the management of the boiler or some defect in its condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 881, 898, 955.]

2. MASTER AND SERVANT 🔑264(10)—ACTION FOR INJURY—RES IPSA LOQUITUR—WAIVER.

Plaintiffs were not precluded from relying upon the doctrine of res ipsa loquitur because they also charged specific omissions of duties or acts of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 870.]

3. MASTER AND SERVANT 🔑287(2)—INJURY TO SERVANT—QUESTION FOR JURY.

How far the immaturity of the boy, less than 16 years of age, who was operating the preheater, contributed to the explosion of its boiler *held* for the jury under all the facts and circumstances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1054–1056.]

4. MASTER AND SERVANT 🔑279(5)—INJURY TO SERVANT—EVIDENCE—SUFFICIENCY.

Evidence *held* to justify a finding that the superintendent in charge of the plant and the boy who operated the heater, immediately before the explosion, allowed the steam in boiler of the preheater to reach 47 pounds' pressure which was 7 pounds more than the maximum working pressure.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 978.]

5. Evidence 🔑584(1) — Weight—Declarations of Deceased Persons.

Evidence of declarations of deceased persons is always more or less unsatisfactory, and the unsupported testimony of a single person as to a conversation between himself and a deceased person is regarded as the weakest of all kinds of evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2424.]

6. Evidence 🔑590—Hostile Witness.

Fact that a witness was in charge of the defendant's plant as superintendent over the deceased, being to some extent responsible for the accident, justifies classing him as a hostile witness, though plaintiffs were compelled by circumstances to call him as a witness to establish certain facts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2439.]

7. Master and Servant 🔑217(5) — Injury to Servant—Assumption of Risk.

Where a mechanical engineer was killed by the explosion of the boiler of a preheater operated by an employé who was under immediate instructions of the superintendent of the plant and not of the deceased, instructions having been given to the employés that the boiler would carry 70 pounds' pressure, while in fact its working pressure was 40 pounds, there being no evidence that the preheater was out of repair, or that there was any imperfection calling for repair or complaint to defendant, or that it was not in thorough running condition, the explosion was not a risk which the deceased had assumed, although he was intrusted with oversight of all the machinery of the plant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 578.]

8. Master and Servant 🔑231(2) — Injury to Servant—Contributory Negligence.

Where a mechanical engineer, intrusted with oversight of all the machinery of a sugar house, was given written instructions that the boiler of a preheater would carry 70 pounds' pressure, nearly double its actual maximum resisting capacity, he was not guilty of contributory negligence in relying on such statement.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 676.]

9. Master and Servant 🔑276(4) — Injury to Servant—Evidence—Sufficiency.

Evidence *held* to justify a verdict for plaintiff, and hence denial of defendant's motion for nonsuit and refusal to instruct the verdict for defendant were not error.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 951, 959.]

10. Appeal and Error 🔑959(1)—Amendment of Complaint—Discretion of Court.

In allowing the plaintiffs to amend their complaint, the court was exercising a discretion confided to it, the abuse of which alone would justify reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825, 3826.]

11. Master and Servant 🔑256(5)—Amendment of Complaint.

Ruling of court allowing the plaintiff to amend the complaint to allege that the person operating the preheater was incompetent did not carry with it an implication that such employé was in fact incompetent, but the implication was that there was sufficient support in the evidence on the point to go to the jury for determination.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 815.]

Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by Annie L. Lippert and Anne Josephine Lippert, a minor, by her guardian ad litem, and Annie L. Lippert, as administratrix of the estate of William Leo Lippert, deceased, against the Pacific Sugar Corporation. From a judgment for plaintiffs and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Gray, Barker & Bowen, of Los Angeles, H. Scott Jacobs, of Hanford, and W. C. Petchner, of Los Angeles, for appellant. Lent & Humphrey, of San Francisco, and H. P. Brown, of Fresno, for respondents.

CHIPMAN, P. J. This is an action for damages brought by the surviving wife and minor child of William Leo Lippert, who, on the 15th day of July, 1909, was killed by the bursting of a "preheater," used by defendant for the purpose of heating sugar beet juices. At the time of the accident Lippert was 28½ years of age, and the minor was 18 months old. The jury found for plaintiffs in the sum of $20,000, and judgment was entered in their favor for that amount. The appeal is by defendant from the judgment and from an order denying its motion for a new trial.

Appellant makes the following points: (1) That deceased was employed as master mechanic and was intrusted with the oversight of all the machinery of the sugar house; (2) he, therefore, assumed the risks of his employment; (3) contributory negligence on the part of deceased; (4) "he fully knew and appreciated and apprehended all of the dangers surrounding his employment;" (5) that if the preheater was out of repair, it was patent to deceased and it was his duty to have remedied its condition; (6) if that was the condition of the apparatus, he should have complained of it to defendant; (7) when deceased was employed as mechanic and assistant superintendent he expressly assumed the duty of putting all machinery into thorough running condition.

Respondents, in their brief, say:

> "The long and able opening brief of appellant * * * deals with adjudicated cases and legal principles applicable to litigation involving such propositions as 'equal means of knowledge,' 'comparative knowledge of masters and servants,' 'continuance of employment,' 'duties of servants to inform masters of defects and danger,' 'precaution against a known or apparent danger,' or 'duty of employer to repair.' The evidence in this case does not require consideration of any of those questions."

Respondents assign, as defendant's negligence: (a) Defendant's informing decedent that the preheater would safely carry a steam pressure of 70 pounds when in fact it was only built for a maximum pressure of 40 pounds; (b) defendant's failure to use ordinary care in the selection of the culpable employé, John Wegman.

In December, 1908, deceased, who was then employed in a sugar factory at Chino, San Bernardino county, wrote to Mr. R. L. McCrea, assistant secretary of defendant corporation, the following letter:

"Mr. R. L. McCrea. Dear Sir: Recently learned that your company intends to start your plant at Corcoran. If the same is correct and you have not already selected a man to operate same, would like you to consider an application from me. If your company cares to consider with me the matter, kindly notify me as soon as possible. Will be in city in the latter part of the week; so would call at your office if you desired. Yours truly, Wm. L. Lippert."

Written in blue pencil:

"R/R Mr. Cole. Mr. P. has written Mr. Lockwood—& so good team."

A meeting was thereupon arranged, which took place in the defendant's office in Los Angeles, on the 26th day of March, 1909. As to what then occurred, Mr. W. C. Petchner, the secretary of defendant, testified:

"At that meeting, at which Mr. Lippert, myself, and Mr. Cole (vice president and general manager of defendant) were present, I referred to Mr. Lippert's application and told him we wanted somebody to take mechanical charge of the house; that Mr. Connolly (defendant's superintendent) had told us he would not care to undertake the mechanical charge of the house, and Mr. Connolly had stated Mr. Lippert was the one whom we should get, because he had been employed at the house in its construction, and in the installation of the machinery, and was supposed to understand all about it, and he would prefer to have such a man. I told this to Mr. Lippert and asked him what he knew about the house, and also asked him about his previous employment; I told him what duties we should expect from him; that he was to be there as the engineer to take charge of the mechanical part of the house, because Mr. Connolly was a superintendent merely, and not a machinist or engineer. I repeated all this explanation to Mr. Lippert, and asked him if he felt competent to take charge of the machinery of the house. He said he did; that that was his business; that he had been employed in the house the year previously, and that he had made out the plan of the house wiring and the placing of the machinery, and had taken part in the installing of the machinery in the house. * * * I took up my active duties at Corcoran in the month of January, 1909, and was there during all the time the factory was prepared for operation for that season, although I was away occasionally in San Francisco and Los Angeles. Mr. Connolly reported to me as his immediate superior while I was there, and up to the 15th of July, 1909. Mr. Lippert never made any report to me during that period or any time prior to the accident regarding any defects in the preheater."

Mr. Cole substantially corroborated Mr. Petchner's testimony as to the conversation above set forth. On March 23, 1909, Lippert wrote from Chino to Mr. Connolly, stating that he had some work to finish at Chino, and that he thought he could take the position at Corcoran about the first of April. He did commence work with defendant some time in April.

Mrs. Annie L. Lippert testified:

"I reside in San Francisco. I was married to William Leo Lippert in Oakland in 1906. At that time he was employed by the American Beet Sugar Company as master mechanic at Chino, Cal. He stayed at Chino several months, and came back to San Francisco, where we remained for a year and a half. Then Mr. Lippert went to work to Corcoran in the year 1908, where he remained about six months. Then he was sent for to go to work at Chino. When they employed him in the sugar factory at Corcoran, they asked him to take the house as master mechanic. He had previously worked at Corcoran, helping to install some of the machinery."

There was received in evidence a contract, dated November 14, 1907, between defendant and the American Foundry & Machinery Company, under which the latter was to furnish the former with an "evaporating system," and containing specifications as to the construction thereof. Said contract provided:

"Preheater to be of steel and to stand a working pressure of 12 pounds; steam chest to stand a working pressure of 40 pounds."

M. B. Kearney, a witness for plaintiffs, testified that he had worked as a steamfitter in sugar factories in different states, and that he was employed as such at the Corcoran plant, although 8 or 10 years had elapsed since he had last worked in a sugar factory; that he commenced work there about the 1st of April; that he overhauled all the steam pipe that needed working on and put in some new pipe. Referring to the preheater, witness said:

"It is a large cylinder shaped piece of machinery between 8 and 10 feet in length, about 6 feet in diameter, with a number of brass tubes running through lengthways for the purpose of carrying steam."

Continuing, witness explained at length the construction of the preheater, the location of valves for the control of steam pressure, etc., and, as to its function in the making of sugar, said:

"There is an opening about in the center where the juice (of sugar beets) is admitted and drops down over those tubes and is heated by the steam; juice coming from elsewhere is pumped into the cylinder and spreads out over the heated steam pipe and passes off into the evaporators."

As to the "steam head" or "steam chest" which blew out and caused the death of Lippert, witness said:

"I think the steam head is square and has a lid of cast iron, and is set back a little, kind of concave. * * * It is bolted all around with bolts two or three inches apart."

He testified that, "about a week before the campaign started," he took the pressure valve apart and cleaned it; the preheater was steamed up for several days before the day of the explosion.

Washington A. Connolly was called as a witness by plaintiffs and testified:

"I was employed by defendant at Corcoran as superintendent or sugar expert for sugar manufacturing, from the 15th of March, 1909, until about the 21st of December, 1909. My duties were to take charge of manufacturing and producing sugar from beets and take charge of chemical control of the house; that is, I would be superintendent over the chemists attending to the chemical part of the house—I was superintendent over all the employés of the Pacific Sugar Corporation outside of its office affairs. * * * Mr. Lippert was employed right along, I think, from in April or the 1st of May. He was hired as master mechanic by Mr. Petchner. I was told so by himself. His duties were to take full charge of all the machinery, and at the time he was hired, which was not in the manufacturing season, he was to repair and overhaul everything prior to the manufacturing campaign, which was supposed to start then about the 1st of July. * * * Mr. Lippert was next in authority to me."

Witness described the apparatus and said:

"I don't know what pressure this preheater, or the heads of this preheater, were supposed to be able to withstand, or were constructed to withstand. Q. Did you ever instruct Mr. Lippert as to what pressure they were able to withstand? A. There were no instructions given, except Mr. Lippert and I got together. Q. If you will answer me yes or no, we will get along quicker. You said you did not? A. No. Q. Did any one instruct Mr. Lippert as to the pressure? A. As to the pressure? Q. As to the pressure that the heads were supposed to carry. A. No, sir; not that I know of. No sir; I don't know what pressure the heads were supposed to carry." (Witness is handed a paper and asked if he knows in whose handwriting the word "Lippert" is.) "A. That is my handwriting. I presume I gave that paper to Mr. Lippert from the looks of it. That is my handwriting. Whether I gave it to Mr. Lippert or my clerk, it don't make a bit of difference, it was intended to go to Mr. Lippert. It was given to Mr. Lippert before the campaign started, I should judge about the 1st of July; something like that. That specifies preheaters. Mr. Lippert and I got those instructions up ourselves. That paper was received from nobody but myself."

The paper referred to was offered and received in evidence and marked "Plaintiffs' Exhibit A." It is of some length, and contains instructions for operating the various parts of the machinery in the factory. We quote:

"From here draw your juice into preheater 'level of juice as indicated by gauge glass.' The preheater is supposed to carry the full 70 pounds, on steam end and 12 on exhaust or supply end. I would suggest not to carry over 6 pounds on supply end; then we can regulate our pressure as required."

The witness continued:

"Before starting up the plant I called Mr. Lippert's attention to that safety valve, about its sticking. I told him the safety valve was apt to stick occasionally. We had not operated the plant except preliminarily the morning of the 15th of July, 1909. I cannot tell if the safety valve stuck that day. * * * A few minutes before the rear end of the preheater blew out I was around there talking to Mr. Lippert there manipulating the preheater, and as near as I can remember, I think I noticed a pressure of a little over 20 pounds on the steam end, and about 8 or 10 pounds on the low-pressure side. * * * I knew a boy named Wegman. His duties were to run the preheater and the evaporators. I employed him for that purpose. We ran a preliminary test of the preheaters about a month previous to that. Mr. Lippert was there at the time. It was tested more for leaks and things of that kind and to ascertain if the lines were all in good order. So far as I know it was not subjected to a water pressure test. There is a way to test the pressure as to what a cast-iron head should withstand, the hydrostatic test. That is the only way unless you put the steam pressure on. You are liable to blow up anything in testing with steam. * * * I did not, nor as far as I know did any one else, tell Mr. Lippert at what to fix the safety valves on the preheater. That safety valve (referring to diagram) was to be set by my instructions to Mr. Lippert to carry not over 25 pounds. Those instructions were given verbally. Besides that, Mr. Lippert made a special safety valve and put it in farther on the other line. I never ran the preheater. It was practically a new apparatus to me. There was no test of the preheater made while I was employed by the company. * * * On the day this accident occurred the evaporators had just been started up —Mr. Lippert started them up himself. Mr. Wegman was there and Mr. Lippert was instructing him. This was the first day and the juice had just got started there. I employed Mr. Wegman. I don't think he had had any previous experience in that line. I had not given him any instructions so far. I told him what his duties were when I employed him. We hired him for the evaporator. * * * When the accident occurred I should judge I was about 25 feet from the preheater. All that I saw was steam. Just at the time when I was coming around the corner I saw Mr. Lippert reach up and get hold of the wheel—there was a wheel that was connected through to the steam valve supplying steam to the preheater."

On cross-examination witness said:

"When I wanted information respecting the working of the machinery or the condition of it in the house I would go to Mr. Lippert. I had no technical knowledge of it at all, but resorted to Mr. Lippert for information concerning the technical points of the machinery. * * * Mr. Lippert told me that he knew all about the preheater, as he helped to build it and tested it the previous year. That was about the synopsis of it. He always said that he was afraid of the preheater, because he said some day the thing would blow up."

The deposition of John Wegman, taken on behalf of plaintiffs, was read in evidence. He deposed as follows:

"I will be 18 years of age the 9th day of August, 1911. I reside in Visalia and am now working in an automobile shop. I was working in the sugar factory at Visalia, and Mr. Sieland, the superintendent, sent me down to Corcoran. There I was introduced to Mr. Connolly, the superintendent, who sent me to Mr. Williams, the beet end foreman. Mr. Williams showed me the next day the different valves on the evaporators and preheater."

Witness described the machinery and continued:

"This preheater had valves on it. There was one valve I know to leave the steam in, that ran down towards the front end of it. Mr. Lippert had his hand on it. It is made of iron and had an iron wheel on the end. The wheel was blown off at the time of the explosion. * * * There was a safety valve on top of the preheater. I don't know what its use was. I don't know about the uses of the pipes in the preheater nor how it operated. * * * When I went to work at the sugar factory the work I was to do was to run the evaporators and the preheater. Mr. Williams he came around and gave me orders and showed me all the valves. Mr. Williams told me how to start them up and told me about the different valves and told me how much steam to carry on the evaporators. He told me to carry 5 or 6 pounds on the first evaporator and the next evaporator I don't know just exactly what he told me, nor do I remember now what he told me to carry in the preheater. I had never seen nor operated a preheater before. We had started up the preheater the morning of the day Mr. Lippert was killed. We got the evaporators hot and full of juice, and it was just getting started. When the accident occurred and Mr. Lippert was killed he had hold of the valve and I was right off to one side of them. He had hold of the valve that you turn the steam in with into the preheater. I stood there for a second, not more than a second, and then I started away, and just as I started away, the preheater blew out. While I was standing there those couple of seconds I noticed the steam gauge on the preheater. It registered about 23 pounds. I don't know who turned the steam into that preheater; Mr. Lippert had hold of the valve at that time; that is all I know. * * * Q. Did you have any conversation at all with Mr. Lippert in regard to that preheater? A. No, sir; I never had no conversation with him at all. He just come around and asked me how things were running. At the time I stood those couple second and looked at the steam gauge, I noticed the preheater steam head was leaking a little bit, a little around the bolts."

The witness stated that the mechanics had screwed up the bolts; that the bolts did not give way, but that the sheet of iron that covers the preheater blew out. At the time of the explosion he was about a foot and a half away from the preheater and received an injury on his wrist. He did not know at what pressure the safety valve was set, and did not remember what amount of steam he was supposed to carry in the pre-heater.

M. B. Kearney was recalled and gave further details of what occurred at the time of the accident, and James Mack Hale was also sworn as a witness for plaintiffs and testified to facts similar to those given by other witnesses.

R. S. Bulla, connected with beet sugar factories since 1890, part of the time as superintendent, testified on behalf of defendant. He described the operation of evaporators and preheaters, although he said the preheater at the Corcoran plant was the only one he had ever seen. He said:

> "A boy of 16 years is perfectly able to watch the system of four evaporators and one preheater and to observe the steam and juice level in each one. * * * The master mechanic is master of the mechanical department. It is his duty to regulate the steam pressure on the evaporators. By regulating the evaporators, I mean the setting of the relief valves and giving the evaporator man in charge those instructions of how far and how high the steam pressure might rise, and in regulating the reducing valves and allowing no more steam in than he considers, in his opinion as an engineer, is safe for the machine."

G. D. Kiefer, a witness for defendant, testified:

> "I reside at Corcoran, where I have lived for almost 5 years. My trade is that of a machinist. I went to work for the Corcoran sugar factory on the 4th of March, 1908. * * * Mr. Lippert was master mechanic there, in which capacity I have had conferences with him. * * * At the time of the explosion I was probably 15 or 20 feet from the preheater—within a few minutes before the explosion. I could see the preheater from where I was. Just before the explosion Mr. Lippert and I sat on the water line. We talked about the preheater. I wanted him at that time to cut it off; I told him that it was a detriment and no use to the factory. He said that the machinery was put there to run, and he was going to run it; we came back in around the preheater, and steam was coming out through the bolt holes on the south end of it. Mr. Lippert called Mr. Connolly; Mr. Connolly had been talking to Mr. Wegman whom he had at that time been showing how to run the evaporator. Mr. Connolly came over and spoke to Mr. Lippert a few words, and I walked back. * * * Then Mr. Lippert started to working with the wheel of the long valve that leads to the main steam line, as I understand it. I turned around and left the factory, or attempted to. I left because I did not think it was policy to stay around. I was afraid of it. The steam was issuing from the steam chest then. * * * The only thing Mr. Lippert said at that time was that he was afraid to start the preheater. I had talked with him before that. He said that he did not believe that the steam lines were connected up properly. He said he thought that the steam lines could be fixed so they would work—that he was going to try to run them to the preheater."

On cross-examination witness said:

> "In the position I held at the time, I was not supposed to know anything about the machinery. My trade is a machinist, but I was the yardman there, I had control of the yard. If anything happened to the machinery out there, I went to Mr. Lippert. Mr. Lippert had entire charge of the machinery part of the factory."

Upon the close of plaintiffs' case, defendant moved for a nonsuit on the grounds: (1) That no negligence on the part of defendant has been shown; (2) deceased was guilty of contributory negligence; (3) deceased assumed the risk of the employment. The court denied the motion for nonsuit.

In Shearman & Redfield on Negligence, § 60, the following rule is declared:

> "Where a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

In Rose v. Stephens, etc., Co. (C. C.) 11 Fed. 438, it is said:

> "In the present case the boiler which exploded was in the control of the employés of the defendant. As boilers do not usually explode when they are in a safe condition and are properly managed, the inference that this boiler was not in a safe condition, or was not properly managed, was justifiable."

It was further said that, while the rule is more frequently applied in cases against carriers of passengers than in any other class, there is no foundation for limiting the rule to carriers. "The presumption," said the court, "originates from the nature of the act, and not from the nature of the relations between the parties."

[1, 2] The cases are industriously cited and considered in Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146. Referring to the case of Young v. Bransford, 12 Lea (Tenn.) 232, which supports a contrary doctrine, attention

is called to the following language in the reported opinion of that case:

> "At the same time the fact that there was an explosion, which is not an ordinary incident of the use of a steam boiler, ought to have some weight, inasmuch as it may be out of the power of the aggrieved party in some instances to prove any more. The reasonable rule would seem to be that laid down by Judge Wallace: 'That from the mere fact of an explosion it is competent for the jury to infer, as a proposition of fact, that there was some negligence in the management of the boiler, or some defect in its condition.'"

We are satisfied that this is a case where the doctrine of res ipsa loquitur is applicable, and plaintiffs are not precluded from relying upon it because they charged specific omissions of duties or acts of negligence. This latter proposition is well supported in Cassady v. Old Colony Street Railway Co., 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285, where it was said:

> "The defendant also contends that even if originally the doctrine would have been applicable, the plaintiff had lost or waived her rights under that doctrine [res ipsa loquitur] because, instead of resting her case solely upon it, she undertook to go further and show particularly the cause of the accident. This position is not tenable. It is true that where the evidence shows the precise cause of the accident, as in Winship v. New York, N. H. & H. R. Co., 170 Mass. 464, 49 N. E. 647, and similar cases, there is, of course, no room for the application of the doctrine of presumption. The real cause being shown, there is no occasion to inquire as to what the presumption would have been if it had not been shown. But if at the close of the evidence the cause does not clearly appear, or if there is a dispute as to what it is, then it is open to the plaintiff to argue upon the whole evidence, and the jury are justified in relying upon a presumption, unless they are satisfied that the cause has been shown to be inconsistent with it. An unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff from relying upon the presumptions applicable to it."

Plaintiffs may therefore rely on the presumption of defendant's negligence, although they endeavored, as did defendant, "to show particularly the cause of the accident."

Deceased was shown to have been competent "to be there as the engineer, to take charge of the mechanical part of the house," for which purpose he was employed, as a witness testified. He had a general knowledge of the plant and the machinery there in use, for he had helped to install some of it. It was not, however, a part of his duty personally to operate the different machines of the plant, or any one of them. Other persons were in personal charge of their operation. The evaporators, including the preheater, the explosion of which caused the death of Lippert, were, by Superintendent Connolly, placed in charge of the boy, Wegman, less than 16 years old. Wegman was told by Connolly to report to Williams, the beet foreman, for instructions how to run the preheater, and Wegman testified that no instructions were given him by deceased, and that all he had were given by Williams to whom Superintendent Connolly sent him. He testified:

> "Williams, he came around and gave me orders and showed me all the valves. Mr. Williams told me how to start them up and told me about the different valves and told me how much steam to carry on the evaporators."

Wegman could not remember what his instructions were as to the pressure he was to carry in the preheater. This was quite an important fact for Wegman to know; and, as he had no knowledge except as he got it from Williams and as Connolly sent him to Williams, it is fair to presume that Williams had the information given in the superintendent's written instruction that "the preheater is supposed to carry the full 70 pounds on steam end," and so instructed Wegman. Connolly testified that there were six copies made of these instructions, and they show on their face that they were intended for the information of the foremen of the different departments of the plant. Wegman testified that he "had never seen nor operated a preheater before." Witness Bulla testified that:

> "A boy of 16 years is perfectly able to watch the system of four evaporators and one preheater and to observe the steam and juice level to each one."

[3] The jury were informed in great detail by witnesses as to the component parts of the plant and their several offices, and illustrative diagrams were used to aid in the explanation. We think, with the information placed before them, they were as well qualified to form an opinion of Wegman's competency as was the witness Bulla. How far the immaturity in years or the ignorance of Wegman contributed to the explosion of the boiler was a matter for the jury to determine under all the facts and circumstances. He testified that a second or two before the explosion he had been standing near the preheater, and noticed that the steam gauge registered 23 pounds. Connolly testified that a few minutes before the explosion he was around there and "noticed a pressure of a little over 20 pounds on the steam end." Witness Kearney, a steam-fitter, employed by defendant, was sent by Lippert to tighten up some bolts around the steam head that were leaking. He gave, in his testimony, a very complete description of the preheater. He testified that Lippert came to where he was working and told him to take his helper and go to the preheater as it was leaking slightly; that he went to the boiler with his helper; that Wegman was there, whose duty was "to see that the steam gauges were kept at a certain stage"; that Williams was there also; that he, the witness, and his helper tightened up the bolts where the leak mostly was and after tightening up the bolts he "looked up at the steam gauge and saw it registered in the neighborhood of 47 pounds"; he "turned to Williams (who was Wegman's instructor), the beet foreman, and said: 'How much steam do you generally carry in that preheater?' He looked up at the gauge and

said: 'That's right.'" Thereupon Kearney and his helper left, Kearney remarking to his helper: "Pack up your tools and let's get out of here." He testified that they had walked over to the machine shop where they had been working, a distance of 50 or 75 feet, when the explosion occurred. He immediately returned and found Lippert in the pit close to the boiler where he died in about 10 minutes. Lippert was not at the boiler when Kearney was tightening the bolts and when Kearney spoke to Williams, but he seems to have returned to the heater during these few seconds, and about all we can learn from the testimony is, as testified by Wegman:

> "He (Lippert) had hold of the valve that you turn the steam in with into the preheater."

Williams did not testify at the trial. Wegman's testimony was that the steam gauge read 23 pounds, but against this is the testimony of Kearney, a steam-fitter, who had called Williams' attention to the fact that the gauge showed 47 pounds, and seems to have hastened to get away, although Williams replied: "That's right." The machinery had been tested before "starting up," and apparently all the parts were in working order. Lippert did not live to explain what he intended to do when he took hold of the valve that controlled the intake of steam to the heater. Under the circumstances the only reasonable conjecture that can be indulged is that with steam escaping around the bolt heads and somewhat around the edges of the boiler head, as the testimony showed was occurring, he would naturally endeavor to shut off the pressure. But it was too late. At that second, according to Wegman's testimony, the explosion occurred.

[4] We think the jury were justified from the evidence in finding that Williams and Wegman allowed the steam pressure to reach 47 pounds, which was 7 pounds more than the maximum "working pressure" which the maker of the preheater had stipulated it was to stand. Superintendent Connolly admitted that he gave the written instructions, which allowed a pressure of 70 pounds. In his testimony he seems to have sought to make Lippert equally responsible for the instructions. He did not testify, however, that Lippert knew anything about the contract between defendant and the maker of the boiler; nor did he testify that Lippert had anything to do with formulating that part of the instructions relating to the pressure. He at first testified that no instructions were given to Lippert upon this point. When confronted with the written instructions he admitted that they were in his handwriting and were given to Lippert before the campaign started, and added: "Mr. Lippert and I got those instructions up ourselves." Lippert knowing nothing of the specifications made by the boiler maker, and Connolly knowing what they were, it is not at all likely that Lippert fixed or had anything to do in stating the pressure which the preheater would withstand. Connolly testified that he called Lippert's attention to the safety valve, that it "was apt to stick occasionally," but he did not know that it stuck that day, and there was no evidence that it was out of order. He testified that:

> "The safety valve (referring to diagram) was to be set by my instructions to Mr. Lippert to carry not over 25 pounds. Those instructions were given verbally."

He also testified that Lippert instructed Wegman. Wegman testified that all the instructions he received were given by Williams, to whom Connolly sent him.

[5] We do not think the jury were compelled to accept at its face value the testimony of Connolly as to verbal instructions or conversations with Lippert, who being dead could not explain or refute them. Connolly may not intentionally have misstated any fact, but his memory may have been at fault. Evidence of alleged declarations of deceased persons is always more or less unsatisfactory and the unsupported testimony of a single person as to a conversation between himself and a deceased person is regarded as the weakest of all kinds of evidence. Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87; Austin v. Wilcoxson, 149 Cal. 24, 84 Pac. 417.

[6] Connolly's connection with the accident and the responsibility resting upon him in a greater or less degree for the unfortunate accident justifies classing him as a hostile witness, although circumstances compelled plaintiffs to call him as a witness to establish certain facts.

[7] Recurring to the grounds for a reversal of the judgment, as stated by defendant in its brief, it may be conceded as proven that deceased "was intrusted with the oversight of all the machinery of the sugar house," but it does not follow that "he assumed all the risks attending his employment." There was no evidence that the preheater was out of repair, or that there was any imperfection in it calling for repair or complaint to defendant, or that it was not in thorough running condition. In fact, it was not an indispensable part of the plant, for Connolly testified that defendant dispensed with it altogether after the accident. No reasonable cause for the explosion can be assigned, based upon any evidence, other than it was caused by an excessive pressure of steam to which the preheater was subjected by the employé of defendant, whose duty, under the authority of defendant, it was, to operate this machine. There was evidence that this employé was performing this duty under the immediate instructions of Williams, and not under the direction of Lippert at the time the explosion occurred. If Williams was governed by or had in mind the written instructions, which we think must be presumed, he may not have been at fault, but surely defendant was in giving them, and the responsibility thus passed to defendant for the accident.

[8] We can see no ground for sustaining defendant's contention that the explosion was caused by Lippert's contributory negligence. He, too, was authorized to assume that the preheater would withstand 70 pounds pressure, nearly double its actual maximum resisting capacity. Considering all the facts and circumstances, the primary cause of the accident seems more reasonably traceable to the erroneous instructions given by the superintendent upon a very vital matter than to any other cause, and for this defendant alone is responsible. But if from all the evidence no reasonable explanation of the accident, acquitting defendant of blame, was shown, the verdict and judgment may rest upon the presumption of defendant's negligence.

[9-11] In its opening brief the specifications of errors called to our attention are, in substance, that the court erred in not granting defendant's motion for nonsuit on the ground of the insufficiency of the evidence and the refusal of the court to instruct the jury to return a verdict for defendant. Also on the ground that the court permitted plaintiffs to amend their complaint at the conclusion of the evidence for plaintiffs by charging defendant with culpability in the selection of an incapable employé, to wit, John Wegman. There is also a general specification of the insufficiency of the evidence in certain particulars. We do not think the court would have been justified in granting the motion for a nonsuit nor in directing a verdict for defendant. There was sufficient evidence to sustain the verdict and judgment. In allowing plaintiffs to amend their complaint, the court was exercising a discretion confided to it, the abuse of which alone could justify reversal. The ruling of the court did not carry with it an implication that Wegman was in fact incompetent to perform the duties assigned to him. The implication was that there was sufficient support in the evidence on the point to go to the jury for determination.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

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33 Cal. App. 233

ROLLERI v. ROLLERI. (Civ. 2065.)

(District Court of Appeal, First District, California. March 15, 1917.)

DIVORCE 🔑307—SUPPORT OF CHILD—ALLOWANCE—DISCRETION OF COURT.

Where husband and wife, pending the husband's suit for divorce, agreed that the wife should take custody of their minor child and support him, and should receive in full of her claims to the husband's separate property the sum of $2,000, and the husband recovered a judgment for divorce, and the court embodied in the judgment an order in accordance with the agreement, and subsequently the wife moved for an allowance for support of the child, and it appeared that she still had on hand between $1,500 and $2,000 of the $2,000 which she had received from her husband, that the money was available for the support of the child, and that the husband on his part had fully performed all conditions of the agreement, the action of the court in denying the wife's motion was not an abuse of discretion.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 800.]

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action for divorce by Domenico Rolleri against Rosie Rolleri. From orders denying defendant's motion subsequent to divorce for an allowance for support of her child, she appeals. Affirmed.

W. R. Biaggi, of San Jose, for appellant. B. A. Herrington and James L. Atteridge, both of San Jose, for respondent.

PER CURIAM. The plaintiff sued the defendant for a divorce. Pending suit the parties came together and entered into an arrangement with reference to their property rights. The property, whatever there was, was the separate property of the husband. They entered into an agreement by which the wife—the defendant—was to take the custody of the minor child (whose interests are now sought to be advanced) and was to support him, and was to receive in consideration thereof and in full of all her claims to the property of the plaintiff the sum of $2,000. The plaintiff recovered a judgment against his wife for divorce, and the court embodied in that judgment an order in accordance with the aforesaid agreement of the parties. Later on the defendant in the case moved the court for an allowance for the support of the child. Upon the hearing of that motion it appeared that she still had on hand something between $1,500 and $2,000 of the sum of money which she had received in accordance with the agreement with her husband, and that that money was in a form to be available for the support of the child—whose support she had undertaken at the time she received it. It appeared on the other hand that the plaintiff on his part had fully performed all the conditions of that agreement. The court denied the motion, and the only question before us is as to whether it was an abuse of discretion for the court so to do.

We are satisfied from the record that there was no such abuse of discretion. The orders appealed from are therefore affirmed.

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33 Cal. App. 234

VAN TASSELL v. HEIDT et al. (Civ. 2038.)

(District Court of Appeal, First District, California. March 15, 1917.)

HUSBAND AND WIFE 🔑333(9)—ALIENATION OF AFFECTIONS — INSUFFICIENCY OF EVIDENCE.

In an action by a wife against the parents of a woman for having alienated from his wife the affections of a man who had sought illicitly the regard of the daughter, where the evidence does not show that defendants were ever guilty of conduct tending to alienate the affections of the husband, judgment for plaintiff against them will be reversed.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1124.]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Myrtle K. Van Tassell against Ella Heidt, Laura Heidt, administratrix, and others. From a judgment for plaintiff, Laura Heidt, and others appeal. Reversed.

Chas. M. Cassin and James L. Atteridge, both of San Jose, and W. M. Gardner, of Santa Cruz, for appellants. John H. Leonard and W. P. Netherton, both of Santa Cruz, for respondent.

PER CURIAM. From the examination which the court has made of the entire record in this case, and dealing with the matter of the insufficiency of the evidence to justify the decision of the court, we are satisfied that the evidence is wholly insufficient to warrant the findings and decision of the trial court. This being an action against the parents of a young woman, who alone have appealed, for having alienated from his wife the affections of a man who had illicitly sought the regard of said daughter, the evidence does not show that the defendants in the action were ever guilty of conduct tending to alienate the affections of the husband from his wife so as to subject them to an action for damages. In other words, there is no sufficient evidence to support the findings and judgment of the trial court in so far as the appellants, the father and mother, are concerned. That being so, and without reference to the question of the error which the court made in the admission of hearsay evidence, which seems to have been repeated, but which may not have been sufficiently objected to, we think that the judgment against the appellants ought to be reversed; and it is so ordered.

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33 Cal. App. 235

L. & E. EMANUEL, Inc., v. OBERLIN BROS. CO. (Civ. 2018.)

(District Court of Appeal, First District, California. March 15, 1917.)

VENUE ⚷21—CHANGE OF VENUE—PLACE OF DEFENDANT'S RESIDENCE.

Where a contract was made in Fresno county, and to be performed there, and defendant's principal place of business was in that county, defendant was entitled to have the case tried therein, though a small part of the work was to be done and delivered in San Francisco, but plaintiff was to install such work in defendant's store in Fresno.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 34.]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by the L. & E. Emanuel, Incorporated, against the Oberlin Bros. Company. From an order denying defendant's motion for change of place of trial, defendant appeals. Reversed, with directions.

Everts & Ewing, of Fresno, for appellant. Milton L. Schmitt, of San Francisco, for respondent.

PER CURIAM. This is an appeal by defendant from an order denying its motion for a change of the place of trial.

From the record it appears that the contract involved in the action, entered into by correspondence, was made in Fresno county, and was to be performed there. It also appears that the defendant's principal place of business is in that county. Under familiar rules, therefore, the defendant was entitled to have the case tried in the county of Fresno. It is true that a small part of the work to be done by the plaintiff, under said contract, consisted in the alteration of some show cases, which when so altered were to be delivered for shipment to Fresno f. o. b. San Francisco; but these cases and other fixtures to be manufactured by plaintiff in San Francisco were to be installed by it in the defendant's store in Fresno, so that this part of the contract like the remainder must be regarded as performable in Fresno county.

The order is reversed, and the court is directed to grant defendant's demand that the place of trial of the action be changed from the city and county of San Francisco to the county of Fresno.

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33 Cal. App. 237

FARIAS v. FARIAS. (Civ. 2026.)

(District Court of Appeal, First District, California. March 15, 1917.)

JUDGMENT ⚷159—VACATION OF DEFAULT—EXCUSABLE NEGLECT—SUFFICIENCY OF APPLICATION.

Motion under Code Civ. Proc. § 473, allowing vacation of default where suffered through excusable neglect, to set aside default judgment in action for divorce, and filed five months after default, merely charging that defendant's attorney was away and neglected to enter appearance or move for further time, and not supported by attorney's affidavit, and in view of a letter written by attorney to client indicating that whatever steps were taken were to be merely for delay, was insufficient to show excusable neglect under the statute.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 310, 312, 313.]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Ada Farias against William Farias. Defendant appeals from order denying motion to vacate default judgment. Affirmed.

George L. Keefer and Ben W. Utter, both of Los Angeles, for appellant. George Appell, of San Francisco, for respondent.

PER CURIAM. This is an appeal from an order denying a motion to vacate a judgment by default in an action for divorce.

The action was commenced by the plaintiff and respondent against the defendant and appellant in the city and county of San Francisco on October 27, 1913. The defendant was served with summons in the county of Los Angeles on November 19, 1913. Within a few days thereafter he wrote to an attorney in San Francisco named Montagu, sending him $15 to be applied on account of court costs and attorney's fees, and directing him to appear for defendant in the action. No appearance was filed, and no application for an extension of time within which to appear was made to either the court or counsel for plaintiff, and the time for making such appearance expired on December 19, 1913. The default of defendant was entered on the 17th of January, 1914, and an interlocutory judgment entered shortly thereafter. The appellant made no move to set aside said default nor for relief from said judgment until July 3, 1914, when he appeared and made a motion to set aside said default under section 473 of the Code of Civil Procedure, which said motion was predicated upon the affidavit of said defendant to the effect:

> That the reason why no appearance was filed by said defendant prior to the entry of said default was that "said Montagu had occasion to go out of the city and county of San Francisco for a few days, and the said Montagu went out of said city, and was absent about the time it was necessary to file a demurrer in said action to prevent a default being entered against defendant; that when said Montagu was out of the city of San Francisco attending to other business he inadvertently overlooked the said case of defendant, and failed to file a demurrer or answer, and failed to get an extension of time within which to appear in said action. * * * Said attorney was so engrossed with other business out of the city of San Francisco that he overlooked the case and failed to appear."

No affidavit is presented from Montagu in support of defendant's said motion; and it is very evident from the foregoing quotations from his affidavit that the matters which are therein stated are purely of hearsay, and therefore of little, if any, value as evidence, and are entirely insufficient to make out a case of excusable neglect under section 473 of the Code of Civil Procedure.

In addition to this there was evidence before the trial court in the form of a letter which was written by Montagu to the defendant prior to the time when his default for nonappearance in the case could be entered, indicating that whatever steps were to be taken in the action were to be merely for delay, or, in the language of said attorney, "to bother and stall her if emergency requires it."

With the foregoing facts before it, it is clear that the trial court committed no abuse of discretion in refusing to set aside the judgment upon the defendant's tardy and insufficiently supported motion for such an order. We find, therefore, no merit in this appeal.

Order affirmed.

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33 Cal. App. 228

PEOPLE v. SEARLE. (Cr. 655.)

(District Court of Appeal, First District, California. March 15, 1917. Rehearing Denied by Supreme Court, May 10, 1917.)

1. HOMICIDE 🔑255(1) — EVIDENCE—SUFFICIENCY—STATUTE—"MANSLAUGHTER."

In view of Pen. Code, § 192, declaring that "manslaughter" includes the unlawful killing of a human being without malice, by a lawful act which might produce death, or without due caution, in a homicide case in which defendant admitted that about the time deceased was wounded a loaded rifle which he was handling was accidentally discharged, evidence *held* to sustain a jury's finding that the homicide resulted from defendant's failure to exercise due care and circumspection in discharging the fatal shot, and that his conduct amounted to criminal negligence, rendering him guilty of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 539.

For other definitions, see Words and Phrases, First and Second Series, Manslaughter.]

2. HOMICIDE 🔑228(1) — EVIDENCE—SUFFICIENCY—CORPUS DELICTI.

Evidence that deceased shortly after a shot was fired was mortally wounded by a bullet under circumstances which would exclude any inference that the wound was self-inflicted was direct evidence of death and cogent and irresistible evidence of violence sufficient to prove the corpus delicti.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 471.]

3. CRIMINAL LAW 🔑406(1)—EVIDENCE—ADMISSIONS AND CONFESSIONS—ADMISSIBILITY.

Where there was ample evidence tending to show that a crime had been committed by some one, admissions and confessions of the defendant made voluntarily were properly received in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894, 895.]

4. HOMICIDE 🔑151(1)—EVIDENCE—BURDEN OF PROOF.

As every killing is unlawful unless expressly excused or justified by law, upon proof that the killing was done by defendant, and nothing further, the presumption of law is that it was malicious and an act of murder, and it is incumbent upon the defendant to prove circumstances in mitigation, excuse, or justification unless they arise out of the evidence produced against him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 276.]

5. CRIMINAL LAW 🔑636(5)—JURY'S VIEW OF PREMISES—WAIVER OF OBJECTION.

While defendant had the right to be present when the premises were being visited by the jury, he could waive this right, and did do so when it was expressly stipulated by counsel that no one need accompany the jury except the sheriff.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1474, 2120.]

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Frank Searle was convicted of manslaughter, and from the judgment and from an order denying his motion for a new trial, he appeals. Affirmed.

A. B. Tinning, of Martinez, and T. H. Delap, of Richmond, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. The defendant was charged in an information by the district attorney of the county of Contra Costa with the crime of murder. He was tried, convicted of manslaughter, and sentenced to imprisonment in the state prison at San Quentin for a term of eight years. The present appeal is from the judgment and from an order denying defendant's motion for a new trial.

Appellant presents but three grounds of appeal, viz.: Insufficiency of the evidence to support the verdict; that the corpus delicti was not proved independently of the extrajudicial admissions of the defendant; and that the view by the jury of the scene of the crime in the absence of the defendant was a violation of his constitutional right.

Dealing with the first point urged, the defendant is alleged to have shot one Patrick Conroy on June 4, 1916. The testimony shows that the deceased was found that afternoon about 5 o'clock mortally wounded on a ranch in the county mentioned. He and one Joe Hickey, two itinerant laborers, were friends and companions, and had been such for a period of eight years. On the afternoon of said June 4th, walking along the railroad track in the vicinity, they came to a small shed on a ranch belonging to one I. T. Coe, which they selected as their resting place for the night. They unrolled their blankets, and Conroy went to get some water at a pump about 400 feet away from the shed. About 5 minutes thereafter Hickey heard a shot. He paid little attention to it, but a few minutes later, Conroy not having returned, he proceeded to the pump to look for him, and there found Conroy prone upon the ground with a bullet wound in his head. He immediately ran to the county road close by to summon help, and there met Coe and the defendant. First aid was given to Conroy, and the defendant was sent by Coe, by whom he was employed, to a town a mile away for medical aid. The defendant was a stranger in the county, and at this time had been employed by Coe for about two weeks only. He slept in a cabin some 200 feet from the pump near which the body of the deceased was found. About a week before the shooting Coe had loaned the defendant a loaded Winchester rifle. About half an hour before Conroy was shot the defendant had left Coe, with whom he had been working repairing a fence, to do the evening chores. Later he returned. During his absence Coe heard the report of a gun, and it was a few minutes after defendant's return to where Coe was still working on the fence that Hickey arrived with the news that his "partner" had been shot. Shortly after the defendant had been dispatched for a doctor, Hickey, who was assisting Coe in his ministrations to the wounded man, caught a glimpse of a man going around the cabin occupied by the defendant. Early the next morning Conroy died. When Hickey announced that his companion had been shot, the defendant (who, it appears, had taken that day several drinks of intoxicating liquor) volunteered the statement that some men or boys had been shooting rabbits in the neighborhood, and that he had heard several gunshots that afternoon, seeking perhaps to convey the inference that Conroy had been shot through the carelessness of hunters. Suspicion attached to the defendant, and he was put under arrest that night. At first he stoutly denied that he had discharged any gun, or that he had hidden a gun, or even that Coe had loaned him one. Later, however, he admitted that a loaded rifle had been borrowed by him from Coe; that at about the time the deceased was wounded while handling the rifle it was accidentally discharged; that while on his way for the doctor he went to his cabin, took the rifle, and hid it where it was subsequently, and prior to his confession, found by an officer. The defendant offered himself as a witness at the trial and in the course of his testimony said, "Of course, I could not tell whether I shot him or not."

[1] The evidence is sufficient to warrant the jury in finding that the defendant killed the deceased. It does not, however, show that the killing was intentional, but it does sustain the view, which doubtless was adopted by the jury, that the homicide resulted from failure on his part to exercise due care and circumspection in discharging the fatal shot; that his conduct amounted to criminal negligence, rendering him guilty of manslaughter.

Section 192 of the Penal Code declares:

> "Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds: * * * 2. Involuntary * * * in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

> "An unintentional homicide committed through the negligent handling of a firearm in a way indicating a reckless disregard of life is manslaughter. It is negligence to point a firearm at another without examining to see whether or not it is loaded, or to handle or use it in a place where a discharge is likely to injure another, as in a highway." Michie on Homicide, vol. 1, p. 253.

So, where parties were playing or skylarking and defendant recklessly handled his gun. Murphy v. Commonwealth (Ky.) 22 S. W. 649; Henderson v. State, 98 Ala. 35, 13 South. 146. In the first-mentioned case the fact that the shot was caused by defendant's finger accidentally slipping on the trigger was held to be an insufficient excuse.

[2, 3] Equally without merit is the defendant's claim that the corpus delicti was not proven independently of the extrajudicial statements of the defendant. The deceased shortly after a shot was fired was found mortally wounded by a bullet under circumstances that exclude any inference that the wound was self-inflicted. We have therefore direct evidence of death, and cogent and irresistible evidence of violence independent of the evidence of the defendant. Here, as in the case of the People v. Carlson, 8 Cal. App. 730, 732, 97 Pac. 827, there was ample evidence tending to show that a crime had been committed by some one, and therefore the admissions and confessions of defendant made voluntarily were properly received in evidence.

[4] Every killing is unlawful unless expressly excused or justified by law. The homicide being shown, it is incumbent upon the defendant to prove circumstances in mitigation, excuse, or justification unless they arise out of the evidence produced against him. The mere fact of the killing having been proved to have been done by the defendant, and nothing further, the presumption of law is that it was malicious and an act of murder. People v. Knapp, 71 Cal. 1, 11 Pac. 793; People v. Bush, 71 Cal. 602, 12 Pac. 781; People v. March, 6 Cal. 543; People v. Roberts, 6 Cal. 214.

[5] Coming now finally to the point that it was prejudicial error to allow the jury, in the absence of the defendant, to review the scene of the alleged crime, we have no doubt that the defendant had a right to be present when the premises were being visited by the jury, but it is settled that he may waive this right (People v. White, 20 Cal. App. 156, 128 Pac. 417), and in this case it was expressly stipulated by counsel that no one need accompany the jury except the sheriff.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

(175 Cal. 16)

LEE et al. v. COLQUHOUN. (S. F. 7243.)

(Supreme Court of California. April 26, 1917.)

JUDGMENT 🔑460(6) — SUIT TO SET ASIDE—COMPLAINT.

The complaint to set aside a judgment as obtained by fraud and without process must show a defense on the merits, and ability to present proof thereof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 885.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Henry E. Lee and another against W. W. Colquhoun. From an adverse judgment, plaintiffs appeal. Affirmed.

H. L. Clayberg, Clark Clement, and Clayberg & Whitmore, all of San Francisco, for appellants. Walter Slack and Joseph K Hutchinson, both of San Francisco, for respondent.

SLOSS, J. The plaintiffs appeal from a judgment entered against them pursuant to an order sustaining a demurrer to their first amended complaint.

The action was one in equity to set aside a money judgment obtained by the defendant herein against the plaintiffs and one Pack, individually and as copartners. It will suffice for present purposes to say that by their complaint the plaintiffs sought to set up, as grounds for equitable relief, that there had not been legal service of summons upon them, and that the judgment had been obtained by fraud. Without examining the sufficiency of the averments relied on, we may assume that the plaintiffs stated facts sufficient to support their claims in these respects. But the complaint was totally devoid of any averment to the effect that the plaintiffs herein ever had or now have a meritorious defense to the action which resulted in the judgment of which they complain, or that such judgment was not, in fact, just. Even though a judgment may have been obtained through fraud, or without service of process, a court of equity will not grant relief against it in favor of a party who "claims only the barren right of being permitted to defend against a claim to which he had no defense." Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639. In an action to set aside a judgment for these grounds, the plaintiff must show:

"That he has a defense to the original action upon the merits, and that he is able to present to the court the evidence constituting that defense. It is not sufficient to merely allege these matters as ultimate facts, or to aver them in the form of an affidavit of merits, but the facts themselves * * * must be incorporated into his complaint, so that the court may determine that if his allegations are admitted by the other party, the plaintiff would have been entitled to a judgment in his favor in the original action." Whitney v. Kelley, 94 Cal. 153, 29 Pac. 624, 15 L. R. A. 813, 28 Am. St. Rep. 106.

This rule is so well established that we content ourselves with referring to Bell v. Thompson, 147 Cal. 689, 82 Pac. 327, and to the very recent case of Matson v. Batto, 161 Pac. 1144, where many of the earlier decisions are cited.

The demurrer was therefore properly sustained upon the ground of want of facts sufficient to constitute a cause of action, without regard to the validity of any of the other grounds specified. Plaintiffs do not complain of the court's failure to grant them leave to amend, nor do they intimate that they could have amended their complaint so as to obviate the defect.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

(175 Cal. 13)

KINARD v. JORDAN et al. (S. F. 7287.)

(Supreme Court of California. April 23, 1917.)

1. DISMISSAL AND NONSUIT 🔑60(3) — FAILURE TO PROSECUTE—EFFECT OF APPEAL.

Code Civ. Proc. § 583, providing for dismissal where plaintiff fails for more than two years after answer filed to bring the action to trial, is not operative in a case where an appeal has been taken from a judgment, although pending such appeal the trial court attempted to vacate the judgment for plaintiff.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 142.]

2. APPEAL AND ERROR 🔑439—EFFECT OF APPEAL—POWER OF TRIAL COURT.

An appeal taken by defendants removed the case from the jurisdiction of the trial court, so that it had no power to set aside the judgment pending the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2197.]

Department 1. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by C. E. Kinard against William H. Jordan and others. From a judgment dismissing the action, plaintiff appeals. Reversed.

C. E. Kinard, in pro. per. Crittenden Thornton, of San Francisco, for respondents.

SHAW, J. This is an appeal from a final order or judgment dismissing the action. The order dismissing the action was made on September 14, 1914, in pursuance of a motion by the defendants, under section 583 of the Code of Civil Procedure, to dismiss the action, because the plaintiff had failed for more than two years after answer filed to bring the action to trial. A brief history of the case is necessary to explain the grounds of the appeal.

The action was begun on March 24, 1906. Prior to 1909 a judgment of dismissal was entered, because of the failure of the plaintiff to file an amended complaint in accordance with the orders of the court. The plaintiff appealed and the judgment was reversed on March 11, 1909, the decision holding that the original complaint stated a cause of action for the specific performance of a contract by Huntington, one of the defendants, to transfer to the plaintiff's assignor certain shares of corporate stock, the other defendants being made parties solely because they were trustees for Huntington or assignees with notice. Kinard v. Jordan, 10 Cal. App. 219, 101 Pac. 696. Thereafter the defendants, except Huntington, filed an amended answer to the complaint. Huntington failed to answer. On October 24, 1911, the trial of the case was set for December 12, 1911. On December 12th it was continued for trial until December 15, 1911. Notwithstanding these orders, a judgment was rendered on November 8, 1911, purporting to be a judgment in favor of the plaintiff against all of the defendants, including Huntington, his default having been previously entered. From this judgment an appeal was taken by Huntington on December 14, 1911, and a separate appeal was taken by the other defendants on December 16, 1911. No transcript was filed by the defendants on the last-mentioned appeal, and that appeal is still pending. On the separate appeal of Huntington the judgment, as against him, was reversed. This decision was rendered on March 9, 1914. Kinard v. Jordan, 167 Cal. 333, 139 Pac. 797. We proceed to consider the judgment of dismissal made on September 14, 1914.

[1] The portion of section 583 relied on provides that the court may in its discretion dismiss an action for want of prosecution, on motion of the defendant, if the plaintiff "has failed for two years after answer filed to bring such action to trial." The answer of the defendants, other than Huntington, was filed before the rendition of the judgment of November 8, 1911. That judgment, however erroneous it may be, purported to determine the case. The aforesaid appeals taken therefrom suspended all power of the court below to proceed, and necessarily took the case out of the operation of section 583 while the appeals remained pending. The motion to dismiss was made within less than six months after the decision on the appeal of Huntington became final. With respect to the other defendants their appeal is still pending, and no proceedings could be had looking toward the trial as to them until that appeal was disposed of. If nothing more appeared it is clear that the motion to dismiss was not well taken.

The motion purports to be made by all the defendants, including Huntington. So far as he is concerned, it is clearly erroneous. He has never filed an answer, and his default was entered for not answering. The judgment against him was reversed, but the default still stands. The reversal was based on grounds which do not affect the validity of the default. As to him, the ground on which the motion was made did not exist. The other defendants insist that the order was properly made because of proceedings in the court below after they had appealed from the judgment of November 8, 1911, against them. The record shows that a few weeks after the filing of their notice of appeal from the judgment of November 8, 1911, the following order was made:

> "In this case upon the court's own motion, plaintiff in person, and counsel for defendants consenting thereto: It is hereby ordered that the judgment heretofore entered in favor of the plaintiff and against the defendants, other than the defendant F. A. Huntington, be and the same is hereby set aside."

[2] The claim is that this order vacated the judgment which was the subject of the appeal previously taken, set the case at large, and made it the duty of the plaintiff to proceed with due diligence to bring the case to trial. The appeal taken by these defendants removed the case from the jurisdiction of the superior court. It was no longer pending therein for the purpose of amending the judgment or of vacating it for errors apparent on the face of the record. The consent of the parties could not reinvest the court with jurisdiction of that subject-matter. The lower court, therefore, had no power to make the order, and it must be deemed a nullity. Parkside, etc., Co. v. MacDonald, 167 Cal. 346, 139 Pac. 805; Stewart v. Taylor, 68 Cal. 5, 8 Pac. 605. It follows that the judgment was not vacated, the appeal is still pending, the order did not revive the duty of the plaintiff to bring the case to trial, and did not again set in motion the time prescribed by section 583.

The judgment of dismissal is reversed.

We concur: SLOSS, J.; LAWLOR, J.

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175 Cal. 6

SANTA BARBARA COUNTY v. MORE et al.

(L. A. 3756.)

(Supreme Court of California. April 23, 1917.)

1. Highways ⚷83 — Abutting Owners — Destroying Trees.

The abutting owner is deprived of right to destroy shade and ornamental trees on the side of a highway, though planted by him, and though he owns the fee to the center of the road by Pol. Code, §§ 2633, 2742, 4041, subd. 39, Code Civ. Proc. § 733, and St. 1909, p. 1129, regulatory thereof.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 292, 293.]

2. CONSTITUTIONAL LAW ⟹292 — HIGHWAYS ⟹83 — TAKING PROPERTY WITHOUT DUE PROCESS.

Statutes regulatory of when and under what circumstances trees on a highway subserving useful as well as ornamental purposes may be destroyed do not take property of the abutting owner without due process.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 807; Highways, Cent. Dig. §§ 292, 293.]

3. WOODS AND FORESTS ⟹11 — PENALTIES — RECOVERY.

The penalty of $100 per tree for maliciously destroying shade trees on a highway may not be recovered under a complaint merely alleging damages.

Department 1. Appeal from Superior Court, Santa Barbara County; Geo. E. Church, Judge.

Action by the County of Santa Barbara against John F. More and others. From the judgment, both parties appeal. Affirmed.

E. W. Squier and Fred H. Schauer, both of Santa Barbara, for plaintiff. Wm. G. Griffith, of Santa Barbara, for defendants.

PER CURIAM. Hollister avenue is the principal highway leading from the city of Santa Barbara in the county of the same name, to the west and north. Defendant John F. More owns a 400-acre tract of land fronting on the southerly line of this highway. The highway boundaries are and for long have been defined by substantial fences on either side. More than 20 years ago, More planted ornamental trees along this highway between the roadway proper and his fence. He owns the fee of the land to the center line of the highway. These trees are native black walnuts, poplars, silver leaf maples, and catalpas. They have grown to be from 1 foot to 3 feet in diameter, and some of them have reached a height of 70 feet. They afforded with other trees a shaded avenue, declared to be one of the most beautiful in the state. While these trees were thus growing, defendant More planted English walnuts upon his 400 acres. The row or rows nearest to the ornamental trees upon the highway suffered from their proximity to them. Some of the ornamental trees thrust out lateral roots to a distance equal to their height. Suckers sprang up from these roots, the soil was impoverished, the moisture from it withdrawn, and the walnuts on these nearby trees were of inferior size and quality. Defendant More upon more than one occasion sought permission of the supervisors of the county to destroy these ornamental trees, offering to substitute therefor some kind of tree, mentioning palm trees, which thrust down a deep tap root and which would not send out lateral roots to the injury of his nut orchard. The board of supervisors of Santa Barbara county delayed action upon these petitions or requests, and they were withdrawn. Then, on the 11th day of April, 1911, the defendant cut down and destroyed six of these trees upon the highway in front of his land. He was notified by the district attorney of the county to cease this work of destruction, and he promised to do so, but a few days thereafter on Sunday, in violation of his promise, he employed a force of men in an effort to destroy all of the trees before he could be restrained from so doing by process of law. Twenty more trees were thus destroyed before the work was arrested by the authorities. Thereupon the county of Santa Barbara brought this action, setting forth these matters, averring that the destruction was maliciously done, and that the damage wrought by it was $2,600. Plaintiff prayed for an injunction and for a monetary judgment in the sum of $2,600. For answer, the defendant John F. More assumed all responsibility, asserted his ownership in the land, admitted the destruction of the trees, denied that they were willfully or unlawfully or maliciously destroyed, and asserted a right in him so to destroy them by virtue of his ownership of the fee of the highway, setting forth in this connection the injury to his walnut orchard as above outlined. The court's findings of fact were in accord with the foregoing statement. It found that the trees had been planted by defendant More, and in their early growth nurtured by him, but that for many years the county had exercised supervision over them, pruning and caring for them. It found further that the trees were the property of the defendant John F. More, "subject to the right of the county of Santa Barbara to preserve them as part of said highway, for the use and benefit of the public, and control the cutting down, removal, or trimming of the same." It found further that the trees "are large handsome trees, and add greatly to the comfortable use and enjoyment of said highway and the economical and convenient maintenance of the same." In support of this last finding, the evidence was that beside their æsthetic value, the trees afforded a grateful shade to the traveler in warm weather and during the long period of summer drought, when it was necessary to sprinkle the roadway, the better to preserve it; and that by arresting the sweep of the winds, they retarded evaporation, and thus lessened the expense of the upkeep of the highway.

The only evidence which the plaintiff offered under the allegation of damage above quoted was that of the supervisor of the district, who testified that he estimated the damage to the highway by the destruction of the trees at $100 apiece, "considering the trees of that value." On cross-examination he explained that the basis of his estimate was the law which exacts a forfeiture of $100 for the malicious destruction of each shade or ornamental tree on any highway. Pol. Code, § 2742. The trial court granted the injunction prayed for. It made no specific finding upon the allegation of damage, but in its conclusions of law declared that the plaintiff "is not entitled to recover in this form of action the penalty of $100 per tree imposed by the statute for digging up, cutting down, or other malicious injuring or destroying shade or ornamental trees upon the public highway."

From this judgment, cross-appeals have been taken by the litigants; by plaintiff, whose contention is that the court erred in not fixing and awarding damages herein, insisting that it established the malicious destruction which entitled the county to recover the $100 penalty; by the defendant, who insists that by virtue of the ownership of the fee of the soil, he had the right absolute to remove the trees. This latter contention first demands consideration. It finds support in two adjudications. The first, Village of Lancaster v. Richardson, 4 Lans. (N. Y.) 136, where the Supreme Court of New York held in case of a destruction similar to the present one that:

> "Independently of the statute, trees standing in the streets or highway, the soil of which belongs to the adjacent owners, are the exclusive property of such owners, and they may remove them at pleasure."

The second of these cases is Bigelow v. Whitcomb, 72 N. H. 473, 57 Atl. 680, 65 L. R. A. 676, where the precise question here under consideration was presented for determination, the court saying that the question before it was:

> "Whether, in laying out a highway under statutory authority, the public acquired a right to prohibit the landowner from removing the trees standing in the highway next to his land, for the purpose of * * * shade and ornamentation. If the public cannot deprive the owner of his trees by using them in constructing or repairing the road, can they deprive him * * * from cutting them down and using them in such a manner as he sees fit?"

The court held that the public acquired no such right, saying:

> "It is no more a deprivation of his property right to cut down his trees and devote them to the useful and necessary work of road construction, than it is to appropriate them standing, for the purposes of shade and ornamentation. An effective prohibition against one's use and enjoyment of his property in a usual and otherwise appropriate manner deprives him of his property, as much as its actual taking or asportation. * * * Whether the trees are useful for shade and add to the beauty of the way, or whether they are only useful for lumber and wood, cannot determine the question of his ownership. If they are his property, he is entitled to the beneficial use of them, subject to such reasonable regulations as the public use of the highway may require (citing authorities)."

[1, 2] It is the unquestioned rule of decision in this state that the owner of the fee of a highway may exercise all such rights of dominion over his land thus subjected to the easement as are not inconsistent with, nor to the detriment of, the easement itself. Colegrove Water Co. v. City of Hollywood, 151 Cal. 425, 90 Pac. 1053, 13 L. R. A. (N. S.) 904; Gurnsey v. Northern California Power Co., 160 Cal. 699, 117 Pac. 906, 36 L. R. A. (N. S.) 185. But the question before us cannot be answered by mere references to the decisions of other states without a presentation of the statute law of this state bearing upon the matter. When consideration is paid to our statutes, it will be found that the Legislature has spoken decisively on the question. By section 2633 of the Political Code, an owner or occupant of land adjoining the highway is empowered to plant trees in and along the highway, and whoever willfully injures any of these trees is liable to the owner or to the occupant "for the damage which is thereby sustained." Section 2742 of the same Code has been cited above, and it declares that:

> "Whoever digs up, cuts down, or otherwise maliciously injures or destroys any shade or ornamental tree, * * * forfeits one hundred dollars for each * * * tree."

Section 4041, subdivision 39, of the same Code empowers the boards of supervisors to encourage under such regulations as they may adopt, "the planting and preservation of shade and ornamental trees on the public roads and highways," and authorizes boards of supervisors to "pay to persons planting and cultivating [such trees] for every living tree thus planted, at the age of four years, a sum not exceeding one dollar." Section 733 of the Code of Civil Procedure declares it to be a trespass to destroy any tree on the land of another person or in the street or highway in front of any person's house, village, or city lot or cultivated ground; and, further, that the trespasser is liable for treble the amount of damages which may be assessed. By the statutes of 1909 (St. 1909, p. 1129), the board of supervisors of each county is empowered to appoint a board of forestry "who shall have exclusive charge and control of all shade and ornamental trees, hedges, lawns, shrubs and flowers growing or to be grown upon the public roads, highways, grounds * * * within its respective county."

These Code sections and this statute clearly indicate the policy of the state in regard to this matter, and more than that, form the controlling substantive law. Whatever may be conceived to have been the right of the property owner to destroy such trees in the absence of the legislation upon our books, of that right by that legislation he is absolutely deprived, unless it can be successfully said that in depriving him of that right the state has taken his property without process of law. This argument which seems to have been the basis of the New Hampshire decision is as above quoted. We do not think, however, that this contention can be successfully maintained. Admittedly as a part of its police power, the state has the right directly or through its agencies to control the use of the public highways for all purposes subserving their uses as public highways. These regulations may and do take many phases, and unless so unreasonable as to work an unlawful confiscation of property, they are not subject to be overthrown. That the regulations of this state as above set forth are not only reasonable but often necessary, the acts of this defendant, which he seeks to justify as the exercise of a legal right, are themselves sufficient to establish. Aside from any consideration of the æsthetic value of such an avenue, though this is my no means negligible, it is shown and found by the evidence, as above indicated, that these trees performed a utilitarian service. They add to the comfort of the traveler, and they lessen the expense of road maintenance. Here then is shown abundant reason for the existence of our regulatory laws. The situation in brief is simply this: That the owner of the fee of the soil has a limited, not an unlimited, right of property in the trees. The public upon the other hand has its limited, and not unlimited, property right in the trees. If their destruction is countenanced or ordered by the authorities, the wood of the felled trees unquestionably belongs to the owner of the fee, so as to the fruit or nuts upon fruit or nut bearing trees. But, upon the other hand, being and growing upon the public highway and subserving useful as well as ornamental purposes, it is for the authorities to say when and under what circumstances they may be destroyed. It would be safe to rest this upon the plain language of our statute, but authority to the same effect is not lacking, and for it reference may be made to 2 Dillon's Municipal Corporations (5th Ed.) § 721; State v. Merrill, 37 Me. 329; Baker v. Town of Normal, 81 Ill. 108; Donahue v. Keystone Gas Co., 181 N. Y. 313, 73 N. E. 1108, 70 L. R. A. 761, 106 Am. St. Rep. 549; Sherman v. Butcher, 72 N. J. Law, 53, 60 Atl. 336. It follows herefrom that the defendant's appeal must be denied, and the judgment appealed from affirmed.

The nature of plaintiff's appeal has been indicated. Herein appellant complains that the court refused to award it the forfeiture contemplated by section 2742.

[3] It is unquestionably true that equity under proper pleading and proof, will award damages where such are necessary to give adequate and complete relief. Such damages, so far as the pleadings are concerned, were alleged, but the proof to support those damages was merely evidence that the county was seeking to exact in the name of damages, a penalty prescribed, which penalty has no bearing whatsoever upon the actual damage sustained. It would be the same penalty of one hundred dollars whether the tree destroyed was a twig of a year's growth, or a monarch of the centuries. Upon the other hand, if it be said that plaintiff is seeking to recover this penalty imposed by law, then, without regard to the question as to whether or not under proper pleading the penalty would be recoverable in this action, it is sufficient to say that the complaint contains no proper averments looking to the enforcement of such a penalty. Chipman et al. v. Emeric, 5 Cal. 239.

It follows herefrom that the trial court ruled correctly in refusing to allow damages, and upon plaintiff's appeal, the judgment is affirmed.

(175 Cal. 18)

HEFNER v. SEALEY et al. (Sac. 2319.)

(Supreme Court of California. April 26, 1917.)

1. DEEDS ⚷56(2)—DELIVERY—INTENT.

Delivery of a deed is not effected by mere manual tradition thereof, unless accompanied with intent that the deed shall become operative as such; that is, that it shall presently pass title without reservation of any right of revocation or recall.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 118.]

2. DEEDS ⚷66 — DELIVERY — INTENT — QUESTION OF FACT.

Whether the requisite intent for delivery of a deed existed is a question of fact for the trial court or jury.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 127, 633.]

3. DEEDS ⚷208(1)—DELIVERY—SUFFICIENCY OF EVIDENCE.

Evidence *held* to support a finding of delivery of deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625, 630.]

4. DEEDS ⚷56(2)—DELIVERY—INTENT.

That the grantor stated that her purpose was to avoid the necessity of administration is not necessarily inconsistent with an intent to presently and irrevocably pass title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 118.]

5. NEW TRIAL ⚷150(4)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Affidavits presented with motion for new trial are not entitled to weight on appeal from denial of new trial, no showing being made that the evidence embodied in them could not with reasonable diligence have been produced at the trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 310.]

Department 1. Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Fred E. Hefner, administrator of Mary Sealey, against Ada M. Sealey and others. From an adverse judgment and order, plaintiff appeals. Affirmed.

George F. Jones, of Oroville, for appellant. Carlton Gray, of Oroville, for respondents.

SLOSS, J. The administrator of the estate of Mary Sealey, deceased, brought this action to quiet title to two parcels of land in Butte county. The plaintiff and the five defendants are the surviving children and the heirs at law of Mary Sealey. All of the defendants except Ida M. Sealey defaulted, and the plaintiff took judgment against them as prayed. Ida M. Sealey answered, asserting title under two deeds from Mary Sealey, dated March 10, 1906. The property in controversy consisted of a lot in the city of Oroville and of a tract of country land. The first of the deeds purported to convey the city lot and five acres of the country land to Ida M. Sealey. The second was a conveyance of the remainder of the country land to the plaintiff and the five defendants. Plaintiff's intestate died on July 18, 1910, and the deeds were not filed for record until after her death. The sole point of controversy between plaintiff and Ida M. Sealey, the nondefaulting defendant, was whether these deeds had been delivered. The court found that there had been a delivery, and gave judgment that defendant Ida M. Sealey was the owner in fee of the land described in the first deed, and of an undivided one-sixth interest in the land described in the second. The plaintiff appeals from this judgment and from an order denying his motion for a new trial.

[1, 2] The appellant contends—and this is the only point made—that the evidence does not support the finding of delivery. There is neither dispute, nor room for dispute, regarding the law applicable to the situation. The delivery of a deed is not effected by a mere manual tradition of the instrument, unless the act "be accompanied with the intent that the deed shall become operative as such" (Kenney v. Parks, 137 Cal. 527, 70 Pac. 556); i. e., that it shall presently pass title, without the reservation of any right of revocation or recall (Follmer v. Rohrer, 158 Cal. 755, 112 Pac. 544). Whether or not the requisite intent existed is a question of fact for the trial court or jury. Moore v. Trott, 162 Cal. 268, 274, 122 Pac. 462, and cases cited.

In the case at bar, several witnesses gave testimony which, if believed by the court, fully supported the conclusion that the deeds had been delivered by Mary Sealey to her daughter Ida with the intention of then and there finally passing title to the land. George E. Gardner, an attorney at law, testified that he had been summoned to Mrs. Sealey's home; that she had told him to make two deeds, saying:

> "I want the property so that there will be no administration. I want to divide the whole thing, a sixth apiece, with the exception of this place where we are living. I want to give that to Ida. I want her to have that for herself."

After the deeds had been drawn pursuant to these instructions, Mrs. Sealey signed and acknowledged them; whereupon Gardner asked what she wanted to do with them, to which she replied: "I guess you had better give them to Ida, I guess you just as well." Thereupon Gardner handed the deeds to the respondent. Mrs. Sealey stated at the time that she wanted to do what was done.

Ida M. Sealey, the respondent, gave testimony of similar purport. Frank Sealey, one of the sons of the decedent, testified that his mother had told him "that she was going to give Ida the house and lot here in town and also her interest in the ranch"; that afterwards Ida showed him the deeds that had been delivered to her. Harvey Sealey, another son, testified that his mother had spoken of deeding her property "so there will be no trouble," and later she had said:

> "I deeded what property I have got to you folks. I deeded this house and lot to Ida, and I deeded her a portion of that property down there. * * * There is a deed where you will all have shares alike in that ranch and won't have no administration about it; you will have deeds for your property."

Mrs. Sealey had also told him that she had delivered the deeds to Ida.

[3, 4] This testimony fully supported the finding of delivery. The fact that Mrs. Sealey stated that her purpose was to avoid the necessity of administration is not necessarily inconsistent with an intent to presently and irrevocably pass title. There are circumstances in the case which might have been taken as indicating that the testatrix had not made the delivery contended for by the respondent, but had merely left the deeds in the custody of a bank for delivery to the respondent after her death, retaining in the meanwhile the right to recall them. But whether the transaction was of this character, or was the one described by the witnesses whose testimony we have quoted, was simply a question of fact for the trial court. The evidence was conflicting, and this court cannot overturn the finding made below. We cannot assent to the appellant's contention that the testimony of Gardner, of the respondent, and of Frank and Harvey Sealey was, either in itself, or in the light of the other evidence in the case, so incredible as to warrant our saying that the trial court could not reasonably accept it.

[5] Certain affidavits were presented by the plaintiff in connection with his motion for a new trial. These cannot, of course, be considered on the appeal from the judgment. Nor is the plaintiff entitled to have any weight attached to them on the appeal from the order denying a new trial, for the reason that he made no showing that the evidence embodied in these affidavits could not, with reasonable diligence, have been produced at the trial.

The judgment and the order appealed from are affirmed.

We concur: SHAW, J.; LAWLOR, J.

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33 Cal. App. 284

FIORI v. AGNEW et al. (Civ. 1911.)

(District Court of Appeal, First District, California. Feb. 13, 1917. On Rehearing, March 22, 1917. Rehearing Denied by Supreme Court May 21, 1917.)

1. APPEAL AND ERROR 🔑1060(4)—HARMLESS ERROR—ARGUMENT OF COUNSEL.

In action for false imprisonment, reference of counsel during closing argument to defendant's failure to testify, though improper, was not prejudicial, where the arrest was illegal, being without complaint or warrant, and the suit was for $25,000, and the verdict was for $500.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135.]

2. FALSE IMPRISONMENT 🔑36 — EXCESSIVE DAMAGES.

In suit for false imprisonment for $25,000, verdict of $500 to plaintiff, who was arrested without process or warrant and without a charge, and confined, was not excessive.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 110, 113–115.]

3. TRIAL 🔑260(1)—INSTRUCTIONS—REPEATING INSTRUCTIONS.

Refusal of defendant's requested instructions covered by the other instructions given is not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651.]

4. TRIAL 🔑267(2)—INSTRUCTIONS—REQUESTS —CORRECTION.

It is not error for the court to so state requested instructions as to correctly state the law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 668.]

5. NEW TRIAL 🔑104(1)—GROUNDS—NEWLY DISCOVERED EVIDENCE — CUMULATIVE EVIDENCE.

Whether new trial should be granted or refused on ground of newly discovered evidence which is cumulative is peculiarly within the province of the trial court.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218, 228.]

6. APPEAL AND ERROR 🔑981—SCOPE OF REVIEW—ORDER REFUSING NEW TRIAL—EVIDENCE.

To warrant reversal of order denying or granting new trial on the ground of newly discovered evidence, the evidence must clearly show an abuse of discretion by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876.]

Appeal from Superior Court, Alameda County; James G. Estep, Judge.

Action by Mrs. Rosie Fiori against L. F. Agnew and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Rehearing denied by Supreme Court. MELVIN, J., dissenting.

James M. Koford, of Oakland, for appellants Agnew & Pullman. G. E. Jackson and John J. Earle, both of Oakland, for appellant Petersen. James P. Montgomery, of Oakland, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff in an action for false imprisonment instituted by her against the defendants, who are members of the police department of the city of Oakland, and by whom the plaintiff alleges she was arrested and imprisoned without probable cause and without rightful authority of law. The cause was tried before a jury, which returned a verdict in her favor for the sum of $500 and costs.

Upon this appeal the first and main contention of the appellants is that the counsel for plaintiff was guilty of prejudicial misconduct during his closing argument in the case. The particular act of misconduct for which appellants seek a reversal of the judgment arises out of the following facts: While a witness the plaintiff testified that shortly before her arrest two unidentified police officers of said city had called upon her with a proposition that upon payment of hush money she would be permitted to pursue the illicit vocation of a prostitute unmolested by the authorities, and that she had rejected their proposition. This episode not having been connected in any way with the defendants, the plaintiff's testimony regarding it was upon motion stricken out. During the trial two of the defendants did not take the witness stand; and in his closing argument to the jury counsel for plaintiff proceeded to comment upon their failure to do so, when the following occurred:

"Mr. Montgomery: Why were they not brought here, gentlemen of the jury, those other two officers—

"A Juror: Why was that?

"Mr. Montgomery: Because she would have picked out the man that made the demand for the money."

Counsel for defendants promptly objected to this remark of plaintiff's counsel, and assigned the same as error, and requested the court to instruct the jury to disregard the same. Some discussion followed, in which the court seemed inclined to allow the remark to stand, under the impression apparently that the testimony of plaintiff upon which it was predicated had not been stricken out; but, upon being convinced to the contrary, the court admonished counsel for the plaintiff that he would have no right to comment upon it, and also proceeded to credit the jury with having good common sense to distinguish between evidence and argument, and to state that the jury were to understand that the remark of counsel was simply argument.

[1, 2] It may be conceded that the remark of counsel for plaintiff made in response to this question of a juror in the heat of the closing argument of a case in which throughout there had been considerable heat was improper; and it may also be conceded that the remarks of the court in response to the objection, assignment, and request of counsel for the defendants were not as strong in their admonition to the jury as the occasion required. Still the question that this court is to determine is whether from an inspection of the entire record the objectionable remark of counsel for plaintiff was sufficient to create in the minds of the jury such a degree of passion and prejudice as to cause their verdict to amount to a miscarriage of justice. The demand of the plaintiff was for the sum of $25,000 damages for an arrest made without complaint or process, and which was therefore illegal, and as to its succeeding imprisonment false, unless, as

contended by the appellants, the plaintiff was a vagrant, and thus subject to arrest at any time without warrant. As to this phase of the case the evidence was conflicting; and the jury, as it was its province to do, resolved the conflict in plaintiff's favor, and yet only awarded her damages in the sum of $500. We cannot say that this modest verdict was the result of either passion or prejudice on the part of the jury amounting to a miscarriage of justice, and hence cannot hold that the objectionable remark of counsel for the plaintiff was sufficiently prejudicial to justify a reversal of the case.

[3] The next contention of the appellants relates to the alleged error of the court in refusing to give certain instructions requested by the defendants as to the preponderance of proof required of the plaintiff in order that she should be entitled to recover for injuries to her credit, reputation, and good name. An examination of the entire body of instructions given by the court shows that these matters were fully covered thereby, and hence that the court committed no error in its refusal to give the said instructions of the defendants in the particular form in which they were requested.

[4] It is also contended by the appellants that the court erred in refusing to give the instructions asked by them upon the subject of vagrancy, and of the right of officers to arrest those guilty of prostitution amounting to vagrancy at any time without a warrant; but the record shows that the court modified the instructions requested by the defendants upon this subject so as to correctly state the law and gave to the jury such modified instructions; and since, as we have seen, the evidence upon the issue as to whether plaintiff was living in a state of prostitution amounting to vagrancy at the time of her arrest, or had reformed from her past conduct of life in these respects, was conflicting, no error can be predicated upon the instructions of the court or finding of the jury upon that issue.

The other errors of law alleged to have been committed by the court in its rulings upon the admission of evidence are not sufficiently meritorious as to require separate comment.

[5, 6] The final contention of the appellants is that the court should have granted a new trial upon the ground of newly discovered evidence. The evidence proffered upon the motion for a new trial was cumulative of evidence offered upon the same general subject during the trial, the determination of the question as to whether a new trial should be granted or refused upon that ground is peculiarly within the province of the trial court, and the case as presented to this court must clearly show an abuse of discretion before the order of the trial court in either granting or refusing a new trial upon that ground will be reversed upon appeal. Cahill v. Stone, 167 Cal. 126, 138 Pac. 712; People v. Selby S. & L. Co., 163 Cal. 84, 124 Pac. 692, 1135, Ann. Cas. 1913E, 1267; Oberlander v. Fixen Co., 129 Cal. 692, 62 Pac. 254.

No other grounds of error being urged, the judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

On Rehearing.

LENNON, P. J. The judgment is affirmed, for the reasons stated in an opinion filed February 13, 1917, which opinion is hereby adopted as the opinion of the court following the resubmission of the cause, and said opinion is hereby ordered refiled as of this date.

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33 Cal. App. 246

PROUTY v. ROGERS et al. (Civ. 2208.)

(District Court of Appeal, Second District, California. March 17, 1917.)

1. DEEDS 🔑112(2) — DESCRIPTION — SUFFICIENCY.

A deed describing the land conveyed did not name the district as G. addition No. 1, but located it at G., and also referred to a map made by a named person in April and May, 1886, as a map recorded in Miscellaneous Records, Book 9, at pages 85, 86, and 87. No such map was recorded at those pages, but there was a map of G. addition No. 1, recorded in Book 9, at pages 45 and 46, and such map was the only map of record in the county of the property situated in the territory or district known as G. on which there was shown a block "P" or which bore the inscription or indorsement "survey April and May, 1886," signed by the named maker. There was only one lot 6 in said block P., and there was no other lot 6 in block P in the territory commonly known as G., and when lots 6 and 7 were sold to plaintiff there was no tract or subdivision at or in G. or vicinity that contained a block P except G. addition No. 1. *Held,* that the description in the deed to plaintiff was sufficient in her suit to quiet title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 324.]

2. TRUSTS 🔑357(2)—PURCHASER FROM TRUSTEE—NOTICE—TITLE ACQUIRED.

Where defendant in suit to quiet title when receiving her deed had notice that her grantor if he had any title whatever to the land, had nothing more than bare legal title, necessarily a title held in trust for plaintiff, who then owned the entire beneficial interest, defendant, if the title vested in her at all, received it subject to the trust and unconditional obligation to convey to plaintiff.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 543–548.]

3. APPEAL AND ERROR 🔑1073(1)—HARMLESS ERROR—DECREE.

In suit to quiet title, it being determined that legal title to the land was vested in defendant, subject to an unconditional obligation to convey to plaintiff, there was no prejudicial error in the decree quieting the title in plaintiff as owner and not ordering execution of any deed of conveyance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4240.]

4. Corporations 🔑425(5) — Representations of Officers—Estoppel of Corporation.

Where plaintiff purchased land from a corporation, and its president and secretary represented to her that the deed to be delivered to her by the company would convey her good and perfect title, on which representations she relied without making inquiry, she making payments partly in cash and partly by a note secured by mortgage given the company, the company was estopped to deny plaintiff's ownership of the land, though it and its officers acted in good faith, and made no misrepresentations, while plaintiff had constructive record notice of the condition of the title.

5. Estoppel 🔑98(2)—Persons Bound.

Where a corporation was estopped to deny the ownership of land which it had conveyed, its officer, who received an assignment of the original owner's contract to convey to the company, and thereafter, from the owner, a conveyance of the land, was charged with notice of all the facts on which the grantee of the land relied as against the company, and the estoppel was binding on him.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 290.]

6. Limitation of Actions 🔑103(2)—Recovery of Land—Trusts.

Where plaintiff, in an action to quiet title, was seised of the property at all times down to the time when the action was begun, and defendant was to be treated as holding the title in trust for plaintiff, there having been no repudiation of the trust sufficient to set the statute of limitations in motion, the action was not barred by Code Civ. Proc. § 318, as to actions for the recovery of real property, or for the recovery of the possession thereof.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 507.]

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Carol Crouse Prouty against Julia A. N. Rogers and W. B. Judson. From a judgment for plaintiff and an order denying their motion for new trial, defendants appeal. Judgment and order affirmed.

Haas & Dunnigan, of Los Angeles, for appellants. Carter, Kirby & Henderson and Schweitzer & Hutton, all of Los Angeles, for respondent.

CONREY, P. J. This is an appeal by the defendants from a judgment quieting plaintiff's title to the lot described in the complaint, and from an order denying the motion of defendants for a new trial. There was a former trial of the action and a decision by this court affirming an order granting a new trial. In that decision there is a statement of facts, and we will repeat here that portion thereof which is identical with the facts proved at the second trial (13 Cal. App. 561, 110 Pac. 142):

"On December 26, 1885, Andrew Glassell, who was the common source of title, entered into a contract with Ralph and W. E. Rogers, whereby he agreed to sell and convey to them a large tract of land, which included the lot in controversy. On March 24, 1886, Ralph and W. E. Rogers transferred this agreement for purchase to a corporation known as the Garvanza Land Company, which, under the terms of the agreement, caused a portion of the land to be subdivided into lots and blocks and designated it as 'Garvanza addition No. 1,' map of which was duly recorded. On June 19, 1886, the corporation, for a valuable consideration, executed a deed, which was duly recorded, to plaintiff, Carol Crouse-Prouty, whereby it conveyed to her the lot in question. After the execution of this deed by the corporation, and on December 15, 1886, the corporation transferred the Glassell contract to W. F. McClure, who, on the day following, assigned it to Ralph Rogers. On July 12, 1888, Glassell executed a grant deed to Ralph Rogers of the lands described in the said contract, excepting therefrom certain tracts, which excepted lands did not, however, include the lot involved in this action. W. E. Rogers joined Glassell in the execution of this conveyance. This deed recited payment of the consideration mentioned in the contract, and that 'this deed is delivered and accepted in satisfaction of the existing obligations of the party of the first part (Glassell) by reason of said contract of December 26, 1885.' On January 2, 1892, Ralph Rogers conveyed the lot in question, together with other lands, to one Conway, from whom, by mesne conveyance, defendants acquired whatever title they have to the lot. It thus appears that plaintiffs' claim of title to the lot is by virtue of the deed from the Garvanza Land Company, whose only interest in the lot was by virtue of the Glassell contract, while defendants claim under a subsequent deed made by Ralph Rogers after he had acquired title to the property by a deed executed pursuant to the Glassell contract. The record contains evidence which tends to prove * * * that defendant Julia Nolan Rogers at the time she claims to have acquired the lot by purchase for a valuable consideration had actual notice of the conveyance of the lot to plaintiff Carol Crouse-Prouty, and of the fact that she claimed ownership under the deed from the corporation. Moreover, under the facts presented, the court might be justified in holding the record of plaintiff's deed sufficient to impart constructive notice. Rogers v. McCartney, 3 Cal. App. 34, 84 Pac. 215."

[1] It will be noted that in its former decision this court assumed that the deed of Garvanza Land Company to the plaintiff contained a sufficient description to identify the land described in the complaint, and that the record thereof was sufficient to impart constructive notice. Nevertheless, the defendants continue to insist that the description in that deed was not sufficient for the purpose of passing title. That description, so far as the name of the tract was concerned, did not name the tract as "Garvanza addition No. 1," but located the tract "at Garvanza." Also the deed referred to a map made by W. F. McClure in April and May, 1886, as a map recorded in Miscellaneous Records, Book 9, at pages 85, 86, and 87. There was no such map recorded at those pages. The evidence shows that there was a map of "Garvanza addition No. 1" recorded in said Book 9, at pages 45 and 46. The evidence shows that the map recorded at pages 45 and 46 is the only map of record in Los Angeles county of the property situated in the territory or district known as Garvanza, on which there is shown a block "P," or which bears the inscription or indorsement, "Survey, April and May, 1886, W. F. McClure, C. E."; that there

is only one lot 6 in said block "P," and there is no other lot 6 in block "P" in said territory commonly known as Garvanza; also that Garvanza Land Company never sold or subdivided any lots in any block "P," except block "P" of Garvanza addition No. 1; that there was not at the time of the sale and conveyance of lots 6 and 7 to the plaintiff, or since that time, any tract or subdivision at or in Garvanza, or in the vicinity thereof, that contained a block "P," except Garvanza addition No. 1. On these facts we hold that the description in the deed was sufficient. See, also, Leonard v. Osburn, 169 Cal. 157, 146 Pac. 530, 532, which approves the decision in Rogers v. McCartney, supra.

[2] Plaintiff's deed when recorded gave constructive notice that Garvanza Land Company had granted the lot in question to her, and there was then on record a contract which gave notice that Garvanza Land Company had acquired the right to obtain the legal title upon payment of the consideration agreed to be paid to Glassell. The deed from Glassell to Ralph Rogers, which also was of record prior to any conveyance of lot 6 by Ralph Rogers, showed that the consideration for all of the described lands, including the lot in question, had been paid to Glassell. Defendant Rogers before receiving her deed, also had actual notice that the plaintiff claimed ownership under her deed from Garvanza Land Company. Defendant Rogers therefore had notice that her grantor, successor by mesne conveyance from Ralph Rogers, if he had any title whatever to this lot, had nothing more than the bare legal title, which necessarily would be a title held in trust for the plaintiff, who then owned the entire beneficial interest. Therefore the defendant Rogers, if the title vested in her at all, received it upon the same trust and subject to the same unconditional obligation to convey to the plaintiff. This conclusion is strengthened, if it needs any further support, by the fact, which the court found upon sufficient evidence, that the grantee to whom Ralph Rogers conveyed this lot, and the succeeding grantees to and including Julia N. Rogers, paid no consideration whatever for their said conveyances.

[3] If under the facts above stated it should be determined that the legal title to the lot is now vested in the defendant subject to an unconditional obligation to convey to the plaintiff, there would be no prejudicial error in the court's decree which quieted title in the plaintiff as owner of the lot and did not order the execution of any deed of conveyance. In any event the result of the decree would be to establish ownership in the plaintiff and put an end to the claims of the defendant. Jones v. Jones, 140 Cal. 587, 74 Pac. 143.

[4, 5] But the plaintiff further claims title by estoppel. During the transactions whereby the plaintiff purchased the lot from Garvanza Land Company and paid for the same and received her deed, it was represented to her by Ralph Rogers, the president of the company, and by its secretary, that the deed to be delivered to her by Garvanza Land Company would convey to her a good and perfect title to the lot. She believed those representations and relied upon them in all of those transactions, without making any other investigations or inquiry as to the title. At the time of receiving her deed plaintiff paid the consideration partly in cash, and gave to the corporation her note for the remainder, secured by mortgage on the two lots conveyed. On June 8, 1887, she paid this note, and the mortgage was satisfied on the record by the company by Ralph Rogers, as president. Upon those facts Garvanza Land Company would have been estopped to deny plaintiff's ownership of the lot. And as Ralph Rogers received an assignment of the company's contract, and thereafter from Glassell a conveyance of the land covered by the contract, he was charged with full notice of all of the facts upon which the plaintiff relied as against that company, and the same estoppel was binding upon him. Upon the facts which we have stated, it seems clear that the plaintiff's rights are unaffected by the subsequent conveyances of the series which ended with the deed to defendant Rogers. Appellants claim that the doctrine of estoppel cannot be applied to the case, because it appears that Ralph Rogers and Garvanza Land Company in their transactions with the plaintiff acted in entire good faith and made no misrepresentations as to the title to the property conveyed to the plaintiff; that when the deed was made to plaintiff she had constructive record notice of the condition of the Garvanza Land Company's title; and that she had the same means of investigating the title that was possessed by her grantor and by Ralph Rogers. This contention should not be sustained. Karns v. Olney, 80 Cal. 90, 22 Pac. 57, 13 Am. St. Rep. 101; Reis v. Lawrence, 63 Cal. 129, 49 Am. Rep. 83; Ions v. Harbison, 112 Cal. 260, 44 Pac. 572.

[6] Defendants pleaded that the action is barred by the provisions of section 318 of the Code of Civil Procedure and by subdivision 2 and by subdivision 4 of section 338 and by section 343 of that Code. The two latter sections are contained in the chapter concerning the time of commencing actions other than for the recovery of real property, and do not apply to this case. In Murphy v. Crowley, 140 Cal. 141, 146, 73 Pac. 820, 821, the earlier decisions were reviewed, and the court said:

> "It seems to be established, therefore, by these cases that, although the main ground of the action is fraud or mistake, whereby the defendant has obtained the legal title to the land in controversy, and the chief contention between the parties is with respect to the fraud or mistake alleged, yet if the plaintiff alleges facts which show, as matter of law, that he is entitled to

possession of the property, and a part of the relief asked is that he be let into possession, or that his title to the land be quieted, the action is in reality for the recovery of real property, and is not barred except by the five-year limitation contained in section 318."

Here the plaintiff by her complaint alleged ownership of the lot and seeks to quiet her title, and for all appropriate relief in equity. The controversy exists by reason of the adverse claim of the defendants based upon a chain of title which begins with a mistake made by Ralph Rogers in executing a deed purporting to convey land which he did not have a right to convey to any one other than the plaintiff. Section 318 is the only one of the Code sections constituting the statute of limitations which can be applied to a case of this kind. That section reads as follows:

> "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question, within five years before the commencement of the action."

If, by reason of defendants' estoppel to set up the claim which they assert in this action, title vested in the plaintiff (as we hold that it did), then the plaintiff was seised of the property within the meaning of section 318, at all times down to the time when this action was begun, and if the defendant Rogers is to be treated as holding the title in trust for the plaintiff, the rights of the plaintiff are not barred by any statute of limitations. There had not been prior to the beginning of the prescribed period, or at all, any repudiation of the trust sufficient to set the statute in motion. Actual possession of the lot had not been taken by the defendants, nor by any person under whom they claim, and the plaintiff had not been notified of any adverse claim against her. Luco v. De Toro, 91 Cal. 405, 18 Pac. 866, 27 Pac. 1082.

Finally, it should be noted that the transcript begins with an amended complaint filed October 21, 1912, and the record before us does not show when the action was commenced.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

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33 Cal. App. 279

BRAUN v. VALLADE et al. (Civ. 1877.)

(District Court of Appeal, First District, California. Feb. 15, 1917.)

1. Negligence 🔑32(2)—Defective Building—Licensee.

Where plaintiff entered defendants' saloon to use the toilet, and after doing so returned to the barroom and ordered a drink, and after he was served saw a picture upon the opposite wall, and walked across the room, to examine it, and in so doing fell into an open trapdoor, suffering injuries, though he entered for a purpose which would render him a mere licensee, when he fulfilled that purpose and ordered a drink he became a customer of the defendants, and defendants owed him the duty of ordinary care.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 43.]

2. Negligence 🔑134(5)—Injuries to Customer—Defective Barroom—Evidence—Sufficiency.

In action by customer for injuries received in falling through a trapdoor in a barroom, evidence *held* to show that plaintiff's injuries were caused by defendants' negligent act in leaving open an unguarded trapdoor in a place open and accessible to customers.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 273.]

3. Negligence 🔑138(1)—Trial 🔑194(16)—Instructions—Province of Jury—Facts.

An instruction that if the defendants negligently opened and left open and not properly guarded a trapdoor in floor of said saloon, and said trapdoor was then a part of said barroom, and open to use of patrons and customers and to the public, and plaintiff was lawfully on the premises, and such negligence and not plaintiff's negligence was the proximate cause of plaintiff's injury, they should find for plaintiff, if understood as referring to the floor space filled by the trapdoor when closed, was not confusing or an invasion of the province of the jury by charging as to matters of fact.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 354, 356–360; Trial, Cent. Dig. § 466.]

4. Trial 🔑296(3)—Defective Instruction—Cure by Other Instructions.

Any confusion possible being doubt as to whether the instruction referred to the spaces below the trapdoor when open, or to the floor space filled by the trapdoor when closed, was cured by an instruction that if a part of the premises where the trapdoor was located was private, and not open to the public, the public did not have access thereto, the defendants were not required to maintain guards around such trapdoor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709.]

5. Trial 🔑260(1)—Instructions—Requests.

Refusal of requested instructions fully and correctly covered by given instructions is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Franz Braun against Arthur Vallade and another. Judgment for plaintiff, and defendants appeal. Affirmed.

S. C. Wright, of San Francisco, for appellants. J. Dimmer and E. D. Knight, both of San Francisco, for respondent.

LENNON, P. J. This is an appeal from a judgment in plaintiff's favor in an action for damages alleged to have been sustained by him by reason of his having fallen through an open and unguarded trapdoor in the floor of certain premises occupied and used by the defendants in the conduct of a saloon.

[1, 2] There is little, if any, disagreement between the parties respecting the main facts of the case. The defendants on the 10th day of July, 1914, were engaged in conducting a saloon known as the Minneapolis Bar on Market street in the city and county of San

Francisco. On said day the plaintiff entered the said place of business of the defendants for the purpose, according to his testimony, of using the toilet attached to and in the rear of the saloon. Having done this and returned to the barroom the plaintiff, not wishing, as he stated, to use the convenience of any place without some return, went to the bar and ordered a drink of beer; and having been served and begun to drink it he observed a picture upon the opposite wall of the saloon, and being interested in painting walked across to examine it, and in so doing fell into an open trapdoor, and was precipitated into the basement, suffering severe injuries. There is some conflict in the evidence as to whether the space in front of where the picture hung, and of which the trapdoor when closed formed a part of the floor, was a portion of the open or public area of the saloon, or was separated therefrom by a piano and other obstructions, indicating that it was private and not intended for public use; but in respect to this matter the plaintiff himself testified that there was no obstruction between the bar and the picture, and that he walked directly across the room toward it and to the open space into which he fell. There is also some evidence that upon the wall above the trapdoor there was a large cardboard sign, reading, "Private. Keep out"; but there was evidently some question as to whether this sign referred to the floor space in front of the picture partly occupied by the trapdoor when closed, or to the basement and entrance into it when the trapdoor was open. The jury resolved these doubts in the plaintiff's favor, and we are not asked to review their discretion in respect to these conflicts in the evidence. The appellants, however, urge as their main contention in the case that the undisputed evidence does show that the plaintiff having entered upon the premises for the purpose indicated by his own testimony, became and was throughout the period of his presence there a mere licensee toward whom, as such, the defendant owed no duty other than that of refraining from causing him an injury by a willful or grossly negligent act. In support of this contention the appellants chiefly rely upon the case of Kneiser v. The Belasco-Blackwood Co., 22 Cal. App. 205, 133 Pac. 989, as indistinguishable from the case at bar. The facts of that case were briefly these: The plaintiff had entered the saloon of the defendant desiring to sit down and rest and to visit the toilet, which he knew to be located in the basement. He had not intended to patronize the bar as a customer, but was induced by the invitation of others already in the place to partake of one or more drinks of liquor, after which he proceeded to go to the basement of the place in pursuit of his original intention to visit the toilet there. While going down the stairs leading thereto his foot caught upon a projecting nail, and he fell and was injured. The court held upon these facts that the plaintiff was a mere licensee, and as such was not entitled to recover. It seems to us, however, that the distinction between the above case and the present one is clearly outlined by a comparison of the facts of each. In that case, as in the present one, the act and intent of the plaintiff in entering the premises of the defendants for the purpose of making use of the toilet rendered him a mere licensee so long as that intent and purpose was maintained, or was returned to if departed from; the act of the plaintiff in the foregoing case in drinking at the request of others may have changed his relation to the defendants from that of a mere licensee to that of a customer; but, if so, the proofs in that case showed that the plaintiff therein resumed his former relation of licensee when he returned to his primary intent and purpose to use the defendants' toilet and was proceeding to carry out that intent and purpose at the time of his injuries. In the case at bar, however, the plaintiff having entered the defendants' premises with an intent and purpose which under the foregoing case would have constituted him a mere licensee, appears to have fulfilled that purpose and terminated that relation when upon returning from the toilet to the barroom he determined to become, and did in fact become, a customer of the defendants by ordering and partaking of a drink at their bar. From the moment of his changed intent and action his relation to the defendant changed from that of a mere licensee to that of a customer, to whom the defendants would owe the duty of ordinary care—a duty which it is conceded would be violated by negligently leaving an open and unguarded trapdoor in that portion of the floor space of the barroom which was open and accessible to customers. We think that the evidence in this case sufficiently shows that the plaintiff stood in the relation of a customer to the defendants at the time of his injuries, and that these were caused by the appellants' negligent act.

The appellants further contend that the trial court erred in giving to the jury the following instruction:

> "The court instructs the jury that if they believe from all the evidence that the defendants in the conduct of their business mentioned in the complaint at the time of the injuries to plaintiff, carelessly and negligently opened and left open and not properly guarded or obstructed a trapdoor in the floor of said saloon, and that said trapdoor was then a part of said barroom and open to the use of patrons and customers and to the public, and that plaintiff was lawfully upon said premises, and that such negligence, and not negligence on the part of plaintiff, was the proximate cause of the injuries to plaintiff, they should find for the plaintiff."

[3, 4] It may be, and in fact is practically conceded on the part of the respondent, that the foregoing instruction is confusing in its reference to the "trapdoor in the floor of said saloon" as being a part of said barroom and "open to the use of patrons and customers

and to the public," the doubt being as to whether these phrases refer to the spaces below the trapdoor when open or to the floor space filled by the trapdoor when closed. If understood in the latter sense the instruction would not be subject to the appellants' criticism; nor would it in our opinion be liable to the objection that it invaded the province of the jury by charging as to matters of fact. Aside from this, however, we think that whatever confusion may have arisen from the doubtful meaning of the foregoing instruction was sufficiently cured by the court in the rest of its instructions, and particularly in the following one, given at the request of the appellants:

> "I charge you that if you believe from the evidence that the part of the premises where the trapdoor was located was private and not open to the public, and the public did not have access thereto, then I charge you that the defendants were not required in law to maintain guards or barriers around said trapdoor."

[5] The final contention of the appellants is that the court erred in refusing to give certain instructions requested by them upon the subjects of contributory negligence and proximate cause. The record discloses, however, that the court quite fully and correctly charged the jury upon these subjects, and hence was justified in refusing to give an added instruction thereon in the particular form requested by the defendants.

Judgment affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

LENNON, P. J. The judgment is affirmed, for the reasons stated in an opinion filed February 15, 1917 (164 Pac. 904), which opinion is hereby adopted as the opinion of the court following the resubmission of the cause, and said opinion is hereby ordered refiled as of this date.

(33 Cal. App. 267)

KEELEY v. ERBE. (Civ. 1987.)

(District Court of Appeal, First District, California. March 21, 1917.)

1. EVIDENCE 🔑445(1) — ORAL AGREEMENT SUBSTITUTED FOR WRITTEN CONTRACT.

Oral evidence is admissible to prove that parties entered into a new and distinct oral agreement as a substitute for a written one.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2052–2054, 2063.]

2. APPEAL AND ERROR 🔑1008(1)—REVIEW—QUESTION OF FACT.

Where trial court who heard oral testimony and saw witnesses believed that oral agreement sued on was substituted for a written one, the judgment will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955.]

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Lee Roy E. Keeley against Herman Erbe. Judgment for plaintiff, and defendant appeals. Affirmed.

Oscar Hudson, of San Francisco, for appellant. Albert Picard, of San Francisco, for respondent.

PER CURIAM. This is an appeal by defendant from a judgment in favor of plaintiff in an action brought by him to recover the reasonable value of legal services.

[1, 2] From the record it appears that the parties entered into a written contract, under the terms of which the plaintiff was to render services as an attorney at law for the defendant upon a contingent fee of 25 per cent. of the value of certain land if title thereto should be obtained for defendant. Subsequently, according to the testimony given by plaintiff, a circumstance was called to his attention for the first time which made the prospect of securing title in the name of the defendant very doubtful, whereupon plaintiff told the defendant "that the situation did not look good to him," and refused to proceed under the contract. They then entered into an oral agreement, whereby the plaintiff should proceed to render the agreed services, he to be paid a fair fee, without, however, there being any agreement as to its amount. The defendant denied that there had been a rescission and abandonment of the written contract.

Oral evidence was admissible to prove that the parties entered into a new and distinct agreement as a substitute for the written one (1 Greenl. on Ev. p. 4, § 303); and, while perhaps such testimony under some circumstances should be viewed with distrust, nevertheless in this case the trial court who heard the testimony and saw the witnesses believed the testimony introduced by the plaintiff as to the oral agreement, and found accordingly. We are constrained, therefore, to hold that the judgment of the trial court cannot be disturbed by this court.

Judgment affirmed.

(33 Cal. App. 262)

TOCKSTEIN v. PACIFIC KISSEL KAR BRANCH. (Civ. 1868.)

(District Court of Appeal, First District, California. March 19, 1917. Rehearing Denied by Supreme Court May 17, 1917.)

1. SALES 🔑90—RESCISSION — ORAL REPRESENTATIONS MERGED IN WRITING.

In the absence of fraud, all preliminary negotiations are presumably merged in a written contract for the purchase of personalty, especially as Civ. Code, § 1625, provides that the execution of a contract in writing supersedes negotiations which preceded or accompanied its execution.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 253.]

2. EVIDENCE 🔑442(6)—RESCISSION — SUFFICIENCY OF EVIDENCE.

In a buyer's action to rescind an automobile sales contract, evidence *held* insufficient to justify a rescission on ground that the buyer was misled by representations of the seller's agent where the buyer thereafter signed a written contract expressly stating that it superseded all oral understandings.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1877, 1886, 1887.]

3. PRINCIPAL AND AGENT ⟹148(4)—AGENT'S AUTHORITY.

Where a party freely contracts with an agent knowing the limit of the agent's authority, he cannot thereafter assert that he was misled into believing the agent had greater authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 537–545.]

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Mrs. E. J. Tockstein against the Pacific Kissel Kar Branch. Judgment for plaintiff, and defendant appeals. Reversed.

J. A. Marsh and A. F. Lemberger, both of San Francisco, for appellant. Daniel O'Connell, of San Francisco, for respondent.

LENNON, P. J. This is an appeal from a judgment in plaintiff's favor in an action brought by her to recover the sum of $412.06 as the aggregate of sums of money alleged to have been paid by her on account of the purchase price of a certain automobile from the defendant, and for repairs thereon, which machine is alleged to have proven defective, and in that respect to have violated the terms of certain alleged guaranties given by the defendant to plaintiff at the time of and which constituted the basis of the purchase by her of said automobile; and also to recover the sum of $420, damages alleged to have been sustained by the plaintiff through her attempted use of such defective machine.

The complaint is in two counts setting forth separately the foregoing items of the plaintiff's alleged loss and damage. Defendant's answer denies the averments of both counts of the complaint in so far as they involve the breach of any agreement or guaranty on the part of the defendant, or of the Ford Motor Company, its principal, in the sale of the machine. The case was tried before a jury, which rendered a verdict in plaintiff's favor for the sum of $619, and from the judgment entered thereon for said sum and costs the defendant prosecutes this appeal.

There is little if any dispute between the parties as to the material facts upon which the determination of this appeal must depend. The plaintiff, being desirous of purchasing an automobile for use in the jitney bus service, went to the defendant as the local agent of the Ford Motor Company of Detroit to procure said car. According to the plaintiff's testimony—which may be taken as true for the purposes of this appeal—she met there a salesman of the defendant to whom she stated that she wanted to buy a Ford car upon installments, and would like to see the car. The salesman informed her that they had not a car in stock to show her at that time, but that all of the Ford cars were sold with a guaranty. He also stated, according to her testimony, that the car would be a new and perfect car, and would be delivered in good shape and would be satisfactory in every way. She thereupon paid the sum of $50 on account of the purchase price of the car, and at that time there was made out and presented to her, and she signed, a writing denominated upon its face "Sales Contract," and being in the customary form of a leasing or conditional sales agreement, containing a general description of the car with a statement of the terms of its proposed purchase and times and amounts of deferred payments. This written agreement contained in black type next above the space of its signature the following words:

> "It is understood that the Pacific Kissel Kar Branch will not be bound by any understandings, agreements, or representations, express or implied, not specified herein or covered by our retail sales guaranty duly executed."

The plaintiff admits signing this paper, and also admits that a little later and before receiving the car she saw and read and signed another agreement in which the terms of her purchase of the car were more fully set forth, and in which also the express terms of the guaranty of the defendant and of the Ford Motor Company, the manufacturer of the car, were set forth in detail; and in which it was also stated that:

> "The above comprises in full the entire agreement covering or pertaining to this sale, and no agreement of any kind, verbal understandings or terms whatsoever will be recognized than as embodied and specified herein."

The plaintiff read and signed said agreement, and also received a duplicate copy of it, and thereupon received delivery of the car. It was a new car, and was selected, arbitrarily, out of a number of similar cars apparently of the same quality. During the 14 weeks which followed, the plaintiff used the car in the jitney service, and in motoring generally, driving it in all about 4,000 miles. From time to time it was in the shop of the defendant for repairs, and at one time was sent to the Ford Motor Company for the remedy of some unspecified defect. The plaintiff paid for a time her installments upon the purchase price of the car, and also paid on account of said repairs the sum of $173.60, but finally failed, or refused, to keep up her payments, in consequence of which the defendant retook possession of the car, and undertook to cancel the agreement for its purchase for noncompliance with its terms. Thereupon the plaintiff commenced this action.

[1] We are unable to distinguish this case in principle from other cases recently before the Supreme Court and this court in which the doctrine is repeatedly restated that a person buying or agreeing to buy per-

sonal property, the terms of which purchase or agreement to purchase are put in writing, is bound as to the terms of the contract by such writing, into which all preliminary understandings and assurances are presumed to be merged, and that such person cannot go behind such writing to avoid the agreement of purchase for the alleged breach of some oral understanding or guaranty not contained within its written terms. This is but a restatement of the substance of section 1625 of the Civil Code as interpreted and applied in the following cases: Kullman, Salz & Co. v. Sugar, etc., Co., 153 Cal. 725, 96 Pac. 369; Germain Fruit Co. v. Armsby Co., 153 Cal. 585, 96 Pac. 319; Gardiner v. McDonogh, 147 Cal. 313, 81 Pac. 964; Dollar v. International Banking Co., 13 Cal. App. 331, 109 Pac. 499.

[2] The application of this principle does not of course operate to prevent a person from avoiding a contract for fraudulent misrepresentations which operate as the inducement for entering into it, and upon which the party injured or misled thereby was entitled to rely; and it is upon that theory that the plaintiff has depended to sustain this action and the judgment rendered therein. She asserts that the inducing cause for her agreement to purchase the car in question was the representation of the salesman of the defendant that the car which would be delivered to her would be a new and perfect car, and that it was guaranteed perfect in every way, and that she would have no trouble with it; but the testimony of the plaintiff herself shows that at the very time the aforesaid salesman was engaged in making these representations he informed her there was a written guaranty went with the car, while the first writing which she then and there signed not only expressly referred to such guaranty, but also expressly stated that the defendant would not be bound "by any understandings, agreements, or representations, express or implied, not specified herein or covered by our retail sales guaranty duly executed." This the plaintiff admits that she saw and signed, and also admits that she signed and received a copy of the amplified agreement between her and defendant at the time that she received the car, in which the express terms of the manufacturer's and seller's guaranty are set forth, and in which it is again expressly stated that the same contains the full agreement between the parties, and that no agreement of any kind and no verbal understandings or promises whatever will be recognized other than as embodied or specified therein. The plaintiff does not pretend to state that she did not sign these writings knowingly and freely, or that any fraud, deceit, or concealment as to their terms and effect existed as an inducing cause for her execution of them; nor has the plaintiff shown in the proofs in this case that any of the terms of the express and limited warranty of the manufacturer and seller of the car set forth in detail in the written agreement were violated by the defendant or by its principal, the Ford Motor Company.

This state of facts brings this appeal directly within the principle laid down in the case of Pease v. Fitzgerald, 161 Pac. 506, recently decided by this court, wherein it is held that a person, signing a written agreement which contains upon its face the statement that only the written representations, agreements, and guaranties contained within its terms shall be binding upon the other party to it, cannot rely upon any oral statements made by the agent or representative of such party prior to or at the time of the execution of the written agreement.

[3] This case is in line with the well-established rule of law that where a party freely contracts with an agent, knowing the limit of the agent's authority, he may not be heard thereafter to assert that he was misled into believing that the agent had greater authority. Northern Assurance Co. v. Grand View Building Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, and cases cited.

It follows that the judgment herein must be reversed, and it is so ordered.

We concur: KERRIGAN, J.; RICHARDS, J.

33 Cal. App. 270

WHILDIN et al. v. MARYLAND GOLD QUARTZ MINING CO. et al.

(Civ. 1630.)

(District Court of Appeal, Third District, California. March 21, 1917. Rehearing Denied April 20, 1917. Denied by Supreme Court May 17, 1917.)

MINES AND MINERALS ⚷43 — CLAIMS — PATENTS—CONSTRUCTION.

A patent to lot No. 41 and 1664, linear feet of the Eureka ledge procured under federal Mining Act July 26, 1866, c. 262, 14 Stat. 251, providing that one having complied with certain conditions shall be entitled to a patent, "granting such mine together with the right to follow such vein or lode, with its dips, angles and variations, to any depth, although it may enter the land adjoining," gave to grantee the fee to the lot and so much of lode as apexed within its exterior surface boundaries with the right to follow the vein on its dip and nothing more; the patent as to that portion of the lode lying beyond the exterior boundaries of the lot being invalid.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 125–129.]

Appeal from Superior Court, Nevada County; George O. Jones, Judge.

Action by David Whildin and others against the Maryland Gold Quartz Mining Company and another. From a judgment for plaintiff and an order denying a motion for a new trial, the unnamed defendant appeals. Affirmed.

Chas. W. Kitts, of San Francisco, and John Mulroy, of Grass Valley, for appellant. Nilon & Arbogast, of Nevada City, for respondents Whildin and others. Fred Searls, of Nevada City, for respondent Maryland Gold Quartz Mining Co.

BURNETT, J. The action was one to quiet plaintiffs' title to a small parcel of mining ground lying easterly of and adjoining the surface boundaries of defendant Eureka Gold Mining Company's patented land, known as the Eureka quartz mine. The land claimed by plaintiffs is designated as East Eureka quartz mine, and is an irregular shaped parcel surrounded on all sides by patented mining claims. Plaintiffs claim that, on the 5th day of September, 1897, the land embraced within the exterior boundaries of the East Eureka quartz mine was public mineral land of the United States, open to exploration and purchase; that, on said date, one Stephen Maynard, a citizen of the United States and the predecessor of the plaintiffs in interest, having discovered a lode or vein of gold-bearing rock in place within the exterior boundaries of said parcel of land, made a valid mining location of said parcel, to be known as the East Eureka quartz mine; that the labor and improvements necessary in order to hold said mining claim under the federal mining laws were done and performed each year by said Maynard and the plaintiffs as his successors in interest. There is no controversy as to the technical formality of said location, the posting of the notice, the marking of the boundaries, or the performance of the necessary labor to hold the claim.

Appellant, Eureka Gold Mining Company, claims only a portion of the land embraced within said location, and it bases its claim to this upon a certain mineral patent, dated September 13, 1869, issued by the Land Department of the United States to the Eureka Gold Mining Company for lot No. 41 in the northeast quarter of section 26, township 16 north, range 8 east, M. D. M., containing 23.29 acres, together with the lode 1,664 feet in length. This patent was based upon a location of 1,700 feet of the Eureka ledge, made December 9, 1865, as indicated by the following:

> "Notice of location. Notice is hereby given that the undersigned have this day located and taken up for mining purposes, seventeen claims of one hundred feet each on the quartz lode or vein known as the Eureka ledge situated upon Eureka hill, about one mile easterly from the town of Grass Valley, Nevada county, California, commencing at a point on said ledge at which this notice is posted, forming the westerly boundary of the claims of the Idaho Mining Company, and extending thence westerly seventeen hundred feet upon and following the said Eureka ledge to a large pine tree forming the eastern boundary of the claims of the Rowanaise Company, with all the dips, spurs, angles and variations of said ledge."

About 164 feet of the Eureka ledge or lode attempted to be granted by appellant's mineral patent lies outside of and beyond the exterior surface boundaries of plaintiffs' mining location, and the right of ownership of these 164 feet of said ledge presents the important issue in the case.

The determination of this matter involves, of course, the question whether this particular part of the lode was subject to location on September 5, 1897, when the predecessor of plaintiffs gave notice of his claim; in other words, whether it was then a part of the public domain. This must depend upon the consideration whether appellant's patent to lot No. 41 and 1,664 linear feet of the Eureka ledge carried and conveyed that portion of the strike which lies beyond the exterior surface boundaries of said lot. If it was operative to vest title to said portion, manifestly, appellant must prevail; otherwise, the order of the trial court must be affirmed.

Respondents' position is:

> "That the Eureka patent granted the fee of lot No. 41 including so much of the Eureka lode as apexed within the exterior surface boundaries of said lot, with the right to follow the vein on its dip and nothing more; and that as to the portion of the lode which lies beyond the exterior boundaries of lot No. 41, the patent is invalid and inoperative."

Furthermore, it is contended that:

> "Appellant has the choice of two courses. Either it could rely upon its old location and possessory right of so many linear feet along the ledge, with its attendant burdens of annual labor, etc., without certain and defined surface rights, or it could proceed to patent, have its lode and selected surface ground officially surveyed and platted, and receive from the government a mineral grant for something certain and defined, thus relieving itself from the burdens mentioned and making certain what was theretofore indefinite. Appellant chose the latter course and it must abide its choice."

We think there can be no doubt, under the decisions, of the correctness of respondents' view of the case. If the patent had been issued under the statute of 1872 (Act May 10, 1872, c. 152, § 3, 17 Stat. 91 [U. S. Comp. St. 1916, § 4618]), even appellant would probably not contest the proposition affirmed by respondents, but no different conclusion can be reached from a proper interpretation of the law of 1866 under which appellant claims, although said statute is not so explicit and certain as the later enactment of Congress. The second section of the federal mining act of July 26, 1866, c. 262, 14 Stat. 251, provides:

> "Whenever any person * * * claims a vein or lode of quartz, * * * bearing gold, * * * having previously occupied and improved the same according to the local customs or rules of miners in the district, * * * and having expended in * * * labor and improvements thereon an amount of not less than one thousand dollars," etc., "it shall * * * be lawful for said claimant * * * to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles, and variations, to any depth, although

it may enter the land adjoining, which land adjoining shall be sold subject to this condition."

The use of the terms "entry" and "tract" clearly implies a surface location, and it is the "tract" for which the patent is granted. The language is opposed to the contention that the patentee may claim the ledge on its course or "strike" beyond the extreme boundaries, although he may follow the lode on its "dip" beyond the lateral lines. It makes no difference what the actual location may have been or what is permitted by the local mining rules or customs. The statute prescribes the measure for the issuance of the patent, and the muniment of title therein authorized cannot be extended or enlarged by any act of the administrative officers of the government. That the patent must be thus defined and limited in its operation has been decisively stated by the courts. One of the early cases is Wolfley v. Lebanon Min. Co., 4 Colo. 112. There the patent to what was known as the "Ben Harding" lode was issued under the act of 1866, and contained the following language:

> "It being the express intent and meaning of these presents to convey to the said J. Warren Brown, his heirs and assigns, only the eight hundred linear feet of the Ben Harding lode, with surface ground hereinbefore described, commencing at the * * * discovery shaft of said lode and extending thence westerly eight hundred feet * * * along the course of the vein, the same being known as claims Nos. 1, etc., * * * with the right to follow said Ben Harding lode or vein, to the distance of eight hundred linear feet, with its dips, angles and variations, to any depth, although it may enter the land adjoining."

In reference to the claim of the right to follow the vein in its course beyond the exterior boundaries of the surface location the court said:

> "It is however, insisted that if not by the literal terms of the act of July, 1866, then by virtue of territorial legislation and local customs and rules of miners, the patentee was entitled to follow the course of the discovered lode, whether it was comprised within his location or not; that one of the purposes of the act of Congress was to recognize and confirm mining rights and titles as they existed under local laws and customs; that whatever may be the true construction of the act as to locations made subsequent to its passage, as to locations made prior thereto, it authorized the issuance of a patent for a lode located in conformity with the rules and customs of the mining district in which it was situated, even though it might depart in its linear course from the lateral boundaries of the described premises."

After a reference to the status of the claimant and possessor before the issuance of the patent, the court declares:

> "A title in fee, by patent, is offered him, which he may, at his pleasure, accept or reject. By the statute, his rights are circumscribed and determined. The act of Congress, from which they spring, is paramount to all local laws, rules, and customs. * * * It is in the light of its provisions that every patent issued in pursuance thereof must be construed, and we cannot therefore, admit that any such patent can, by virtue of local laws and customs, transfer to the patentee any greater interest or estate than that which the paramount law warrants."

Quoting from the opinion of Judge Deady in the case of Chapman v. Toy Long, 4 Sawy. 34, Fed. Cas. No. 2,610, to the effect that the locator has the choice of remaining in the possession of the mine and developing and appropriating its mineral deposits, or of taking steps to purchase it and secure a patent therefor, it being a matter left to his own option or sense of self-interest, the court proceeds to say:

> "The patent operates to convey not only the circumscribed tract of land which, under the claimant's direction, has been platted, but also the lode contained therein, with the right to follow the same in its downward course into adjoining premises, but not to follow it when, on its onward course or strike, it departs from the vertical side lines. In the latter case, after its departure, it is the subject of location by whomsoever it may be discovered."

It was therefore held that the plaintiff was not entitled to the portion of the lode in its course beyond the patented side lines. The case was manifestly carefully considered and ably expounded by the Colorado Supreme Court.

Two interesting and noted Utah cases are also brought to our attention, both involving the same question. In McCormick v. Varnes, 2 Utah, 355, the notice of location covered some 2,200 feet of the lode, and the patent corresponded with it, but only about 100 feet were covered by the surface boundaries, and it was held that the patentee in his title was limited to this description, the court declaring that:

> "It is clear that the government did not intend, by the act of Congress of July 26, 1866, to authorize the miner to locate, or itself to grant, two separate and distinct estates in a mining location, one in the surface ground, and the other in the vein or lode, whenever the latter might be found to run in its course, without regard to the surface ground."

It was pointed out that under the common law the claimant would be entitled only to whatever might be over and under the surface of a segment of the earth, carved out by the extreme lines of the location extended downwards indefinitely, and that the said statute of 1866 operated to qualify or enlarge this right in one respect only, and that is, to the extent that the claimant—

> "may follow the lode from the apex found within the surface ground, on its dip to any depth, although in its course downward it may so far depart from a perpendicular as to enter the land adjoining. * * * But he cannot go beyond or outside of his side lines on the course or strike of the vein."

The other Utah case, Tarbet v. Flagstaff Mg. Co., went to the United States Supreme Court on appeal, and is reported in 98 U. S. 463, 25 L. Ed. 253, and the rulings of the Utah Supreme Court similar to those in the McCormick Case, supra, were upheld. The rule was also laid down that a location made crosswise of a lode or vein, so that its greatest length crossed the same instead of following the course thereof, will secure only so much of the claim as it actually crosses at the surface, and its side lines will become its end lines for the purpose of defining the rights of the owner. The same theory that is held by appellant herein was embodied in a proposed instruction that was refused by the lower court, and the Supreme Court of the United States declared that the ruling was correct. The proposed instruction was as follows:

> "By the act of Congress of July 26, 1866, under which all of these locations are claimed to have been made, it was the vein or lode of mineral that was located and claimed; the lode was the principal thing, and the surface area was a mere incident for the convenient working of the lode; the patent granted the lode, as such, irrespective of the surface area, which an applicant was not bound to claim; it was his convenience for working the lode that controlled his location of the surface area; and the patentee under that act takes a fee-simple title to the lode, to the full extent located and claimed under said act."

It was declared that the true construction of the act of Congress of 1866 is:

> "That the owner of a mining right in a lode or vein cannot follow the course of the vein beyond the end lines of his location extended perpendicularly downwards, but that he may follow the dip to an indefinite distance outside of his side lines."

The foregoing case is followed in Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 75, 18 Sup. 899, 43 L. Ed. 72, wherein the subject is learnedly reviewed by the court through Mr. Justice Brewer and it is declared that:

> "The express purpose of the statute [of 1866] was to grant the vein for so many feet along its course, yet such grant could only be made effective by a surface location covering the course to such extent."

In Walrath v. Champion Mg. Co., 63 Fed. 552, the acts of 1866 and 1872 are compared, and it is declared by Judge Hawley:

> "A survey of the surface ground must be made before it can be patented, and the surface lines of such survey should be marked upon the ground, whether patented under the law of 1866 or 1872. The intent of both acts, in this respect, is substantially to the effect that the mining locations made thereunder should be along the lode lengthwise, and the surface boundaries should be marked upon the claim. It was not intended by either act that the locator would have any right to follow the lode upon its strike beyond the surface lines of his location. The term 'location' as used in both acts refers to the surface ground, as well as to the vein or lode. The lode claim, whatever its nature, character, or extent, is to be limited to the survey of the surface location, and the title to the lode upon its strike is not given to any portion thereof which departs beyond the surface lines of the location."

Montana Ore Purchasing Co. v. Boston & Montana Co., 20 Mont. 336, 51 Pac. 159, is an instructive case from Montana, very much in point here. The patent called for 2.98 acres of land, more or less, and "and 1,318 linear feet of the said Rarus vein, lode, ledge, or deposit of the length hereinbefore described," etc. The court said:

> "While it is often true that the surface of mining ground is often spoken of in the decisions of the courts as an incident to the vein whose apex lies within or under it, we are clearly of the opinion that the mining statutes of the United States contain no authority for the conveyance of the lodes or veins embraced in a located quartz claim independently of the surface ground connected with and containing or overlying them. Neither is the subject of patented grant by itself. * * * What did the Rarus patent convey? * * * The patent conveys an area of 2.98 acres and no more. * * * In so far as the patent attempts to convey the Rarus lode on its strike, independently of the granted surface of 2.98 acres, it is void and of no effect."

Other similar decisions are cited by respondents, but the foregoing would seem to set the matter at rest.

It is true, as pointed out by the Montana court, that certain expressions are used in the statutes that apparently favor appellant's position, but the phraseology results from the fact that the lode is the actual thing in interest and the principal subject that is contemplated. However, as pertinently declared:

> "Such expressions and such provisions cannot avail to permit the grant of lodes or veins embraced in a located quartz claim regardless of the surface connected therewith."

There are certain expressions, also, in some of the decisions of the courts that lend color to the contention that title to the lode independent of the surface boundaries may be acquired, but they are not to be taken as laying down the law in the premises.

Appellant also seems to find some comfort in certain statements contained in sections 58 and 59 (3d Ed.) of Lindley on Mines. It is apparent, though, that the learned author is therein dealing largely with the mining rules and regulations as to the location of claims and with the opinions of the Land Department of the government. However, when we look at section 60 we find this declaration:

> "The courts of last resort have uniformly overruled the interpretation of this act adopted by the land department, and have established the rule that surface lines, both side and end, were contemplated by the act of 1866, and that when a patent was once obtained the patentee was not permitted to follow the vein on its course beyond the surface boundaries."

Then, in section 71, Judge Lindley compares the two acts of 1866 and 1872, and, in reference to the former, makes this comment:

> "The act of 1866 left the manner of locating these claims to local regulation, limiting the linear extent of each individual claim to 200 feet, except in case of the discoverer, and to a maximum of 3,000 feet to an association of persons." "We have seen that under the local rules locations were made of the vein and a given number of linear feet on the course was claimed; also, that prior to patent the locator could follow that vein, wheresoever it might run, to the extent claimed. His surface ground was for the convenient working of his lode, and its extent was regulated entirely by local custom. His right to the vein in length or depth was not dependent upon the form or extent of the surface ground. When he applied for and received a patent, he received title to but one lode, and could only follow that on its course to the extent which it was included within his surface lines. While end lines were implied, his right to pursue the vein in depth was not based upon their substantial parallelism."

He then proceeds to state what changes were effected by the statute of 1872, but we need pursue the subject no further.

We may say in conclusion that the principal mistake made by appellant lies in the assumption that the location and the patent are governed by the same rule. As pointed out, the location, prior to 1872, could be made of the lode without regard to the surface boundaries, but under the patent the locator was limited to the lode within the designated lines on the surface of the ground. When appellant applied for its patent, it undoubtedly might have included surface ground for the entire length of the lode claimed by it, but it chose to take 23.29 acres along about 1,500 feet of the vein and no surface ground for the remaining 164 feet, and it filed in the local land office its plat showing such choice.

We feel satisfied that the judgment is just and legal, and the order denying the motion for a new trial is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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33 Cal. App. 269

KAYE et al. v. SUPERIOR COURT OF KERN COUNTY et al.

(Civ. 2259.)

(District Court of Appeal, Second District, California. March 21, 1917.)

1. PROHIBITION ⚷13 — RESTRAINT OF ACT ALREADY DONE.

Where the court's act performance of which is sought to be restrained by writ of prohibition has been done, though the court acted in excess of its jurisdiction, the alternative writ will not be made peremptory, since no purpose would be served.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 62.]

2. PROHIBITION ⚷31—MOOT QUESTION.

Where the record on petition for writ of prohibition presents a moot question, the proceeding will be dismissed without prejudice to petitioners' right to apply for such other and further writ as they may deem advisable.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 80.]

Petition for writ of prohibition by W. W. Kaye and others against the Superior Court of the County of Kern and Milton T. Farmer, Judge thereof. Proceeding dismissed.

W. W. Kaye and T. F. Allen, both of Bakersfield, for petitioners. Emmons & Johnstone, of Bakersfield, for respondents.

PER CURIAM. Prohibition. One Newell obtained a judgment in the justice's court against Katze et al., from which defendants appealed to the superior court, where the case was submitted for decision upon an agreed statement of the facts involved. The court adopted the agreed statement as its findings, and gave judgment thereon for plaintiff. Thereafter defendants, pursuant to notice and upon statutory grounds, moved the court for a new trial, which motion for new trial so made by defendants the plaintiff moved to dismiss. The court refused to grant the motion so made by plaintiff to dismiss, and continued to a later date the hearing of defendants' motion for a new trial. Plaintiff then applied to this court for an alternative writ of prohibition directed to the respondent, requiring it to desist from further proceedings in the matter. The application was based upon the ground that the court was without jurisdiction to entertain a motion for new trial of a case on appeal from a justice's court, where the trial was had upon a stipulation of the facts involved. The writ was granted on November 25, 1916, and by the clerk issued in form prepared and submitted by petitioners' attorneys, requiring respondent to desist from further proceedings or ruling upon defendants' motion for new trial then pending before it until the 18th of December, 1916, instead of until the further order of the court, as required by section 1104 of the Code of Civil Procedure. It appears from the return that after the expiration of said time, to wit, on December 27, 1916, the court heard the motion for new trial and granted the same. In so doing, since the command of the writ was merely to desist from any ruling until December 18th, there was no violation of the order.

[1] It thus appears that the act the performance of which it was sought to restrain having been done, and conceding the court acted in excess of its jurisdiction, as to which, upon the authority of Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364, Quist v. Sandman, 154 Cal. 748, 99 Pac. 204, and Abbey Land, etc., Co. v. San Mateo, 167 Cal. 434, 139 Pac. 1068, 52 L. R. A. (N. S.) 408, Ann. Cas. 1915C, 804, we entertain no doubt; nevertheless no purpose could be served by making the writ peremptory.

[2] Indeed, as it now appears, the record presents a moot question; and the proceeding, without prejudice to the right of the petitioners to apply for such other and further writ in the premises as they may deem advisable, is dismissed.

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32 Cal. App. 807

CALIFORNIA WESTERN R. & NAV. CO. v. INDUSTRIAL ACC. COMMISSION et al. (Civ. 2079.)

(District Court of Appeal, First District, California. Jan. 22, 1917.)

Petition for writ of review by the California Western Railroad & Navigation Company against the Industrial Accident Commission and others. Award affirmed.

Pettis & Pemberton, of Fort Bragg, for petitioner. C. H. McConaughy and Chris M. Bradley, both of San Francisco, for respondents.

PER CURIAM. The petition in the first instance, as it appeared to the court, alleged in effect that the award of the commission was dependent upon the testimony contained in the deposition of the mother of the deceased taken in Finland, and which deposition was given by the witness without having been subjected to an oath. It was also alleged that the deposition was not duly authenticated. The record before us now shows that the witness who gave her deposition was duly sworn, and the deposition also appears to be duly authenticated; and upon an examination of the record we believe that the evidence as shown by that deposition sufficiently supports the award of the commission.

For these reasons the award will be affirmed; and it is so ordered.

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32 Cal. App. 803

GOMEZ v. AMERICAN CAN CO. et al. (Civ. 2074.)

(District Court of Appeal, First District, California. Dec. 11, 1916.)

Proceeding by Catarino Gomez against the American Can Company and the Industrial Accident Commission of the State of California under the Workmen's Compensation Act (St. 1913, p. 279). From an order of the Commission denying a rehearing, she applies for writ of review. Petition denied.

Oscar Hudson, of San Francisco, for petitioner. Chickering & Gregory, of San Francisco, for respondent American Can Co. Christopher M. Bradley, of San Francisco, for respondent Industrial Accident Commission.

PER CURIAM. The petition herein is denied. We think that the finding of the Industrial Accident Commission that the applicant has failed to establish any sympathetic affection of his uninjured eye was justified by the evidence before it, and hence that the order of the Commission denying the petition for a rehearing was properly made.

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33 Cal. App. 48

LAKE v. STERLING DEVELOPMENT CO. et al. (Civ. 1842.)

(District Court of Appeal, First District, California. Feb. 20, 1917. Rehearing Denied by Supreme Court April 19, 1917.)

Appeal from the Superior Court of the City and County of San Francisco; J. M. Seawell, Judge.

Action by Fred W. Lake against the Sterling Development Company and others. From judgment for plaintiff, and from order denying new trial, defendant named appeals. Reversed.

Jesse Olney, of San Francisco, for appellant. B. M. Aikins, R. P. Henshall, and Luther Elkins, all of San Francisco, for respondent.

LENNON, P. J. In this action the plaintiff sought and secured a judgment quieting his title to certain lands claimed to be owned by him under a certificate of purchase of state school lands issued to his assignor in the year 1869. The court denied a motion of the defendant Sterling Development Company for a new trial, and this appeal is from the judgment and order.

The primary points presented in support of the appeal are covered and controlled, we think, by the recent decision of our Supreme Court in the mandamus proceeding of Aikins v. Kingsbury, 170 Cal. 674, 151 Pac. 145. In that proceeding it appears that the plaintiff in his action had granted a portion of the identical lands here involved to the petitioner therein, who sought by writ of mandate to compel the register of the land office of the state to issue a patent thereon. The essential features of the appeal in that case and in this are the same. The certificate there held to be forfeited is the identical certificate that the plaintiff herein claims under, and the issues raised in this case are identical with those raised in that. It is urged, however, by the appellants that the question of the annulment by foreclosure of the certificate under which respondent claims, and which question is referred to in Aikins v. Kingsbury, supra, but not there decided, be disposed of by us. A decision as to the validity or invalidity of that judgment was not deemed necessary in Aikins v. Kingsbury, nor do we deem it necessary here.

It will suffice, we think, for us to say that the judgment and order appealed from should be reversed, upon the authority of Aikins v. Kingsbury, supra; and it is so ordered.

We concur: RICHARDS, J.; KERRIGAN, J.

174 Cal. 663

In re COLLINS' ESTATE.

CHAPPELLE v. WOODHAMS.

(S. F. 7913.)

(Supreme Court of California. March 20, 1917. On Rehearing, April 16, 1917.)

1. APPEAL AND ERROR 🔑151(3)—PARTY AGGRIEVED—EXECUTOR.

The executor of a will admitted to probate having been duly appointed, and taken up, the administration, represents, and is under duty to protect the interests of, all the beneficiaries, and may oppose contest of the will till final decision thereof, and so appeal from revocation of probate as a party aggrieved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 947.]

2. WILLS 🔑55(1)—TESTAMENTARY CAPACITY—SUFFICIENCY OF EVIDENCE.

Evidence on a will contest *held* insufficient to support a verdict that decedent was not of sound and disposing mind.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137–140, 148–150, 161.]

3. WILLS 🔑41—TESTAMENTARY CAPACITY.

Testator's extreme stinginess, repulsive or filthy personal habits, ill temper, jealousy, dictatorial and disagreeable disposition, and propensity to drive hard bargains do not constitute insanity or unsoundness of mind, but at most accentuate any inference of unsoundness founded on other circumstances.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 84, 85.]

4. WILLS 🔑34—TESTAMENTARY CAPACITY—INSANITY.

Aside from dementia leaving no mental power to form any conception of the relation of things, insanity which will avoid a will is delusion operating on the testamentary act.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 71–73.]

5. WILLS 🔑55(1)—TESTAMENTARY CAPACITY—OPINIONS.

Opinions as to unsoundness of mind are insufficient to establish the fact, being based on facts showing neither morbid delusion nor total mental incapacity, and showing nothing more than personal peculiarities and habits, occasional lapses or failure of memory and defective nervous and muscular co-ordination, and it clearly appearing that none of these frailties was present at the execution of the will or affected its provisions.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137–140, 148–150, 161.]

On Rehearing.

6. APPEAL AND ERROR 🔑151(3)—"PARTY AGGRIEVED"—EXECUTOR.

Code Civ. Proc. § 1299, providing an executor named in a will may petition to have it proved, authorizes him to prosecute the petition to a final determination, and so makes him as trustee for the beneficiaries a party aggrieved, who may appeal from the order refusing admission to probate.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 947.

For other definitions, see Words and Phrases, First and Second Series Aggrieved Party.]

Department 1. Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Albertine Collins Chappelle contested the will of Betsey H. Collins, deceased, and from an order revoking probate, W. E. Woodhams, executor, appeals. Reversed.

William H. Johnson, of San Jose, for appellant. Hiram A. Blanchard, of San Jose, for respondent.

SHAW, J. This is an appeal from an order revoking the probate of the will of Betsey H. Collins, deceased.

[1] The appellant has no interest in the estate except such as arises from the fact that he is the duly appointed and qualified executor of the will previously admitted to probate. The will provides for several legacies and devises the residue of the property to the contestant. Respondent contends that the executor is not a party aggrieved, and hence that he cannot maintain this appeal. This proposition is not well taken. When a will has been admitted to probate and the executor is duly appointed and has taken up the administration of an estate, he represents all of the beneficiaries of the will. It then becomes his duty to protect their interests, and as such executor he has the right to oppose a contest of the will until the final decision thereof; consequently he may maintain an appeal from an adverse judgment in the lower court. Estate of Whetton, 98 Cal. 203, 32 Pac. 970; Estate of McKinney, 112 Cal. 454, 44 Pac. 743; Estate of Dillon, 149 Cal. 685, 87 Pac. 379; Estate of Hite, 155 Cal. 457, 101 Pac. 448; Estate of Logan, 171 Cal. 362, 153 Pac. 388.

[2] The only question presented in the case is whether or not the evidence is sufficient to support the verdict of the jury that the decedent was not of sound and disposing mind at the time of the execution of the will.

The testatrix was the wife of Herman Collins. They had no children born to them. The contestant, Mrs. Chappelle, was adopted by them as their daughter when she was about 2 years of age, and lived with them until her marriage to Chappelle about the year 1909. The family formerly resided in South Dakota. Some 10 years previous to her death they removed to San Jose, Cal. In May, 1912, Collins left his wife and went to

England, remaining there until his death in May, 1915. The testatrix, in her later years, was afflicted with varicose veins in her leg. On October 28, 1914, a surgical operation was performed on her to remove them. At the time of making the will, on March 25, 1915, she was about 75 years of age. Her estate consisted of a farm in South Dakota, valued at about $12,000, something over two thousand dollars on deposit in savings banks, and money loaned on secured notes amounting to $2,500, besides some small articles of personal property. Before leaving his wife Herman Collins executed a deed purporting to convey to the contestant the residence in which he and the testatrix had lived prior to his departure. This deed he placed in escrow to be delivered to the contestant upon his death, and it has since been delivered to her. The testatrix occupied this residence until her death. The will bequeathes a legacy of $500 each to two nieces, and a like amount to a nephew and his wife jointly. It also bequeathes $100 to the nephew and his wife for the upkeep of the graves of the father and mother of the testatrix. All the residue of the estate is given to Albertine C. Chappelle, the contestant.

The contestant and five other women, intimate acquaintances and near neighbors of the testatrix, each testified that in her opinion the testatrix was not of sound mind when she executed the will. There was no other testimony on the subject except that of two physicians, one of them the husband of the contestant, who, in answer to hypothetical questions purporting to state the substance of the reasons given by the contestant's witnesses, each stated his opinion to be that she was of unsound mind. We will state as briefly as possible the facts given by the witnesses as the foundation for their opinions.

The testatrix did not eat enough; she was too close to feed herself properly; so close that she would not take proper nourishment, and if she saw anybody else eating plenty, she thought that they spent too much money; she wanted so many vegetables for a nickel that the vegetable peddler refused to call at her house. She wanted the neighbors to cut down the lilac trees so that she could see her husband when he turned the corner. When she saw her husband give three peaches from his back yard to a neighbor woman she became very angry, and thereafter was always talking about it. She was troubled frequently with aphasia, and would at such times try to tell things, but could not make herself understood. One of these spells occurred about a month before the will was made. In these spells she would open and close her eyes, trying hard to think of the words, then give it up, then try again and fail. Her mouth was drawn to one side from paralysis of the facial muscles. After the operation mentioned she shuffled her feet in walking, as if she were unable to raise them. During the last two or three years she frequently asked a neighbor to do little errands for her, such as paying her taxes, buying her wood, and the like. She grieved about her husband not coming back or writing to her. There did not seem to be, in the opinion of one witness, any good common sense to her talk. No instances, however, were given of this lack of common sense. After the operation in 1914 she lost flesh very rapidly and became very thin. Prior to that she was rather fleshy. She harbored a grudge against one of the witnesses because her husband had given the witness a chair, and she was jealous about it. She never wanted any one to have pleasure. When the contestant visited her for a month, in May, 1915, she did not seem to recognize her as she entered the room, but recognized her in a moment and broke down and cried. She did not inform the contestant of the operation for varicose veins, in October, 1914. She first told the contestant to go home, and then when she got ready to go she begged her to stay. She was very suspicious, very disagreeable and ill-tempered, getting so agitated with anger that she would get weak and have to sit down and rest. Sometimes she could not be made to understand anything except by writing, which she would then try to read and would shake her head as if she did not understand it. She would not allow her daughter to do the washing for herself and children during the said visit for fear she would use more water than was permitted, and she would turn down the gas when the daughter was cooking in the kitchen, saying that it was wasting. She was always a woman it was nearly impossible to live with, always nagging and scolding, and was extremely penurious. This was true before the daughter's marriage in 1909. When eating she would grab the victuals in her hands and eat as if she were starving. She ate peas with a spoon and took meat in her fingers, when eating, seldom using a knife or fork. She would pick up partly eaten scraps out of other plates and sop up the gravy off the meat plate with a piece of bread, when visiting at a neighbor's after a meal. A few weeks after making the will she got some Easter cards to send to friends and her daughter. She did not know what to write on them, and was very much disturbed because of that fact, said she did not know how to put it on paper, and finally sent the cards without anything on them except the address. She was foolishly fond of money, and on one occasion hugged and kissed a cent piece given her by a neighbor. She had trouble with her left hand at times so that she could not move it very well, and she had to move it from one place to another with the other hand.

On the other hand, the evidence showed that, notwithstanding these peculiarities and physical conditions upon which the witnesses based their opinion that she was of unsound mind, during all of this time she was able to and did transact her ordinary business as before and without serious difficulty, except that which arose from her deafness. The savings banks accounts show that she was depositing and withdrawing money therefrom during this period. The $2,500 loaned as aforesaid was represented by eight notes, bearing interest payable at different times, some annually, some semiannually and some quarterly. These loans were made for her by the appellant, Woodhams, who, during all this time, was acting as her agent for that purpose. Before making a loan he would submit the proposition to her, and she would approve it. She kept the notes and mortgages and all her other valuable papers in her own custody. As each installment of interest became due she would take the note to Mr. Woodhams' office, receive from him the interest paid and have it credited on the note. She kept a close account of the dates, and never failed to look after the interest promptly as it became due, or to select the right note from among her papers. She had loaned $100 to contestant's husband, Dr. Chappelle. In May, 1915, when the contestant was visiting the testatrix, and when she says she believes the testatrix was of unsound mind, the testatrix handed her this note and told her to give it to her husband as a present. The contestant received it without objection, and delivered it as instructed. The testatrix knew the date when taxes became due and made preparations in advance for paying the same. She made one loan just three weeks before the making of the will, and she withdrew money from the bank and deposited money therein shortly before and shortly after the making of the will. Those who transacted business with her testified that they saw no cause to question her capacity to transact business or the soundness of her mind. The will itself bears evidence of a rational mind. In view of the amount and character of her property and her family relations, the dispositions of her will seem entirely reasonable. She herself wrote the instruction stating how it was to be made, and it was prepared in accordance therewith after a prolonged consultation extending over two days, by Mrs. Smith, secretary to Mr. Woodhams. She brought the deed for the Dakota farm in order to have it correctly described in the will. She assisted in comparing the description in the will with that in the deed, she reading one paper and Mrs. Smith reading the other. Some 14 months before the date of the will she wrote a letter to Woodhams concerning one of the loans. Its language is clear and forcible and the ideas sound and rational, showing a business capacity of a rather unusual character for so old a woman. There was no evidence of any sudden change in her mental condition. The aphasia and the difficulty in moving the left hand were first manifested shortly before the making of the will, but the peculiarity of habits, character, and disposition had, so far as appears, existed for many years and while she was in normal condition.

[3] Extreme stinginess, repulsive or filthy personal habits, ill temper, jealousy, a dictatorial and disagreeable disposition, and a propensity to drive hard bargains do not constitute insanity or unsoundness of mind. As was said in Estate of Redfield, 116 Cal. 652, 48 Pac. 794, they have no greater effect "than to accentuate the inference of unsoundness founded on other circumstances." In this case they do not even have that effect, for the evidence shows that the testatrix had had these habits and peculiarities in as great degree for many years, and there is nothing to indicate that they had their origin in a diseased mental condition.

[4] The fact that she shuffled her feet as she walked, after the operation on her leg in October, 1914, for varicose veins, showed physical disability, but it had no direct tendency to prove mental disease or insanity. The attacks of aphasia and the difficulty in moving one hand, there being evidence of but one instance of the latter, show a considerable degree of senile deterioration. But these things do not of themselves establish the insanity that is essential to render a person incapable of making contracts or a will. "It is commonly held that aside from those cases of dementia where the patient has not mental power to form any conceptions whether true or false, of the relations of things, the true test of insanity is mental delusion; that if a person persistently believes supposed facts which have no real existence, and against all evidence and probability conducts himself upon the assumption of their existence, he is as to that belief under a morbid delusion, and delusion in that sense is insanity. * * * But before a will can be rejected on that account it must appear that 'its dispository provisions were or might have been caused or affected by the delusion,' * * * delusions which are not operative in the testamentary act, do not relate to the persons or objects affected by it, are not permitted to invalidate it." Estate of Redfield, supra.

In this case there is no pretense that the testatrix had not mental power to form reasonably accurate conceptions of the true relations of things. Her peculiarities and eccentricities do not constitute the degree of dementia referred to in the exception first noted in the passage just quoted. With respect to the true test there stated, the existence of delusions, there is absolutely no evidence. It is obvious that the physicians who gave their opinions that she was of unsound mind were measuring it by a more exact and perfect standard than is required by the law, the mind wholly normal and healthy, free from any defective co-ordination arising from disease or decay. In a medical sense anything short of this may constitute insanity or unsoundness of mind; but the law does not demand such perfection to give capacity to manage one's affairs and make valid dispositions of property. The law defining insanity which will avoid such an act requires "either insanity of such broad character as to establish mental incompetency generally, or some specific and narrower form of insanity, under which the testator is the victim of some hallucination or delusion." Estate of Chevallier, 159 Cal. 168, 113 Pac. 130. And even in the latter class the act to be avoided must have been produced in whole or in part by the delusion or hallucination. Id.

[5] At best, the testimony of expert witnesses as to insanity, based on hypothetical questions skillfully framed to call for an answer favorable to the party in whose behalf it is asked, "is evidence the weakest and most unsatisfactory." Estate of Dolbeer, 149 Cal. 243, 86 Pac. 695, 9 Ann. Cas. 795. When, as in this case, the opinions as to unsoundness of mind, including those of the intimate acquaintances, are based on facts which show neither morbid delusion nor total mental incapacity, which prove nothing more than personal peculiarities and habits, accompanied by physical weakness, occasional lapses or failure of memory and defective nervous and muscular co-ordination, and it clearly appears that none of these frailties was present at the time of the execution of the will or affected its provisions in any way, the evidence is wholly insufficient to establish the fact.

The order is reversed.

We concur: SLOSS, J.; LAWLOR, J.

On Rehearing.

PER CURIAM. [6] In the opinion heretofore rendered the court in department held that the appellant, Woodhams, was sufficiently interested in upholding the will of the deceased to maintain an appeal from the order in controversy, but inadvertently assumed that it was an order revoking the probate of the will, the fact being that it was an order refusing to admit the will to probate, and it was made upon a contest of the will before probate. The record on appeal was in typewriting as provided in section 953a, Code of Civil Procedure, and neither party for the information of the court printed in their briefs the order appealed from, or any part of the pleadings in the case. Code Civ. Proc. § 953c.

The difference in the facts does not require a different ruling. Woodhams was named in the will as executor thereof, and as such he filed a petition for the probate thereof, to which the respondent filed the contest. The Code (§ 1299, Code Civ. Proc.) provides that any executor named in any will may petition the court to have the will proved. This clearly authorizes the executor to file and prosecute the petition to a final determination. An appeal may be taken from an order refusing to admit a will to probate. Having the authority and the right to file and prosecute the petition, he stands, with respect thereto, in a fiduciary relation to all the beneficiaries thereunder, and it is his duty, and accordingly his right, to take all the proceedings necessary to secure a just determination of its validity, including an appeal from an adverse decision on the question. He has authority, also, under section 369, Code of Civil Procedure, to sue without joining with him the persons for whose benefit the action is prosecuted. In this case he is interested because his position as the executor named in the will and as the petitioner for its admission to probate makes him the trustee for that purpose of the legatees named in the will. In that capacity and by virtue of that right he is a "party aggrieved" by the decision, and one who may appeal therefrom as provided in section 938 of the Code of Civil Procedure. There are no decisions by this court on the exact point, but the principle is everywhere recognized. 40 Cyc. 1229, 16 Ency. of Plead. & Prac. 997; 18 Cyc. 206, 3 Cor. Jur. 622.

Petition for rehearing denied.

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32 Cal. App. 796

VAN CALBERGH v. EASTON et al.

(L. A. 3917.)

(Supreme Court of California. April 13, 1917.)

ADVERSE POSSESSION ⟹54—UNINTERRUPTED POSSESSION — BEGINNING ACTION BEFORE TIME.

Under Code Civ. Proc. § 325, providing that to constitute adverse possession there must be uninterrupted and continuous possession for five years, relief cannot be given if suit is begun before, although it is not concluded till expiration of five years.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 271.]

In Bank. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by E. Van Calbergh against Alice A. Easton, J. M. Moyer, and others, in which Moyer filed an answer and cross-complaint. From a judgment for plaintiff, and an order denying a new trial, Moyer appealed to the District Court of Appeal, which reversed the judgment, and appellant files application for rehearing. Rehearing denied.

The following is the opinion of James, J., of the District Court of Appeal, in which Conrey, P. J., and Shaw, J., concurred:

Plaintiff brought this action to quiet his title to a certain lot of land in the city of Los Angeles, alleging that he had for more than five years last past been the owner and in possession of and had paid the taxes upon the lot. It was asserted by the complaint that Alice A.

Easton, a defendant, and certain other persons sued by fictitious names, claimed an interest in the property adverse to the plaintiff. The complaint was filed on November 12, 1912. J. M. Moyer appeared and answered, claiming to be the successor in interest of the defendant Alice A. Easton, and to be one of the persons mentioned by fictitious name in the complaint of plaintiff. He filed an answer and cross-complaint, alleging fee-simple ownership of the land in controversy and asking for judgment accordingly. There was an answer to the cross-complaint, and the case went to trial; findings and judgment being made and entered in favor of the plaintiff, from which judgment and from an order denying a new trial to the defendant, this appeal was taken.

The record of the trial is presented by bill of exceptions. It is shown that by stipulation of the parties it was agreed that in April, 1889, Alice A. Easton was the owner of the property in fee title. The plaintiff testified that prior to the year 1907 he had owned and lived upon the lot immediately adjoining that in controversy here; that in November, 1907, he was informed by one Warden, connected with an abstract company, that said Warden had for sale the lot described in the complaint; that he was assured by Warden that he could give a clear certificate of title, which was given, and in consideration of a deed being made, the plaintiff paid to Warden the sum of $375. The deed from Warden to the plaintiff was introduced in evidence. It bore date of November 6, 1907, but the plaintiff testified he did not receive the deed until the latter part of November, 1907. By that testimony we take it to mean that the transaction was completed and the deed delivered in the latter part of November, 1907. Plaintiff testified that he immediately took possession of the lot after receiving the deed, built a fence around it, and had used it continuously from that time on up to the date of the trial, which occurred in March, 1914. He showed payment of taxes for the years, 1908, 1909, 1910, and 1911; the tax receipts introduced showing that the second payment for the year 1911 was made to the tax collector on April 24, 1912. The defendant showed that he had made several payments of taxes on the property, and particularly that he had paid the second installment of the 1911 taxes on February 7, 1912, more than two months prior to the time that the plaintiff made a duplicate payment of the same tax. In proving his chain of title, taking the fact stipulated that Alice A. Easton was the owner in fee of the property in 1889, he showed by the judgment roll that title had been quieted in his favor against Alice A. Easton and others in July, 1910.

The court in its findings did not determine that at the time of the commencement of the action the plaintiff had acquired title to the lot and was the owner thereof, but made its findings in this way: "That at the date of the filing of the complaint, to wit, the 12th day of November, 1912, the plaintiff was not, and for more than five years next preceding said date had not been, the owner of the tract of land described in the complaint. * * * That for more than five years prior to the filing of the complaint in this action, to wit, ever since the 10th day of November, 1907, to the present time, viz. the date of the filing of these findings, the plaintiff has been, by actual occupation, in the open, notorious, uninterrupted, adverse, continuous, exclusive, hostile possession, under a claim of title and color of title, of said lands hereinbefore described, and the plaintiff has paid all taxes levied and assessed since the inception of said possession, but he did not pay the second half of the city or of the county taxes levied and assessed for the year of 1912 until after the filing of the complaint herein."

Appellant argues, and we can see no escape from the legal logic, that in order to authorize a judgment in favor of the plaintiff it was necessary, because of the fact that adverse possession was relied upon, that plaintiff show continuous and uninterrupted possession and the payment of taxes for a period of five years preceding the commencement of the suit. The evidence did not establish such a condition of fact, and neither was it by the findings of the court so determined. By his own testimony, the plaintiff did not receive a deed or enter into possession of the lot until "the latter part of November, 1907." He commenced this action on the 12th of November, 1912, which was, according to his own testimony, less than five years from the date of the delivery of the deed. If the conclusion of the court is the correct one—that is, that it mattered not whether the complaint was filed within five years, so long as at the time of the trial or the making of findings the full five years had run—then the complaint may as well have been filed during the third year of the prescriptive term, with the only condition that the full period of five years should have completely run before judgment. It would seem that a bare statement of the proposition is its own answer.

Appellant makes the further contention that, conceding that the plaintiff had been in possession adversely for the full period of five years prior to the commencement of the action, nevertheless it was not shown that he had paid all taxes levied and assessed against the property, because the second half of the 1911 tax was paid by the defendant in February, and that the further payment of the same tax by the plaintiff more than two months later would not satisfy the requirements of the statute. We are in accord with the appellant on this proposition also. We recognize the decisions in cases like Owsley v. Matson, 156 Cal. 401, 104 Pac. 983, and Cummings et al. v. Laughlin et al., 160 Pac. 833, as determining, under the facts of those particular cases, that a payment by each of the contending parties of the same tax would not debar the prescriptive claimant from the benefit of the payments made by him. Such decisions are applicable to cases of overlapping boundaries, but we think not applicable to facts such as are here involved. If it be the law that an adverse claimant can rest upon his payment of taxes, notwithstanding they may have already been paid by the record owner, then the record owner is absolutely powerless to protect himself at all against the evidence of the payments made by the adverse possessor, and in order to prevent title to his property from being divested he will be compelled to go into court before the prescriptive period has run and either ask for an ejectment of the person in possession, or seek a decree to quiet title against the unmatured right of the claimant. The statute (Code Civ. Proc. § 325), to our minds, makes it an indispensable prerequisite that the adverse claimant shall have paid all taxes levied and assessed within the period of his occupancy, and if they have been paid prior to the time that he offers payment to the tax collector, then the tax debt for that year has been satisfied and the double payment amounts to naught. In such a case he could not be held to have paid the tax. The argument that this view may result in a scramble between the owner of the legal title and the adverse claimant as to who shall be first at the tax collector's office is rather an argument against the expediency of the statute than against its effect. To our minds, its effect is plain, and stated in language unmistakable.

We think the contentions of appellant on each of the questions discussed must be sustained.

The judgment and order are reversed.

Charles Lantz, of Los Angeles, for appellant. Frank C. Prescott, of Los Angeles, for respondent.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District is denied. In denying the petition we deem it proper to say that we do not desire to be understood as approving the portion of the opinion relative to the matter of the payment of the second installment of taxes for the year 1911. We are satisfied that the decision of the District Court of Appeal is correct upon the first ground for its decision stated therein.

33 Cal. App. 70

RODGERS v. PACIFIC COAST CASUALTY CO. (L. A. 3921.)

(Supreme Court of California. April 24, 1917.)

1. INSURANCE 🔑435—LIABILITY INSURANCE—PAYMENT OF JUDGMENT.

Under a liability policy insuring against sums paid by insured toward satisfying judgments against him, insured's giving a note for such a judgment constitutes a payment rendering the insurer liable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1144.]

2. APPEAL AND ERROR 🔑842(1)—REVIEW—JURY QUESTION.

Where a liability policy insured against sums paid toward satisfying judgments obtained against insured, whether insured's giving a note for a judgment upon the understanding that it should be surrendered for an assignment of insured's cause of action against the insurer constituted a bona fide payment of the judgment which was actually satisfied of record was a question of fact determined by the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316–3318.]

In Bank. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Frances G. Rodgers against the Pacific Coast Casualty Company. A judgment for plaintiff was affirmed by the District Court of Appeal, and defendant petitions for a rehearing. Petition denied.

The following is the opinion of James, J., in the District Court of Appeal, in which Conrey, P. J., and Shaw, J., concurred:

In this action the judgment entered by the trial court was in favor of the plaintiff. Thereafter a motion for a new trial was made by the defendant and denied by the court. The appeal is taken from the judgment, and also from the order.

Plaintiff on the 18th day of April, 1910, suffered bodily injuries in an elevator which was being run in an apartment house in the city of Los Angeles. The owner of the apartment house business was Nevada Irwin. The latter at the time of the accident held a policy issued by the defendant herein indemnifying her against loss and expense arising for damages accidentally suffered by reason of the operation of elevators in the apartment house. The maximum liability fixed by the policy was the sum of $5,000 where injury was suffered by one person only. This plaintiff, after suffering her injuries, commenced an action in the superior court to recover from Nevada Irwin damages on account thereof, which suit resulted in a final judgment (after appeal taken and decided) in her favor for the sum of $2,539.93. Within 60 days after this judgment became final, Nevada Irwin gave to the plaintiff herein her promissory note for the full amount of and in satisfaction of the judgment. She then, upon the promissory note being surrendered to her and canceled, delivered to this plaintiff an assignment of her (the said Irwin's) claim against the defendant here on the policy of indemnity insurance. This action was then brought. The case was tried before a jury with the result already indicated.

The policy issued by the defendant to Nevada Irwin in terms insured said Irwin on the account mentioned "against loss and expense arising from claims upon the assured for damages on account of bodily injuries accidentally suffered or alleged to have been suffered during the period of this policy by any person by reason of the operation of the elevators described herein." There were a number of conditions stated in the policy. It was required, among other things, that notice should be given to the company immediately of any accident, and that, if suit was brought on account thereof, the assured should forward to the company all process and papers served, and then that "the company, at its own expense, will settle or defend said suit whether groundless or not. The moneys expended in said defense shall not be included in the limits of the liability fixed under this policy. The assured shall not assume any liability, nor interfere with any negotiation for settlement or any legal proceeding, nor incur any expense nor settle any claim except at his own cost, without the written consent of the company." It further provided that "no action shall lie against the company for any loss or expense under this policy unless it shall be brought for loss or expense actually sustained and paid in satisfaction of a final judgment, within ninety days from the date of said judgment and after trial of the issue." The contentions of appellant for reversal herein rest upon two principal propositions which are advanced in the briefs: (1) That under the terms of the policy no action would lie against appellant until the assured had actually paid the amount of the judgment rendered against her, or some part thereof, and that the execution of a promissory note to the injured party would not amount to payment within the meaning of the policy; (2) that under the facts shown in evidence the making of the promissory note by Nevada Irwin in favor of this plaintiff appears not to have been done in good faith, and that the transaction was not bona fide. There seems to be no contention but what an assured has the right under such a policy as that here considered to make a valid assignment of a matured claim against the insurer. The policy contains no terms appropriate to forbid such assignment. It was alleged in the complaint herein, and there appeared to be no dispute as to the facts of the matter, that Nevada Irwin gave the requisite notices to the defendant company as to the accident having happened to this plaintiff, and that when suit was brought to recover damages she delivered to the legal counsel for this defendant all papers in connection with such suit; that this defendant by its counsel took charge of the litigation, managed and controlled it throughout, both in the trial court and upon appeal—in fact, contested the action to the court of last resort. It has been held in several well-considered cases that, where an insurance company acting under the terms of policies practically identical with those made by the insurer in this case takes out of the hands of the assured direction and control of litigation, its liability to the assured becomes fixed and determined upon the entry of judgment; and it is also held that, if precedent payment of the judgment is required of the assured, such payment may be made by promissory note. The decisions indicating a

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

contrary view on the first proposition do not commend themselves to our judgment as presenting a reasonable and fair construction of the contract, when the objects and purposes sought to be accomplished are taken into view. We are in agreement with the expressions to be found in the opinion of the Supreme Court of Minnesota in Patterson v. Adam et al., 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N. S.) 184. The court there says: "The object and purpose of the contracting parties is not to be lost sight of in construing a contract, nor is the rule that in case of ambiguity it must be resolved against the one who prepared the instrument. The language in the lengthy document before us was not the choice of the assured. Recognition needs be taken of the enormous growth of liability insurance of late years. The hazards of modern industries and the risks connected with some of the advantages of present-day life call for this kind of insurance. Policies attempting to fill this demand should, if possible, be construed so as not to be a delusion to those who have bought them." The court proceeds with the statement that, even granting that the policy was so worded that it must be considered one of indemnity, under the facts the company placed itself in a position which resulted in liability; there having been no payment of the judgment in that case by the assured. This last conclusion was based upon the fact, as here, that the company exercised the right reserved to it to settle and carry on litigation, excluding the assured from any interference therewith. The court again says: "Neither public policy nor legal principles can be invoked against the validity of these provisions, if they mean no more than an undertaking to contest an asserted claim against the assured, for which it is liable when established; but if, under the pretense of an insurance obligation, the company carried on litigation in the name of one who has neither voice nor interest therein, and which does not affect the company itself, because the assured is unable or unwilling to pay if plaintiff is awarded judgment, it would seem the company becomes an officious intermeddler. * * * We therefore hold that in a policy such as this, where the company has come into the litigation and assumed exclusive control thereof under its contract, it recognizes a liability, if it fails to defend successfully, to pay the assured the amount of the judgment it so permits to be established, not exceeding the sum stipulated in the policy, and also that, as to the plaintiff (the plaintiff being the person who secured a judgment for damages because of injuries suffered), it should be considered that such judgment is a debt due the assured from the company, and not dependent on any contingency." It was determined by that decision that the judgment creditor of the assured could attach by garnishment the amount of the liability incurred by the insurance company as a debt then due to the assured. The following cases support the proposition that under the terms of a policy of indemnity insurance which promise to indemnify for loss paid by the assured the satisfaction of a judgment procured by the giving of a promissory note is to be deemed payment of the judgment debt: Kennedy v. Fidelity & Casualty Co. of New York, 100 Minn. 1, 110 N. W. 97, 9 L. R. A. (N. S.) 478, 117 Am. St. Rep. 658, 10 Ann. Cas. 673; Taxicab Motor Co. v. Pacific Coast Casualty Co., 73 Wash. 631, 132 Pac. 393. In the latter cases it is pertinently suggested as being inconsistent with the general purposes and intent of such policies to hold that, unless the assured has the actual money or specific property to apply in discharge of the judgment, and that such money or property is so applied, no liability ever arises against the insurer. It has been often held, too often to require citation of authorities, that where there is an express agreement to that intent, a promissory note given to the creditor will extinguish the debt to which it is to be applied.

The second proposition advanced by the appellant, we think, is one which was finally decided by the jury, because it rests upon the evidence heard in the case and the circumstances surrounding the matter to be adverted to. It appeared that after the plaintiff here had found that Nevada Irwin had not sufficient property out of which she might at the time obtain satisfaction of the judgment, she, through her attorney, conferred with the attorney for Nevada Irwin; that it was then agreed that a promissory note should be made by Nevada Irwin in payment of the judgment, and (perhaps simultaneously) it was also understood that the promissory note after being so given should be surrendered and paid by the assignment of Nevada Irwin's claim to this plaintiff. Upon the giving of the promissory note satisfaction of the judgment was actually entered. Under the evidence the jury was altogether authorized to find that it was the intent that liability under the judgment should be extinguished by the giving of the promissory note of Irwin to this plaintiff. As we have suggested, however, this branch of the case enters the realm of fact, and it may not be said that there was no evidence sufficient to sustain the finding made by the jury as is implied from the verdict. And it may be further said that under the law as announced in the decision we first cited herein, when the judgment against Irwin became final the liability of the insurer became fixed. Assuming the correctness of this conclusion, it would then have been competent for Nevada Irwin, without the giving of a promissory note, to have assigned her claim against the insurer to Rodgers in consideration of the satisfaction of the judgment. The transaction as it was made, however, was perfectly legal in the form it took, and, we think, conceding the good faith of the transaction, as we must, was wholly within the rights of the parties.

The complaint made of error because of the giving of certain instructions and refusal to give other instructions offered has been examined. The court, in the view we take of the case, properly submitted to the jury the question as to whether the transaction wherein the note and assignment were given and made was one carried out in good faith and with the intent to extinguish the liability of Irwin upon the judgment. The instructions as a whole appear to have sufficiently and correctly stated such propositions of law as the jury needed advice upon.

The judgment and order are affirmed.

Gray, Barker & Bowen, William A. Bowen, and Bowen & Bailie, all of Los Angeles, for appellant. Lee Riddle, W. O. Morton, Harry A. Hollzer, and C. B. Morton, all of Los Angeles, for respondent.

PER CURIAM. In its petition for rehearing the defendant insists that the opinion of the District Court of Appeal holds that, under the terms of the policy of insurance to Nevada Irwin, the company became bound to pay to Irwin the amount of the judgment recovered against her by the injured party as soon as it became final, and without previous payment thereof by Irwin to the injured party, and that the decision is based on that proposition.

[1] The opinion is not based solely on that proposition. It also proceeds upon the theory that the payment by Irwin of the judgment against her in favor of the injured party is a condition precedent to the existence of a cause of action in favor of Irwin against

the company, as indeed the policy expressly declares, but that such previous payment need not be made in money, but may be made in property of any kind including the promissory note of Irwin if such note is accepted expressly as payment—a theory in which we concur.

[2] This leaves as the main point of the case the question whether or not the note was accepted as payment and was made in good faith. This, as the District Court says, is primarily a question of fact which the jury, on the evidence, resolved against the company.

The petition for rehearing is denied.

(175 Cal. 53)

MEEK et ux. v. PACIFIC ELECTRIC RY. CO. (L. A. 4000.)

(Supreme Court of California. May 4, 1917.)

1. Husband and Wife ⟹209(3)—Injuries to Wife—Actions.

By express provision of Code Civ. Proc. § 427, subd. 8, the husband and wife may incorporate in one cause of action a statement of the damages sustained by the wife on account of personal injuries, and a statement of the consequential damages suffered by the husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 768, 968, 973.]

2. Damages ⟹186—Injuries to Wife—Recovery by Husband — Evidence — Sufficiency.

Uncontradicted evidence that a wife in an accident lost an arm above the elbow, that she had been in sound health, and did the housework, but that her injuries were permanent, and of a nature preventing her performance of her usual duties, and that her nervous system was seriously impaired, and that the expectation of life of both the plaintiffs was upwards of 30 years, is a sufficient showing upon which the jury is authorized to find the value of the services of the wife, since there is no need of direct or express evidence of the value of the wife's services in order to entitle the husband to recover for the loss thereof.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 509.]

3. Damages ⟹216(1)—Injuries to Wife—Measure of Damages—Instructions.

In suit by husband and wife for injuries to the wife, an instruction that in fixing the damages the jury should fix the amount in each separate matter irrespective of the amount of the other, and should not consider whether the total amount awarded is large or small, was not erroneous.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548, 549.]

4. Damages ⟹132(12)—Excessive Damages—Injuries to Wife.

In suit by husband for loss of wife's services and by wife for personal injuries, verdict of $22,500 was not excessive, where the wife, 30 years of age, lost an arm, suffered in both body and mind, suffered a shattered nervous system, and was no longer able to perform her usual household duties.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 383.]

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by J. F. Meek and wife against the Pacific Electric Railway Company. Judgment for plaintiffs, and order denying motion for new trial, and defendant appeals. Affirmed.

Frank Karr, R. C. Gortner, and A. W. Ashburn, all of Los Angeles, for appellant. E. B. Drake, of Los Angeles, for respondents.

VICTOR E. SHAW, Judge pro tem. Action by plaintiffs as husband and wife to recover damages for personal injuries to the latter alleged to have been caused by the defendant's negligence. The trial resulted in a verdict for plaintiffs, pursuant to which judgment was entered in their favor for the sum of $22,500, from which, and an order denying its motion for a new trial, defendant appeals.

[1] The grounds upon which appellant seeks a reversal are: First, want of sufficient evidence to support the verdict; second, erroneous instructions given to the jury; third, that the verdict is excessive. In addition to a statement of the injuries suffered by Evalena Meek and for which compensation in damages is sought, it was alleged in the complaint that by reason thereof, J. F. Meek had incurred liability and made expenditures in a large sum for medicines and surgical treatment rendered necessary on account of the injuries to his coplaintiff, and that, due to the loss of her services caused by such injuries, he had sustained damages in the sum of $20,000. Express authority for thus incorporating in one cause of action a statement of the damages sustained by the wife on account of personal injuries with a statement of the consequential damages suffered by the husband is found in subdivision 8 of section 427 of the Code of Civil Procedure, which provides that:

> "In any action brought by the husband and wife, to recover damages caused by any injury to the wife, all consequential damages suffered or sustained by the husband alone, including loss of the services of his said wife, moneys expended and indebtedness incurred by reason of such injury to his said wife, may be alleged and recovered without separately stating such cause of action arising out of such consequential damages suffered or sustained by the husband."

With reference to damages sustained by the husband and due to the loss of services of his wife it was alleged and, except as to the amount of damage, proved:

> "That before said accident said plaintiff Evalena Meek was an able-bodied woman; sound in mind and body; made part of her own clothes; did the housework for herself and husband, and when she had any one employed to assist in the housework she overlooked the same, and, in fact, was in charge and control of the household and performed the usual duties that a housewife performs in that behalf; but that since said accident said plaintiff Evalena Meek has been unable to perform, and will never be able to perform, the said duties as aforesaid, to the plaintiff J. F. Meek's damage in the sum of $20,000."

In rendering its verdict the jury found that, due to the injuries suffered by the wife, plaintiff had sustained damages in the sum of $15,000, and that the damages sustained by J. F. Meek for loss of the services of his wife and expenses was $7,500. It is conceded that the expense incurred by the husband for medical care and treatment was $1,148, leaving a balance of $6,352, awarded for lost services.

[2] The attack made upon the verdict for insufficiency of evidence is directed to the amount of consequential damage awarded to the plaintiff J. F. Meek for loss of his wife's services, and this is based upon the fact that, while the allegations of the complaint in this regard were conclusively established, no evidence was introduced or offered as to the pecuniary value of such services. The uncontradicted evidence in support of the allegations that, prior to the injuries sustained, which included the loss of an arm above the elbow, the wife was in sound health, did the housework, performed the household duties and usual duties of a housewife, and that her injuries are permanent and of a nature by reason whereof she will never be able to perform her usual duties, together with proof of the fact that her nervous system was seriously impaired, and that the expectation of life as to both of the plaintiffs was shown to be upwards of 30 years, constituted a sufficient showing upon which the jury, guided by their general knowledge of such matters, were authorized to find the value of such services. Redfield v. Oakland C. S. Ry. Co., 112 Cal. 220, 43 Pac. 1117; Martin v. Southern Pacific Ry., 130 Cal. 285, 62 Pac. 515. Indeed, from the very nature of the case, the husband's loss is not susceptible of direct proof. Suppose a wife performed no manual labor, can it be said that her husband has no right to recover from the wrongdoer compensation for rendering her incapable of performing such service? The services rendered by a wife, aside from the consideration of her society, or what is termed the consortium, damages for which are not recoverable in this state, may be and often are of such character that no witness can say what they are worth. Conceding that part of the service performed by the wife might be the subject of market value it is not true when applied to all, since the aid, advice, and assistance rendered a husband in conducting his affairs, and management of the home, is not to be tested by what such service could be hired for. Hence "there is no need of direct or express evidence of the value of a wife's services, either by the day, week or any other stated period, in order to entitle the husband to recover for the loss thereof, as the relation which she sustains to him is a special and peculiar one, and the actual facts and circumstances of each case should guide the jury in estimating for themselves, in the light of their own observation and experience, and to the satisfaction of their own consciences, the amount which would fairly and justly compensate the husband for his loss." 13 Cyc. p. 215, note 22. See, also, Metropolitan St. R. Co. v. Johnson, 91 Ga. 466, 18 S. E. 816; Kimberly v. Howland, 143 N. C. 398, 55 S. E. 778, 7 L. R. A. (N. S.) 545; Denver Consol. Tramway Co. v. Riley, 14 Colo. App. 132, 59 Pac. 476; Pennsylvania R. R. Co. v. Goodman, 62 Pa. 329; Selleck v. City of Janesville, 104 Wis. 570, 80 N. W. 944, 47 L. R. A. 691, 76 Am. St. Rep. 892. The fact that some of the cases supporting the proposition are from jurisdictions where both the consortium as well as the services of the wife are elements of damages recoverable by the husband render them of no less weight as authorities, since they hold that the service, whether physical in character or rendered in an advisory capacity, for which, as well as the corsortium, recovery is sought, is not a subject as to the value of which direct evidence is required.

By an instruction designated U, the jury was told:

> "In view of the fact that this is an action by the plaintiffs for the injuries to the wife, and also by the husband for lost services of his wife, and alleged expenses, I instruct you that in fixing the damages, if any, you should fix the amount in each separate matter irrespective of the amount in the other, and should not consider whether the total amount awarded is large or small, but should fix the amount in each instance according to the instructions that I have given you on that issue."

Appellant insists that the instruction was prejudicial in that it not only caused the jury to lose sight of the fact that plaintiffs were entitled to but one payment on account of the injuries suffered, but required the jury to arrive at their verdict by a process, the effect of which was well calculated to increase the award to a sum in excess of that which they would otherwise have fixed as the total damage to both plaintiffs for the wrong suffered. And also claims that the instruction is in conflict with one wherein the jury was told:

> "In the event that you find for the plaintiffs herein, you should return but one verdict for an amount which in your judgment will compensate both plaintiffs for the damage and loss suffered by reason of the injury to the plaintiff Evalena Meek."

[3] We are unable to perceive any merit in these contentions. Only one verdict was returned, and by that the jury found that the total damage sustained by both plaintiffs was $22,500. In view of the fact that the action was not only to recover damages for the wife's injuries, but, on behalf of the husband, to recover for loss of her services, the instruction designated U, wherein the jury was told that they should not permit the amount, whether large or small, awarded in the one case, to influence them in fixing compensation for the other was, in our opinion, a correct statement of the law properly given the jury, and in accordance with which, as shown by the form of their verdict in fixing the amounts found due, it acted in arriving at a conclusion.

[4] Aside from the amount of the award,

there is nothing disclosed by the record from which we, as a matter of law, can say that the verdict is excessive. Evalena Meek was at the time of the accident 30 years of age, and, among other serious injuries of a permanent nature suffered, as the loss of an arm, in consequence of all which she has not only suffered in both mind and body, but can indulge in little or no hope for future improved condition of health. The language used by this court in Reeve v. Colusa Gas & Elec. Co., 152 Cal. 99, 92 Pac. 89, wherein the court refused to disturb as excessive a verdict for $30,000 awarded to a woman 57 years of age, is applicable to the facts herein involved. It was there said:

> "It is impossible adequately to describe the suffering and misery—past, present, and future—inflicted upon the plaintiff as a consequence of the injury. The verdict is large, the amount of damage was a question for the jury, subject to the supervision and correction of the trial court, and, having been passed by the latter without disapproval, it is not for us to say, under the circumstances, that it is excessive."

See, also, Morgan v. Southern Pacific Ry., 95 Cal. 501, 30 Pac. 601, where it is said:

> "A verdict will not be disturbed because excessive, 'unless the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury.'"

In the case at bar it appears that the sum awarded by the jury consisted of $15,000 for injuries to the wife, $1,148 for expenses incurred and paid by the husband on account of her injuries, and $6,352 for loss of services to the husband. There is nothing disclosed by the record upon which this court can as a matter of law say that the verdict is excessive.

The judgment and order appealed from are affirmed.

We concur: SLOSS, J.; SHAW, J.

(175 Cal. 63)

JOHNSON v. V. D. REDUCTION CO. et al.

(L. A. 4025.)

(Supreme Court of California. May 4, 1917.)

1. Appeal and Error 🔑994(3)—Scope of Review—Credibility of Witnesses.

If witnesses compared notes with plaintiff and exhibited a partisan feeling in testifying, that was for consideration of the trial judge, and not for the court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3904–3905½.]

2. Nuisance 🔑72 — Public Nuisance—Abatement—Right of Action.

Civ. Code, § 3480, defines a public nuisance as one which affects at the same time an entire community and any considerable number of persons, although the damage to individuals may be unequal. Section 3493 provides that a private person may maintain an action for a public nuisance if it is specially injurious to himself. Code Civ. Proc. § 731, provides that an action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance. Defendant maintained 30,000 hogs in pens and fed them the refuse collected from the entire city of Los Angeles. A private individual owning land in the vicinity sued to abate the alleged nuisance. *Held*, that as he was specially affected, he could maintain the suit, although other persons in the same vicinity were affected by the nuisance, and it was in fact public.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164–169.]

Department 1. Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Injunction by W. R. Johnson against the V. D. Reduction Company and others. Decree for plaintiff, and defendants appeal. Affirmed.

Collier & Clark and James E. Shelton, all of Los Angeles, for appellants. Robert L. Hubbard, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. This is an action brought by plaintiff to enjoin the continuance of a nuisance alleged to have been created and maintained by defendants in growing and feeding hogs upon garbage produced and gathered in the city of Los Angeles, from whence it was transported in cars to a railroad switch adjacent to the lots and pens of defendants, which covered an area of about 200 acres, where they, at all times, kept approximately 30,000 head of swine upon a daily ration of some 300,000 or 400,000 pounds of city garbage hauled out and fed to them.

The appeal is by defendants from a judgment in favor of plaintiff granting a permanent injunction as prayed for, the effect of which is to prevent defendants from shipping to said switch and distributing as feed to said hogs at the place in question garbage or similar material of a partially fermented, decayed or decaying character, and from maintaining at said place, or in the vicinity thereof, hogpens where such material shall be kept and fed in a manner to pollute and befoul the atmosphere with noxious, unwholesome, and offensive odors, in consequence of which plaintiff and his family shall be deprived of the free use and enjoyment of his home, or which shall injuriously affect his property.

The court made findings from which it clearly appears that the effect of the operations, conducted at a place less than a mile distant from the plaintiff's home, was to create vile and noxious odors, offensive to the senses, and which reached and polluted the air in the vicinity of and in plaintiff's residence, at times rendering it unfit for occupation, thus interfering with the enjoyment thereof and causing his family great inconvenience and physical distress.

[1] Appellants insist that there was not sufficient evidence introduced to justify the action of the court as to some of the findings made. This objection is not directed so much to the substance of the findings as to the ex-

aggerated and superlative form of language used by the court in describing the alleged variety of offensive odors and disagreeable conditions created by the acts of defendants which, in a number of ways, as found by the court, interfered with the plaintiff and his family's comfort and health and their right to the enjoyment of his home, so alleged to be impaired and destroyed by the conditions to which he and his family were subjected. Not only was there direct testimony of witnesses in support of the findings, but inferences fairly deducible from facts proved, and the manner in which the defendants conducted the business, tend strongly to establish the material facts found by the court, and upon which the judgment is based. The fact that, as claimed by appellants, such witnesses "compared notes with plaintiff" and in testifying exhibited a partisan feeling, while a subject for consideration by the trial judge, is not one with which this court is concerned. An examination of the record discloses no just ground for the attack made upon the findings.

In their answer defendants, as a separate defense, alleged that a large number of persons by reason of living and having homes in the vicinity of the place where the hogs were kept and fed were equally with plaintiff affected by the operations which it was claimed constituted a nuisance, and if found to be a nuisance, then it was of a public nature, as defined in section 3480 of the Civil Code, and since plaintiff suffered no special injury he could not by reason of section 3493 of the Civil Code maintain an action to enjoin the same. Notwithstanding such defense was, on motion, stricken from the answer, it nevertheless appears that evidence was received upon the issue so assumed to have been raised, from which the court found:

> "That there are a considerable number of other persons living as near to the said hog ranch as does plaintiff, and some nearer, and in almost a direct line between plaintiff's home and said hog ranch, and the odors which arise from the hog ranch and permeate the atmosphere as heretofore described, at times, affect the other persons residing in that community in the same manner and nearly to the same degree as plaintiff."

[2] The ruling of the court in striking from the answer the matter set up as a separate defense is assigned as error, upon which, and the findings quoted, appellants strenuously insist upon a reversal of the judgment. The contention is based upon the claim that not only, as shown by the allegations of the answer made the subject of the motion to strike out, but as shown by the quoted finding of the court, the nuisance was of a public nature, as defined by section 3480 of the Civil Code, as to which, as provided by section 3493 of the Civil Code, a private person may not maintain an action unless the nuisance is "specially injurious to himself." The facts of the case are practically identical with those involved in that of Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82, where the nuisance complained of was caused by the manner in which a creamery was operated in a thickly settled neighborhood by reason whereof vile and offensive odors, stenches, etc., were permitted to escape and pollute the air in and about the dwellings and homes of a considerable number of persons, rendering them unfit for occupation, thus causing the plaintiff, who sued alone in said action and others similarly affected, great distress and inconvenience. The court, after a lengthy discussion of the point here made, urged by the appellant therein, held that, conceding the nuisance to be of a public nature, such facts did not deprive the individual plaintiff of the right to an action for its abatement if it interfered with or obstructed the use and enjoyment of his private property; that as to each of such persons whose homes were rendered uninhabitable, and the right to personal enjoyment thereof seriously impaired by such odor and stench, a cause of action existed for the abatement of the nuisance, which each of them so specially injured might maintain. Civ. Code, § 3493; Code Civ. Proc. § 731. The rule adopted was approved and applied in Meek v. De Latour, 2 Cal. App. 261, 83 Pac. 300, which also was a case involving like facts to the one at bar. Counsel for appellants, conceding, if accepted as the law, the decisive character of the Zumwalt Case, attack it upon the ground that, while section 731 of the Code of Civil Procedure, as it then read, in express terms authorized any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance defined in section 3479 of the Civil Code to sue for the abatement thereof, the effect of the amendment thereof, made in 1905 (St. 1905, p. 130), was to deprive persons so injuriously affected of the right of action. Reference to the amendment shows an added clause the sole purpose of which was to empower district attorneys and city attorneys of their own motion to institute civil actions for the abatement of public nuisances in counties and cities, and to compel them so to do when directed by the legislative authorities of counties and cities. Clearly it was not the intention of the Legislature by enacting the amendment to abridge or affect the rights given by the section prior to the amendment to private persons in maintaining actions for the abatement of nuisances whether of a private or public nature when the effect thereof seriously impairs their health, abridges their right to personal enjoyment, or renders their dwellings and homes unfit for occupation. Its only purpose was to provide statutory authority for the institution of civil actions for the abatement of public nuisances by municipal officers.

Counsel for appellants, in support of his claim for reversal, has cited a number of authorities to the effect that where a considerable number of persons sustain a common injury only as a result of the nuisance the injury is public—illustrations of which are found in cases involving obstructions to highways and navigable streams, or offensive odors and unwholesome smells free from habitations and which affect those only traveling upon highways or in public places. Such cases are not in point, and are readily distinguished from those where the disagreeable odors and smells pollute the air in and about the dwellings and places of business of persons to such an extent as to render them uninhabitable, and cause the occupants thereof inconvenience and physical distress. See Wood on Nuisances (3d Ed.) § 671; Adams v. City of Modesto, 131 Cal. 501, 63 Pac. 1083.

While conceding some apparent conflict of decisions upon the question, we are of the opinion that the correct rule to be applied is stated in the Zumwalt Case, supra, and upon the authority thereof the judgment is affirmed.

We concur: SLOSS, J.; SHAW, J.

(175 Cal. 45)

PEOPLE v. LOGAN. (Cr. 2025.)

(Supreme Court of California. May 3, 1917.)

1. Homicide ⚷309(1) — Manslaughter — Provocation—Instructions.

While it is proper to instruct that to reduce homicide to manslaughter, defined by Pen. Code, § 192, as unlawful killing without malice, on a sudden quarrel or heat of passion, the heat of passion must be such as would naturally be aroused in an ordinarily reasonable person, and that defendant must have acted under it, it is error to instruct that there must have been a personal injury inflicted or attempted to be inflicted on defendant, as the heat of passion may be due to other causes; and it is for the jury to determine whether or not the facts and circumstances in evidence are sufficient to lead them to believe defendant acted under a heat of passion, or to create a reasonable doubt thereon.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 649.

For other definitions, see Words and Phrases, First and Second Series, Manslaughter.]

2. Homicide ⚷340(1)—Appeal—Prejudicial Error—Failure to Give Instructions.

There being other circumstances calling for an instruction on manslaughter, erroneously limiting the provoking cause of heat of passion to personal injury is prejudicial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 715.]

In Bank. Appeal from Superior Court, Alameda County; William S. Wells, Judge.

Dave Logan was convicted of murder, and appeals. Reversed.

Frank J. Murphy, Charles N. Douglas, of San Francisco, A. L. Frick, of Oakland, and Oscar Hudson, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

HENSHAW, J. The defendant, charged with the crime of murder, was convicted of murder in the second degree, and sentenced to life imprisonment. Upon his appeal, first heard by the District Court of Appeal, it was urgently insisted that the trial court erred to his injury in an instruction which it gave on the crime of manslaughter. The District Court of Appeal upheld the conviction and a petition for hearing before this court was asked upon the ground that the District Court of Appeal had mistaken the argument of appellant against the legality of the instruction. For a further consideration of this question a hearing here was ordered.

It is not questioned but that instructions defining the crime of manslaughter under the facts developed at the trial were proper to be given. The importance to the defendant of accurate instructions becomes manifest from the following brief statement of facts. This statement is not, of course, to be regarded as containing any view of this court upon the weight to be given to the defendant's evidence. It is simply a statement of the evidence which defendant himself and his witnesses offered, both to exculpate him and to lessen the degree of the crime from that charged. The parties and the principal witnesses were colored people. Mabel Jones, a colored prostitute, had formerly been the intimate of the deceased, John Brooks. He was her "lover"; her "man." During his absence from the city of San Francisco she transferred her favors to the defendant, who lived with her. She and defendant had retired for the night together, when Brooks knocked at her door in the house of prostitution where she was living and demanded admission. He threatened to kick the door in and to shoot them through it if the door was not opened. The defendant then arose from the bed in his night clothes and, unarmed, opened the door. Brooks entered the room with a pistol in his hand and demanded that the woman leave the room and talk with him, and threatened to shoot her as she lay in the bed if she did not do so. Logan protested, and Brooks turned on him and beat him to the ground with the pistol which he held in his hand, then jumped on him and beat him over the head. The house was aroused, the police were sent for, and Brooks fled. This was the origin of the ill feeling between the men. After this encounter threats of Brooks were brought both to the knowledge of Logan and of the Jones woman, he declaring that he would kill them both. In fear of this, defendant went armed. Brooks was physically much the superior of Logan. On the night of their fatal encounter Logan entered a resort of the colored people —part saloon, part café—in which, for the entertainment of the guests, there was a piano. He was about to go to San Diego, and had purchased a ticket for that purpose.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

He went to the resort to meet a friend, not knowing that Brooks was in the place. In fact, however, it appears that Brooks was under employment there as pianist and entertainer. Logan walked back through the bar and into the restaurant or café where the piano was situated to procure something to eat. It was quite usual in that place for the guests to walk back toward the kitchen and give their orders directly to the cook, and this Logan proceeded to do, still unconscious that Brooks, who was seated at the piano, was in the room. In so walking toward the kitchen his course led him behind Brooks seated at the piano. The distance between the two men was very short. As he passed, Brooks swung around on the piano stool and rose to his feet, saying: "What the hell are you standing behind me for? Why don't you go on and sit down?" Brooks had one or both hands in his pocket. He sprang toward the defendant, who jumped back, drew his pistol, and began to fire. The deceased, the much more powerful man, forced him to the ground, and he continued to fire while the deceased was on top of him and beating him. One or more of these shots proved fatal, Brooks collapsed, and Logan fled, afterwards surrendering himself to the officers of the law. Under its evidence the prosecution attempted to show that the defendant, harboring a spirit of murderous revenge for the injuries, real or fancied, which Brooks had inflicted upon him, sought him out in the café, stood behind him until Brooks' attention was directed to him; Brooks then rose to his feet and asked the defendant why he was thus standing behind him, to which the defendant replied, "Are you afraid of me?" pushed Brooks with his left hand, stepped back himself, drew his pistol, and immediately began to fire. Over certain features of the encounter the evidence leaves little doubt. Brooks did arise and face the defendant with one or both hands in his pocket, and either before the defendant drew his pistol (as the defendant testifies) or after he drew his pistol and fired the first shot (as the witnesses for the people testify), Brooks did spring upon the defendant, hurled him to the ground and fought him on the floor, the defendant being underneath.

This is a sufficient résumé of the evidence for the purposes of the consideration to follow. The court, after its instructions concerning the nature and elements of the crimes of murder in the first and second degrees, defined manslaughter to the jury correctly in the terms and language of the Penal Code, saying that:

> "Voluntary manslaughter is the unlawful killing of a human being without malice, upon a sudden quarrel or heat of passion." Pen. Code, 192.

It then gave a further instruction to the jury in the following language:

> "I instruct you that in the case of a voluntary killing of a human being, without lawful excuse or justification, in order to reduce the killing from murder to manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing. The killing must be the result of the sudden, violent impulse of passion, supposed to be irresistible, for, if there should appear to have been an interval between the assault, or a provocation given, and the killing, sufficient for the voice of reason and humanity to be heard, the killing must be attributed to deliberate revenge, and should be punished as murder."

And again:

> "To reduce the killing from murder to manslaughter, you must find from the evidence that such killing was the result of a sudden, violent impulse of passion on the part of the defendant, caused by some immediate serious or highly provoking injury inflicted, or attempted to be inflicted, on the person or reputation of the defendant, and which injury was sufficient, in your minds, to excite an irresistible passion in a reasonable person, and the interval of time, if any, between the provocation and the killing, if any, was not sufficient for the defendant's passion to cool and the voice of reason and humanity within him to be heard."

These instructions are almost literally a transcript of section 23 of the Crimes and Punishment Act of 1850. Stats. 1850, p. 231. But that section ceased to be the law by failure to re-enact it in the Penal Code. People v. Salvador, 71 Cal. 16, 11 Pac. 801.

[1] In the present condition of our law it is left to the jurors to say whether or not the facts and circumstances in evidence are sufficient to lead them to believe that the defendant did, or to create a reasonable doubt in their minds as to whether or not he did, commit his offense under a heat of passion. The jury is further to be admonished and advised by the court that this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances, and that, consequently, no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man. Thus no man of extremely violent passion could so justify or excuse himself if the exciting cause be not adequate, nor could an excessively cowardly man justify himself unless the circumstances were such as to arouse the fears of the ordinarily courageous man. Still further, while the conduct of the defendant is to be measured by that of the ordinarily reasonable man placed in identical circumstances, the jury is properly to be told that the exciting cause must be such as would naturally tend to arouse the passion of the ordinarily reasonable man. But as to the nature of the passion itself, our law leaves that to the jury, under these proper admonitions from the court. For the fundamental of the inquiry is whether or not the defendant's reason was, at the time of his act, so disturbed

or obscured by some passion—not necessarily fear and never of course the passion for revenge—to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment. Maher v. People, 10 Mich. 217, 81 Am. Dec. 781. Thus the sight of a wife in adultery, or even a reasonable belief that his wife was committing an act of adultery, although the belief may be unfounded, has been held sufficient evidence to go to the jury as creating "the heat of passion" in the mind of the defendant. State v. Yanz, 74 Conn. 177, 50 Atl. 37, 54 L. R. A. 780, 92 Am. St. Rep. 205. And this heat of passion may result from terror as well as anger or jealousy. Stevenson v. U. S., 162 U. S. 313, 16 Sup. Ct. 839, 40 L. Ed. 980; Wiley v. State (Tex. Cr. App.) 65 S. W. 190. It may arise from the slayer's father-in-law attempting to take from him his wife and children. Cole v. State, 45 Tex. Cr. R. 225, 75 S. W. 527. These cases serve to illustrate that it is not alone the fear of great bodily injury which will reduce a homicide to the grade of manslaughter. The passion aroused may be one entirely disconnected with any fear of personal injury, the fundamental inquiry being, we repeat, whether it be sufficient to obscure reason and render the average man liable to act rashly. Mack v. State, 63 Ga. 693; Flanagan v. State, 46 Ala. 703. The next proposition for the jury's determination is whether the existence of the provocative cause arousing passion being shown the defendant in fact did act under it. It remains but to add that in this state the question has received due consideration in the cases of People v. Bruggy, 93 Cal. 476, 29 Pac. 26, and People v. Jones, 160 Cal. 358, 117 Pac. 176.

[2] Indisputably, then, the instruction which was given was erroneous under our existing law. The only remaining consideration is whether or not it was injurious to defendant. But upon this suffice it to say that, having in mind the facts as above outlined, the feelings naturally engendered in defendant's mind by the indignity previously put upon him, the physical superiority of the deceased, the aggressive manner in which he accosted him, the fear that he was about to be subjected to a second humiliating beating, there was at least some evidence tending to reduce the crime from murder to manslaughter, for the due consideration of which evidence defendant was of right entitled that the jury should be correctly instructed. For, as well said in Stevenson v. United States, supra:

> "The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter or an act performed in self-defense, and yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and cannot be matter of law for the decision of the court."

The judgment and order appealed from are therefore reversed.

We concur: SLOSS, J.; SHAW, J.; MELVIN, J.

(175 Cal. 42)

WARD et al. v. INDUSTRIAL ACC. COMMISSION OF STATE OF CALIFORNIA et al. (S. F. 7939.)

(Supreme Court of California. May 2, 1917.)

Master and Servant ⟹373—Workmen's Compensation Act—Accident Arising out of Employment.

Injury to employé sent in a team to dig post holes, from accidental discharge of a gun, which, with his acquiescence and that of the employer, a fellow servant had taken along for personal use, was not from an accident arising out of the employment, within the Workmen's Compensation Act (St. 1913, p. 279); the accident not resulting from a risk reasonably incident to the employment, but bearing no relation to the nature of the employment.

In Bank. Application by John Ward and another for writ of review against the Industrial Accident Commission of the State of California and others. Award of compensation annulled.

Walter H. Linforth, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

HENSHAW, J. John Ward, petitioner herein, is a contractor. William Ward, his brother, was employed by John to do general labor. John had a contract to dig post holes on land some miles distant from the city of Santa Barbara. William was directed to drive the team hauling the wagon which contained the tools and implements for this work. The work would consume several days. Thomas Ward, a nephew of both of the brothers, was employed by John Ward to accompany his Uncle William on the wagon to the scene of the work and then during the progress of it to take care of the horses. Thomas was a young man of about 21 years of age. The wagon was loaded with the tools and implements, and Thomas climbed onto it, taking his seat beside his uncle, the driver, William. He took with him and placed on the seat between himself and his uncle a shotgun, resting the butt of the gun on the seat and the barrel leaning against the tools and implements with which the wagon was loaded. He took the gun for his own pleasure, thinking he would "get a chance to hunt out there after we quit work." The shotgun had no connection with nor bearing upon any part of the work which the men were employed to do. His employer, John, knew he was taking the gun. His Uncle William knew that he had placed it on the seat between them and did not object. After having thus proceeded some miles on their journey, in a rough place on the road, the gun slipped from its insecure position on the seat, struck the footboard, and was discharged, the shot striking William in the left arm and mutilating it so as to necessitate amputation. Under this state of facts—and they are without controversy—the Industrial Accident Commission, to which application was made for compensation, awarded compensation under its finding that the injury "arose out of and happened in the course of said employment, and occurred while the injured employé was performing service growing out of, incidental to and in the course of his employment." To review this award the employer and his insurance company secured this writ of review, and the sole question presented is whether it can be said that, within the contemplation of our law, this accident "arose out of" William Ward's employment; for admittedly it happened in the course of his employment and while he was performing service under his employment.

Clearly we think this award cannot be upheld. Respondents' attorney has referred us to no authority upholding any similar award, and from his known industry and ability it is a safe assumption that such authorities do not exist. The case is clearly one where an employé in the performance of his duty meets with an accident bearing no relation whatsoever to the nature of the employment. The only argument in support of the award would be, it seems to us, that the employer in permitting the fellow employé to take with him the shotgun subjected the injured man to an extra hazard. But as against this it is clear that the employer, though he knew that the shotgun was to be taken along, neither ordered it nor in any other way than by his silence assented to it. It is not even contended that the employer knew that the gun was loaded, and unloaded it was as harmless as any of the tools which they were carrying. It was quite open to the injured man to object to the presence of the gun, if in fact he did object to it, and it was but a part of common prudence for him to have seen that the gun was unloaded when he assented to his nephew placing it in this obviously dangerous position. The decision of this matter is clearly within the principle declared in such cases as Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164, and Fishering v. Pillsbury, 172 Cal. 690, 158 Pac. 215. In the first of these cases it is said:

> "The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employé's work or to the risks to which the employer's business exposes the employé. The accident must be one resulting from a risk reasonably incident to the employment."

This accident was no more reasonably incident to the employment than it would have been had a pistol been carried in the nephew's pocket and by the same jolt of the wagon had been accidentally discharged to the injury of the uncle.

The award is therefore annulled.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.

(33 Cal. App. 214)

PALO ALTO MUT. BUILDING & LOAN ASS'N v. FIRST NATIONAL BANK OF PALO ALTO. (Civ. 1622.)

(District Court of Appeal, Third District, California. March 12, 1917. Rehearing Denied by Supreme Court May 10, 1917.)

1. Building and Loan Associations 🔑 23(1)—Officers—Authority—Evidence—Sufficiency.

The fact that the secretary of a corporation was intrusted by the board of directors with the performance of some of their duties did not justify the conclusion that the board had abandoned its functions to be exercised by the secretary, where it was shown that the board still directed and supervised matters of importance in the business of the corporation.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 27, 31.]

2. Building and Loan Associations 🔑 26—Contracts—Irregularities—Ratification by Directors.

Irregularity in advancing the money of a corporation before the loan was approved by the board of directors was cured by the subsequent approval and ratification of the loan by the directors.

3. Building and Loan Associations 🔑 26—Irregularities in Making Loan—Right of Borrower to Complain.

A borrower who actually obtained a loan from a corporation could not object to any irregularity in the proceedings whereby he secured it, and a bank concerned in obtaining the loan for him is in no better position to complain.

4. Mortgages 🔑 25(3)—Consideration—Existing Debt—Interest.

A trust deed given in place of a mortgage and in release thereof properly included an amount of interest, since interest and principal stand upon the same footing as to the consideration for the security.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 34.]

5. Corporations 🔑 426(1)—Resolution of Stockholders—Writing Down Stock Holdings.

The resolution of the stockholders and directors of a corporation in "writing down" the value of its stock holdings to the amount of a defalcation of its secretary in order to secure permission to resume business, which resolution expressly provided that it should not be deemed in any manner a waiver of the corporation's rights to enforce any claim, liability, or obligation due from any debtor, etc., did not deprive the corporation of the right to sue for the conversion of a check cashed by the stockholder at a bank without authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702.]

6. Subrogation 🔑 2—Resolution of Stockholders—Secretary's Bond.

Nor would such resolution support the contention that the amount received on the secretary's bond should be credited pro rata on the claim for the conversion of the check.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 3.]

7. Building and Loan Associations 🔑23(4)—Secretary—Powers.

A secretary of a corporation had no authority by virtue of his office to indorse and cash a check payable to the corporation.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 29.]

8. Principal and Agent 🔑103(7)—Authority of Agent — Transfer of Principal's Property.

In the absence of authority, express or implied, an agent cannot transfer his principal's property and such authority will not be presumed. [Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 283½.]

9. Corporations 🔑429 — Officers — Right to Deal with Corporate Property for Own Benefit—Notice.

In view of Civ. Code, § 2230, prohibiting, with exceptions, trustees and their agents from taking part in transactions concerning the trust in which they are interested adversely to the beneficiary, and section 2234, providing that violation of such provisions is a fraud against the beneficiary, and section 2322, relating to the manner of creating a trust, an officer of a corporation who is an agent and trustee within the contemplation of such sections has no authority to use the corporate property for his own benefit, and such use is notice of lack of authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1720–1723, 1725.]

10. Corporations 🔑428(11)—Acts of Agent —Imputation of Knowledge.

Where an agent of a corporation is dealing with corporate property in his own behalf in a transaction in which he is interested adversely to the corporation or in a scheme to defraud the corporation, it will not be presumed that he will communicate to the corporation facts affecting the transaction, and knowledge of such facts will not be imputed to a corporation, except where the corporation is in fact represented in the whole transaction by the officer as agent, since the knowledge of the agent is considered and imputed as the knowledge of the principal only when the former acquires it in course of his agency.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1760.]

11. Principal and Agent 🔑177(1) — Presumption—Imputation of Knowledge.

Any presumption that an agent will communicate knowledge to his principal is disputable. [Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 670, 672.]

12. Corporations 🔑425(4)—Authority of Officers—Ostensible Power.

Where the secretary of a corporation without authority indorsed a check payable to the corporation and used the proceeds in a transaction in which he was interested adversely to the corporation, there being no evidence that he had before applied corporate property in substantially the same manner, the corporation is not bound by the agent's act nor estopped to deny his authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1700, 1701.]

13. Bills and Notes 🔑341 — Holder in Due Course—Parties in Privity.

Where the secretary of a corporation without authority indorsed a check payable to the corporation to a bank, as between the corporation and the bank the doctrine of bona fide holder does not apply, as they are parties in privity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 829.]

14. Bills and Notes 🔑338 — Indorsee in Due Course—Statute.

Nor is the bank an indorsee in due course as defined by Civil Code, § 3123, or entitled to the rights of such indorsee as enumerated by section 3124.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 819, 820.]

15. Corporations 🔑426(1)—Misappropriation of Corporate Funds.

The contention that the corporation suffered no loss because the money was used to secure title to property upon which the corporation had a mortgage equal to the amount of the check is without merit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702.]

16. Corporations 🔑426(12)—Acts of Officers—Ratification.

In view of Civ. Code, § 2310, providing that a ratification of an agent's act can be made only in the manner necessary to confer original authority for the act ratified or where an oral ratification would suffice by accepting or retaining the benefit of the act with notice thereof, where the secretary of a corporation without authority indorsed a check payable to the corporation and used proceeds to secure title to property upon which the corporation had a mortgage, the fact that the corporation subsequently took a renewal deed of trust in place of the mortgage did not amount to a ratification of the secretary's unauthorized act of which it was not then aware.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1716.]

17. Corporations 🔑426(10)—Acts of Officers—Ratification.

Even though the corporation was benefited by the execution of the renewal trust deed, its retention of such benefits would not constitute a ratification of the act or prevent it from repudiating the unauthorized act, since, when a principal first acquires knowledge of facts, if the time and conditions are such that he cannot in justice to himself repudiate the whole of the agent's act, he may stand upon what he has authorized, and the third person must bear the loss resulting from his dealing with an agent without learning the extent of his authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1704, 1714.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Suit by the Palo Alto Mutual Building & Loan Association against the First National Bank of Palo Alto. Judgment for plaintiff, and defendant appeals. Affirmed.

Green, Humphreys & Green, of San Francisco, for appellant. J. S. Hutchinson and Cushing & Cushing, all of San Francisco, for respondent.

BURNETT, J. The suit is for the conversion of a check for $7,500 and the proceeds thereof. The answer denies the conversion and sets up the special defense that plaintiff discounted and cashed the check at defendant's bank, that the money was appropriated for the benefit of plaintiff, and that the demand in suit has been paid. Respondent is a building and loan association, and appellant a national bank, both doing business in Palo Alto. Appellant was not the bank of deposit of respondent; the banking business of the latter being done at the Bank of Palo Alto. One Marshall Black was the secretary of respondent, but held no other position therein. Appellant bank was located in the same block as respondent's place of business, while the Bank of Palo Alto was three blocks distant. Plaintiff's ownership of the check was admitted by the pleadings, said check being in the following form:

"$7,500. Daniel Meyer.
"San Francisco, Cal., May 5, 1910. No. 1601.

"The Anglo & London Paris National Bank of San Francisco: Pay to the order of Palo Alto M. B. & L. Ass'n $7,500$^{00}/_{100}$ seventy-five hundred $^{00}/_{100}$ dollars. Daniel Meyer."

Black indorsed the check as follows:

"Pay to the order of First National Bank. Palo Alto Mut. Bld. & Loan, by Marshall Black, Secretary"

—and delivered it to appellant. At that time two deeds respectively from Annie MacIntyre and Alexander MacIntyre to Black, covering a tract of land in Palo Alto, were on deposit in escrow with appellant to be delivered to Black on the payment of $7,366.40. Appellant received the check, so indorsed and delivered, without the actual knowledge of respondent, and applied the proceeds as follows: It credited the account of Alexander MacIntyre at the bank with the sum of $2,755.25, and applied $4,611.15 on a promissory note then due from MacIntyre to appellant, thus paying the note. Of the former amount it remitted MacIntyre $2,366 in cash, and applied what remained apparently to an overdraft due from MacIntyre to itself. The balance of $133.60 it paid to Black in cash. It then delivered said deeds to Black, who thus acquired title to said property. Prior to March, 1910, Black had organized a corporation known as the "Marshall Black Investment Company," of which he was the president and manager, and he owned practically all the stock. On March 22, 1910, the investment company, through Black, applied to respondent for a loan of $7,500 upon the security of said land standing then in the name of the MacIntyres. The application for the loan was approved, the money advanced, and Black, on receiving the deeds from the MacIntyres, conveyed the property to said investment company, which had executed a mortgage on the property to respondent for the said sum of $7,500.

On November 29, 1911, the investment company, in consequence of the release of the mortgage and other considerations, executed to the San Jose Abstract Company, as trustee for the benefit of respondent, a trust deed covering said property as security for said indebtedness to respondent. The sum secured thereby was $8,500, value actually received by said company and until September, 1912, respondent had no knowledge of the misappropriation of the separate and independent sum of $7,500 covered by the check involved herein. About this time it became known that Black was a defaulter to the extent of over $100,000, and the facts concerning the transaction between him and appellant, as to said check, came to light. On account of said defalcation the building and loan commission of the state compelled respondent, pending investigation as to its financial condition, to suspend business. The suspension continued from October 1, 1912, to December 14, 1912, when, after the adoption of a plan of reorganization of the finances by the directors and stockholders in compliance with the demand of said commissioner, the association was permitted to resume business. This plan is fully set forth in the findings, and it amounted substantially to a sufficient reduction in the value of the stock of the stockholders to cover the deficit caused by Black's defalcations, thus making it appear that the assets of the association equaled its liabilities. In consenting to said plan the board of directors of respondent adopted the following resolution:

"Be it further resolved that the acceptance and carrying out of said plan or any charge or entry made pursuant thereto or otherwise shall not be, or be deemed to be, in any manner a waiver by this corporation of any right it may have to in any manner enforce any claim, liability, or obligation whatsoever due from any debtor or party in any manner involved in or connected with the loss referred to in said plan and generally known as the Marshall Black deficiency."

The same resolution was adopted at the stockholders' meeting.

Counsel on both sides have displayed great industry and ability in presenting their views as to the legal propositions involved, and seemingly have exhausted about all the learning on the subject. The discussion has, indeed, taken a wide range, and we cannot within reasonable limits follow it in all its ramifications.

We think the contentions of appellant have been satisfactorily answered in the brief of respondent, and, as far as specific attention is paid to them, we shall probably do little more than present a synopsis of the argument contained in said brief.

[1] As to the authority of Marshall Black to represent respondent, upon which appellant lays much stress, the court found as follows:

"That at all times mentioned in said complaint and for several years immediately prior to May 6, 1910, one Marshall Black was the secretary of plaintiff, but did not hold any other office in the said plaintiff, and was not a director thereof; that during all of said time the business of plaintiff was managed and controlled by a board of directors, and said Marshall Black (as such secretary) had charge of the business of said plaintiff corporation, subject to the control and supervision of the board of directors of plaintiff, except as otherwise found herein."

There is abundant evidence for the support of this finding, notwithstanding appellant's contention that Black was literally in control of the business, that he was permitted to handle the business of the association as he saw fit, and that the directors took no part in its management and never examined its books and records. Appellant makes a common mistake, to which we have had occasion before to advert, in that it has directed attention to evidence opposed to said finding, but has ignored what is favorable thereto. Respondent calls attention to some 20 matters of importance in the business of the association which had been directed and supervised by the board, as shown by the evidence. These we need not enumerate, but they are sufficient to justify the conclusion of the court, and they certainly negative the claim that the board abdicated its authority and abandoned its functions to be exercised by Black. We think it can safely be said that the association was actually under the supervision and control of said board, and that Black was authorized to discharge only the duties that usually belong to the office which he held, although we could not affirm with much confidence that said board of directors "were particularly vigilant and active in guiding its affairs." Like many other similar boards, they were disposed to withhold their personal individual attention from the exercise of the duties of the secretary in the business of the concern, believing, no doubt, that these matters could and would receive effective consideration from said officer. If the directors had been as active and vigilant as they should, it is quite probable that the rascality of Black would have been discovered much earlier, to the great advantage of the association and its stockholders. It is but a truism to say that directors of such organizations generally confide too much in the honesty of their ministerial officers and are too prone to delegate to the latter services which should be performed or personally supervised by the directors themselves. The misplaced confidence in an unworthy agent herein disclosed finds many a parallel in the history of such organizations, and the serious and deplorable consequences of such confidence should be a lesson to those charged with the duty of managing these important concerns involving the interests of those illy prepared to experience financial loss. However, in the apparent remissness of the directors herein we find no comfort for appellant nor warrant for its claim that any loss occasioned by this particular transaction is chargeable to their negligence.

Another finding of which complaint is made is the following:

> "That on various occasions prior to May 6, 1910, Marshall Black, as a matter of convenience in operating the office of said plaintiff, did from time to time cash some checks or drafts payable to the order of said plaintiff at the office of said defendant; * * * that none of the checks so cashed amounted to a greater sum than $500, excepting one check, the transaction involved in the cashing of which is now in controversy and litigation, and the acts of said Marshall Black in cashing said checks were not, nor was any thereof, brought to the knowledge of plaintiff corporation, its officers or directors, and neither the said plaintiff corporation, nor its officers, or directors, other than said Marshall Black, had any knowledge thereof, and said Marshall Black never communicated the fact of the cashing thereof to plaintiff; that the discounting or cashing of notes, drafts, or bills of exchange by said Marshall Black with defendant was carried on under the circumstances as herein stated, and not otherwise, and never became nor was at any time nor at all an established or any practice or custom; that said corporation plaintiff never at any time or at all, either directly or indirectly, ratified or acquiesced in, or confirmed or approved the said acts of said Marshall Black in cashing said checks or drafts; that neither the articles of incorporation nor the by-laws of said plaintiff ever at any time or at all authorized or empowered said Marshall Black or any other person as such secretary or otherwise, or at all, to cash or discount checks or drafts or bills of exchange for any purpose whatever or otherwise, or at all."

We think there is no ground for the contention that this finding in any respect is unsupported. There may be evidence in the record that would warrant a contrary finding as to some of the facts enumerated, but, of course, that is of no consequence here. Respondent calls attention to the specific portions of the transcript wherein is found testimony in harmony with the views of the court as thus expressed, but it is not deemed necessary to set it forth herein.

[2, 3] We are of the opinion that there is no more merit in the objection to the finding as to the payment of $7,500 as a loan to the investment company. There was undoubtedly an irregularity in advancing the money before the loan was approved by the board and before the notification by the attorney that all legal requirements had been complied with, but the irregularity was cured by the subsequent approval and ratification of the loan by the directors. In fact, it seems to have been approved a second time on May 10, 1910, four days after the deed to the property came into the possession of plaintiff. Aside from that, it must be true that the borrower who actually obtained the loan could not object to any irregularity in the proceedings whereby he secured it, and, of course, appellant is in no better position to complain.

[4, 5] The trust deed given in place of said mortgage and in release thereof was to secure the payment of $8,500. This included the amount of $1,000 in interest, and we can see no possible reason for an objection to this any more than to the principal of the indebtedness. Manifestly they stand upon the same footing as to the consideration for the security.

We can perceive no merit in the claim that "the liability of respondent arising out of Black's defalcations have been paid, satisfied, and canceled as shown by the 'Marshall Black Deficiency Account.'" It is quite apparent that there was no actual payment to respondent of the proceeds of said $7,500 check. We have already detailed the disposition that was made of the money. There is nothing to show that any part of it ever came into the possession of respondent or that the loss by reason of the misappropriation of the fund was ever made good either entirely or partially. It is equally plain, from the resolution passed as aforesaid by the directors and the stockholders, that there was no intention, by reason of said deficiency account or otherwise, to satisfy and cancel said obligation. The actual loss by reason of the defalcations of Black was over $100,000, but, in order to satisfy the building and loan commission and to secure permission to resume business, it seems that the capital stock, reserve fund, undivided profits, etc., were reduced or written down to the extent of the loss. This, as stated by respondent, was a matter of bookkeeping and adjustment of the various accounts to satisfy the said commission that the concern was solvent and entitled to do business; or, in other words, the large sums credited to said deficiency account were simply written off the value of the stockholdings. We can see nothing in the transaction that should be construed as operative to extinguish respondent's claim to compensation for the conversion of said check. The amount received, as we understand it, although nominally for the corporation, is actually for the benefit of the stockholders who have suffered the loss.

[6] In this connection it may be said that we view similarly the contention that the amount received on Black's bond should be credited pro rata on this claim. The question is really one of subrogation which concerns only respondent and the surety company.

Thus far there seems but little room for debate, but some other points made by appellant probably possess more merit.

The question of agency in its various aspects has received much attention, and it is claimed that, in accordance with its well-established principles, the act of Black in cashing the check must be regarded as the act of respondent. We do not so understand the law and the facts.

[7] It is plain that Black had no express authority to indorse the check, and this has already been sufficiently considered. It is also true that he had no such authority simply by virtue of his office as secretary. Blood v. Marcuse, 38 Cal. 590, 99 Am. Dec. 435; Cook on Corporations, vol. 3 (6th Ed.) § 717.

[8, 9] Likewise it must be admitted that, in the absence of authority, express or implied, he cannot transfer his principal's property, and such authority will not be presumed. Read v. Buffum, 79 Cal. 77, 21 Pac. 555, 12 Am. St. Rep. 131; Cal. Winemakers' Corporation v. Sciaroni, 139 Cal. 277, 72 Pac. 990. Beyond that an officer of a corporation can have no authority to use the corporate property for his own benefit, and such use is notice of lack of authority. Sections 2230, 2234, 2306, and 2322, Civ. Code. Directors and officers of corporations are agents and trustees within the contemplation of these sections of the Code. Graves v. Mining Co., 81 Cal. 319, 22 Pac. 665; Pacific Vinegar & Pickle Works v. Smith, 145 Cal. 363, 78 Pac. 550, 104 Am. St. Rep. 42.

In relation to this question some interesting cases are reviewed by respondent.

In Hubback v. Ross, 96 Cal. 426, 31 Pac. 353, one Makin desired to obtain money from plaintiff in connection with certain shipments, and plaintiff drew bills of exchange upon his correspondents in Liverpool and delivered them to Makin. Plaintiff demanded security of Makin, and the latter presented a deed from Ann S. Ross to plaintiff conveying certain property. Makin delivered the deed for the bills of exchange running to himself. The action was brought to foreclose the deed as a mortgage and defendant denied that it was given for the purpose declared by plaintiff. The latter claimed that Makin, being intrusted with the conveyance, had at least apparent authority to deliver it for the purpose of securing his personal obligation, but it was held that the apparent authority was limited, by one of the fundamental principles of agency, to the right to deliver it only as a security for some obligation of his principal, and, further, that plaintiff was not justified, as a matter of ordinary prudence, in presuming that Makin might use the instrument for his own benefit and purpose.

In the Smith Case, supra, the court had under consideration the indorsement of a corporate obligation by the president of a company to himself. Therein it is said:

> "It is hardly necessary to say that the general power conferred upon Smith under the by-laws did not give him authority to contract with himself. In every case where the validity of a contract made by a trustee with himself is in question, general authority to act for the corporation must necessarily have existed in order to apply the principle invoked here. The law assumes that the trustee is invested with general power to contract, but limits its exercise to matters strictly in the interest of the beneficiary, and disqualifies him from exercising it in his own behalf. This disability directly results from the existence of the general authority."

The same rule is enforced in the late case of Western States Life Insurance Co. v. Lockwood, 166 Cal. 185, 135 Pac. 496, wherein, in reference to the president of plaintiff, it is said:

> "It is universally held as a consequence of this doctrine that he may not on behalf of the corporation contract with himself as an individual, which, of course, includes contracting with others with whom he has an interest, without the full knowledge and approval of the corporation."

Among the many cases cited from other states we refer only to Ward v. City Trust Co. of New York, 192 N. Y. 61, 84 N. E. 585. Therein, it seems, certain officers of Hartman Manufacturing Company obtained a check for $125,000 from Hanover Bank, payable to the order of Hartman Company, by falsely representing that the loan was secured for said company. One of these officers indorsed the check in the name of Hartman Company by himself as president and general manager, and delivered it to the City Trust Company in payment of his personal note. The referee in the lower court found that the defendant trust company acted in good faith, and concluded that it was a bona fide holder for value. The Court of Appeals reversed this decision, holding that the defendant was not justified in taking the check for the personal obligation of the president and that it could not be a bona fide holder of the obligation. Therein it is said:

> "The form of the check in question was notice to the trust company that Umsted was using the property of the corporation of which he was president to pay the personal debt of himself and Kiefer in apparent violation of its rights. * * * The effect of such notice was to put the trust company upon inquiry to see whether it was about to accept money from one to whom it did not belong in payment of its own claim. The presumption arising from the face of the check was that it belonged to the Hartman Company, and that its president had no right to use it to pay his personal debt."

It was also held that the broad power conferred upon the president of the corporation was not sufficient to authorize him to give away the assets of the company or to use them to pay the personal debts of its officers. Emphasis is laid upon the proposition that by reason of the fact that the check showed upon its face that it belonged not to Umsted or Kiefer, but to the Hartman Company, there was a "shadow" upon it, and the defendant could not in good faith accept it until the shadow had been removed. It is declared that:

> "While the courts are careful to guard the interests of commerce by protecting the negotiation of commercial paper, they are also careful to guard against fraud by defeating titles taken in bad faith, or with knowledge, actual or imputed, which amounts to bad faith, when regarded from a commercial standpoint."

Of course, it is true, as pointed out in the decision, that if reasonable inquiry would have led to the discovery of facts which would have dispelled any suspicion, the purchaser of the paper is entitled to the benefit thereof as if he had made proper investigation. That is self-evident, being equivalent to saying that, if the agent had ample authority in the premises, the want of knowledge thereof by the purchaser would not invalidate the transaction. Manifestly it is only in the case where the agent lacks authority that the principal may exact the duty of inquiry and that the failure to inquire imposes a penalty upon the purchaser.

The Ward Case, supra, substantially covers most of the principles of law involved herein, but we append the other cited cases as instructive on the subject: M. Jacoby & Co. v. Payson, 85 Hun, 367, 32 N. Y. Supp. 1032; Knoxville Water Co. v. East Tenn. Nat. Bank, 123 Tenn. 364, 131 S. W. 447; Germania Safety Vault & Trust Co. v. Boynton, 71 Fed. 797, 19 C. C. A. 118; Claflin v. Farmers' & Citizens' Bank, 25 N. Y. 293; Robinson v. Chemical National Bank, 86 N. Y. 404; Bank of New York N. B. A. v. American Dock & Trust Co., 143 N. Y. 559, 38 N. E. 713; and also Randolph on Commercial Paper, § 368, and Thompson on Corporations, § 1700.

[10, 11] One feature or incident of agency to which appellant has adverted at considerable length is embraced in the term "imputation of knowledge to plaintiff." This, however, is nothing but a phase or circumstance of express, implied, or ostensible authority. The knowledge of the agent is considered and imputed as the knowledge of the principal only when the former acquires it in the course of his agency. If he does not acquire it while acting within the scope of his authority, the knowledge is no more to be imputed to the principal than to an utter stranger. The imputation has been held to rest upon the presumption that the agent will communicate such knowledge to his principal. Manifestly no such presumption can exist where the agent is engaged in a transaction beyond his authority and in which he is interested adversely to his principal or in a scheme to defraud his principal. In McDonald v. Randall, 139 Cal. 246, 72 Pac. 997, it was said:

> "A corporation is not chargeable with the knowledge of one of its officers or agents who is acting on his own behalf, and not for the corporation."

And in McKenney v. Ellsworth, 165 Cal. 326, 132 Pac. 75, the court says:

> "Where an agent of a corporation is dealing with the corporation in a transaction in his own behalf, it will not be presumed that he will communicate to his principal facts affecting the transaction."

An exception is recognized to the rule where the principal is in fact represented in the whole transaction solely by the party as agent. Herein plaintiff was not represented by Black in the matter of the loan to the investment company, since he dealt with respondent through its board of directors, its security committee and attorney. Respondent would not, therefore, be charged with constructive knowledge of Black's misapplication of the fund. But if the presumption existed it would be a disputable presumption, and the court has found, on sufficient evidence, that the plaintiff had no knowledge of these things. The doctrine manifestly cannot be applied to the extent and end claimed by appellant. The contention resolves itself to this: That the principal, if he has knowledge of the exercise by the agent of certain powers, is bound by the act of the agent, and he must be held to have such knowledge from the fact that the agent knows of it himself. Such doctrine, of course, could not be maintained, as it would place it within the power of an agent to bind the principal to any course of conduct however foreign or obnoxious to the authority actually conferred.

[12] There is no doubt that the circumstances might be such as to estop the principal from denying the authority of the agent. That is a familiar principle, but it does not apply here. The acts of the agent may be so open and frequent as to create and compel the inference of acquiescence on the part of the principal. But they must be acts of a similar nature. Here there is no evidence that Black had before applied the corporate property in substantially the same manner. The elements of ostensible agency to do the thing which was done are entirely lacking, and we can see no reason for invoking the principle contended for that "a corporation is bound by the powers that its agent is permitted to exercise openly."

What has been said, we think, disposes of the contention of appellant that it was a "bona fide purchaser for value without notice." It cannot be said to be a purchaser "without notice," since, as we have seen, it was put upon inquiry, and it must be held to know what it could have found out by investigation. In Smith v. Los Angeles Irrigation, etc., Association, 78 Cal. 289, 20 Pac. 677, 12 Am. St. Rep. 53, the court says:

> "The fact that the note appeared upon its face to have been executed by Garey on behalf of the corporation was sufficient to charge his assignee with notice of any want of authority to execute it."

In Randolph on Commercial Paper, § 1012, the rule is stated:

> "In like manner, one cannot become a bona fide holder of a check drawn by a bank president on his own bank, and certified by himself, or of a certificate of deposit given by a bank cashier in the name of a bank, and indorsed and deposited by him to his own credit."

[13, 14] And, as pointed out by respondent, the controversy here is between plaintiff, the payee of the check, and appellant as indorsee. They are parties in privity, and, strictly speaking, the said doctrine does not apply as between the immediate parties to the transaction. The rule is stated in Daniels on Negotiable Instruments as follows:

> "It is a general principle of the law merchant that, as between the immediate parties to a negotiable instrument—parties between whom there is a privity—the consideration may be inquired into, and that as to them the only superiority of a bill or note over other unsealed evidences of debt is that it prima facie imports a consideration."

Nor is the situation changed within the contemplation of sections 3123 and 3124 of the Civil Code, as appellant is not an "indorsee in due course" as therein defined. Among the many authorities as to this point it is sufficient to refer to Judge Cooley's opinion in the case of McLellan v. Detroit File Works, 56 Mich. 579, 23 N. W. 321, where a partnership had issued promissory notes and thereafter transferred its property to the corporation, which assumed certain indebtedness, excluding, however, the notes of plaintiff. The president of the corporation, though, renewed the notes to plaintiff by giving him corporation notes. It was said:

> "The case was such that the plaintiff must be deemed to have accepted renewals of the notes with knowledge of all the facts. They held partnership notes, and they accepted corporation notes in renewal; and they must be deemed to have known that an officer of a corporation can have no general authority to give the notes of the corporation to take up the outstanding obligations of members. Special authority would be required to empower him to do so; and those persons who should venture to take such notes from him must, at their peril, ascertain that the special authority has been conferred."

Furthermore, it was declared that:

> "A corporate note given for an individual obligation is not given in the regular course of business, but presumptively is ultra vires. An officer of a corporation can never have implied authority to give such notes. * * * The general authority to make commercial paper in the name of a corporation is given to be exercised for the benefit and in the business of the corporation, not for the benefit or in the business of others; and it is therefore obvious that one who takes such paper with knowledge that it is not given for a corporate purpose can have no claim to the protection which the law accords to a bona fide holder."

[15, 16] Another point made by appellant, worthy probably of some notice, is that respondent suffered no loss by reason of the fact that the money was used to secure title to the property upon which respondent had a mortgage for $7,500. The contention seems to be that, if the proceeds of said check had not been applied to the purchase of said property, respondent would have lost the $7,500 which it had already loaned on the strength of the security. However, there does not appear to be merit in the defense that, if the $7,500 had not been misappropriated, another equal amount would have been lost. A thief who admits a theft and his use of the money for his individual benefit could hardly find justification or excuse in the plea that by his unwarranted use of the money he saved the owner the loss of another similar amount. Respondent was entitled to the security and also the proceeds of the check. Nor does it appear that the additional $7,500 could have been realized out of the property. The amount of the various incumbrances made in good faith greatly exceeded its value, and while respondent was enabled to secure the repayment of the said sum of $8,500 covered by the trust deed, there is nothing to show that the other amount misappropriated by Black could have been obtained. Nor can we agree with appellant:

> "That plaintiff cannot retain the advantage derived from the renewal deed of trust executed in 1911, and at the same time insist that such retention does not constitute a ratification of Black's unauthorized act."

The doctrine of ratification is gone into pretty thoroughly in the briefs. The principle is reiterated by respondent that it is necessary in order to effect a ratification that action be taken with full knowledge of the facts (Civ. Code, § 2310; Hall v. E. W. Wells & Son, 24 Cal. App. 238, 141 Pac. 53; Lambert v. Gerner, 142 Cal. 399, 76 Pac. 53), and attention is directed to the fact that, when respondent took said renewal and mortgage, it had no knowledge of Black's appropriation of the check; hence there was no such ratification.

[17] Again, assuming that respondent was benefited, the situation is covered by the doctrine announced in 2 Corpus Juris, § 133, as follows:

> "Where, however, when the principal first acquires knowledge of the facts, conditions are such that he cannot in justice to himself repudiate the whole of the agent's acts, he may stand upon what he has authorized, and the third person must bear the loss resulting from his dealing with an agent without learning the extent of his authority."

Other qualifications of the doctrine are pointed out which lead to the conclusion that by taking said security respondent did not ratify the act of Black or of appellant in said transaction as to the check, but we forego specific mention of them.

We are satisfied that Black had no authority, express or implied, for the indorsement of said check; that no authority, however broad, could have authorized him to cash the check for his own benefit; that appellant was put upon inquiry as to the limit of his authority, and that it must be deemed to have known that he was not acting within the scope of his agency; that appellant converted the property without authority of law; that respondent has not been paid the amount nor any portion thereof; that it is not estopped by reason of having received the benefits of the transaction or otherwise from recovering the proceeds of said check; that it has not ratified the said unauthorized act of Black; and that it has been damaged to the extent claimed by the conduct of appellant in cashing said check.

The judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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33 Cal. App. 340

PEOPLE v. GONZALES. (Cr. 533.)

(District Court of Appeal, Second District, California. March 28, 1917.)

1. Homicide 🔑203(3) — Admissibility of Evidence—Dying Declarations.

Declarations that "I am done," "I am going to die," etc., indicated a sense of impending death sufficiently to render them admissible as dying declarations.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 432.]

2. Homicide 🔑116(6)—Justifiable Homicide—Self-Defense.

A homicide is not justifiable unless the slayer was then in apparent imminent danger of losing his life or sustaining serious bodily injuries, and previous threats, unaccompanied by hostile acts, are insufficient.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 163.]

3. Homicide 🔑339 — Evidence — Striking Out.

There is no reversible error in striking out testimony of previous threats made by deceased when there had been no testimony of, nor offer to prove, a hostile act by deceased at time of killing, although evidence received later in the trial might have furnished a sufficient foundation for the stricken testimony.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 714.]

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Jose Gonzales was convicted of murder, and appeals. Affirmed.

W. C. Dorris, of Bakersfield (Henry R. Holsinger, of Bakersfield, of counsel), for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

SHAW, J. Appellant was convicted of the crime of murder in the first degree, and, in accordance with the verdict rendered, sentenced to imprisonment for life.

Deceased, Abraham Morales, with his wife and others, among whom was appellant, attended a gathering at the house of a neighbor on the evening of August 13, 1916. About 9 o'clock p. m., defendant requested deceased to step out of the house with him, ostensibly for the purpose of a private conversation, whereupon deceased left his wife and went outside with defendant. A few minutes thereafter a pistol shot was heard, and Morales was found a short distance from the house, suffering from a bullet wound which caused his death three days later.

[1] The court permitted the prosecution to introduce statements made by deceased immediately after being shot. Their reception in evidence was objected to upon the ground that they were not made under a sense of impending death, and therefore inadmissible as dying declarations. Touching the question, deceased, when found lying upon the ground, among other things, said:

> "He (referring to defendant) took advantage of me; run me out friendly and now done me. I am done." "Joe (referring to defendant) took advantage of me; got me out there friendly and shot me. Now I am done." "I am done; lift me up." "I am in a dying condition; I am sure I am going to die." "He took advantage of me. I think he killed me all right; I think I am dead."

The wife of deceased testified:

> "He said he was going to die, and that he was going to leave me very far from my parents; that he (Gonzales) had not spoken to him as a man; that if he had spoken to him as a man, he would have defended himself."

In People v. Cord, 157 Cal. 568, 108 Pac. 514, it is said:

> "Where a person has been fatally wounded, is in sore distress therefrom, and believes that he will not recover and is soon about to die, his statement made in this belief, relating to the cause of his injury, is admissible, if it appears that he subsequently died from the direct effects of the wound."

Measured by this rule, the admission of the statements so made by deceased did not constitute error.

[2, 3] Testimony was offered to the effect that some three months prior to the homicide an altercation occurred between de-

fendant and deceased, at which time blows were exchanged, and, upon being separated, the deceased said, "Later I will settle this," and, referring to himself and defendant, said that "they would settle it in a very short time." Objection was made to this line of testimony upon the ground that no foundation was laid for its introduction, since there was no evidence of an overt act or attack being made upon defendant by the deceased. Thereupon counsel for defendant said: "If I can't connect this up, I will consent that it be stricken out." Thereupon the evidence was admitted, and upon the conclusion of the testimony of the witness the district attorney moved to strike out the testimony upon the same ground upon which he had objected to its reception. The motion was granted. In People v. Campbell, 59 Cal. 247, 43 Am. Rep. 257, it is said:

> "If A. threaten the life of B., this fact will not of itself justify B. in killing A. There must be some act on the part of the person making the threat, from which it appears that there is real or apparent danger of the execution of the threat."

When this evidence was tendered there was no testimony whatsoever tending to show any act of aggression committed by deceased at the time of the homicide indicating that he intended to attack defendant. Since there was neither claim nor proof of a hostile demonstration by deceased at the time of the homicide, the fact that he had theretofore made threats against defendant could not justify the latter in killing him. The law does not justify a homicide, unless it is shown that the slayer was at the time of the killing in apparent imminent danger of losing his life, or of sustaining serious bodily injury; and previous threats, unaccompanied by some hostile act, do not afford such justification. "Previous threats alone, * * * unless coupled at the time with an apparent design then and there to carry them into effect, will not justify a deadly assault by the other party." People v. Scoggins, 37 Cal. 683. As shown by the record, the objection urged to the introduction of the evidence and the argument used in support of the motion to strike out, as well as the language used by the court in granting the motion, were all calculated to acquaint defendant's counsel with the ground upon which the ruling was made. Nevertheless, he did not offer to reintroduce the evidence, after defendant's testimony was received, to the effect that after the deceased, at defendant's request, accompanied him outside the house, deceased "got mad when I told him about the paper, * * * [and] came after me and struck me three or four times and tore my shirt. It was then that I drawed the gun, and he took hold of it and as I pulled the gun back, why the gun went off, and that was all."

Assuming the act of deceased to have been such as would have justified defendant in apprehending danger of great bodily harm, there was no evidence of it when the ruling so complained of was made, and no offer to make such showing preceding the ruling of the court, when it must have been apparent to counsel that for want thereof the court deemed it inadmissible. Under the circumstances shown, it cannot be said the court erred in granting the motion to strike out.

The judgment and order from which the appeals are prosecuted are affirmed.

We concur: CONREY, P. J.; JAMES, J.

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33 Cal. App. 336

SCHNIEROW v. BOUTAGY et al.

(Civ. 1941.)

(District Court of Appeal, Second District, California. March 28, 1917.)

1. LANDLORD AND TENANT 🔑22(5)—AGREEMENTS TO LEASE—DAMAGES FOR BREACH.

Under Civ. Code, § 3300, providing that, when not otherwise provided, the measure of damages for breach of a contract is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom, plaintiff could not recover the loss incurred by him in selling his business at another location at a sacrifice as damages for defendants' breach of an agreement to lease him a storeroom, as the parties did not contemplate that plaintiff should sacrifice his property, and the loss was not attributable to defendants' breach.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 59.]

2. APPEAL AND ERROR 🔑1151(2)—MODIFICATION OF JUDGMENT—REDUCING RECOVERY.

Where, in an action for breach of an agreement to lease a storeroom, the court improperly allowed plaintiff $400 for loss incurred in selling a business at a sacrifice, the judgment may be modified by deducting $400.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498–4500, 4503–4505.]

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Barnett Schnierow against W. S. Boutagy and another. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

William H. Fuller, of Los Angeles, for appellants. Baird, Gerecht & Chambers, of Los Angeles, for respondent.

SHAW, J. Plaintiff obtained judgment in the sum of $502 against defendants as damages for breach of a contract, whereby the latter agreed to lease to the former a storeroom then in process of construction. Defendants appeal upon the judgment roll.

As alleged in the complaint and found by the court, plaintiff in reliance upon defendants' agreement, disposed of his business on Temple street at a loss of $400, changed his residence at a cost of $15, and incurred a loss of time, to his damage in the sum of $87, in securing another storeroom.

[1] Conceding the loss of time and expense of removal incurred by plaintiff so found by

the court to have been a detriment proximately caused by the breach of defendants' contract, we are unable to perceive how the loss due to the sacrifice sale of his business could be attributed to such breach. "It is the well-settled general rule of damages for any breach of contract that the damages that can be recovered for a breach are only such as may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract, as the probable result of a breach. Other damages are too remote." Hunt Bros. Co. v. San Lorenzo, etc., Co., 150 Cal. 51, 87 Pac. 1093, 7 L. R. A. (N. S.) 913. Certainly the parties, when they made the contract, did not contemplate that plaintiff in reliance upon their agreement should give his property away or sell it at a sacrifice. In cases of this character, the measure of damages for a breach of contract "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Section 3300, Civ. Code. Upon this record, the loss incurred by plaintiff in selling his business at a sacrifice cannot be attributed to the act of defendants in refusing to comply with their contract. Mitchell v. Clarke, 71 Cal. 163, 11 Pac. 882, 60 Am. Rep. 529. Indeed, had there been no breach of the contract on the part of defendants, plaintiff's loss would have been precisely the same.

[2] Under this view, it is apparent that the findings do not support the judgment rendered by the court; nevertheless justice between the parties may be accomplished by a modification thereof. It is therefore ordered that the judgment be modified by deducting therefrom the sum of $400, leaving a balance of $102; and since as thus modified plaintiff is not entitled to costs (section 1025, Code Civ. Proc.), the award of $15.70 as costs of suit is stricken therefrom. As thus modified, the judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(33 Cal. App. 338)

EDDIE v. GAGE MFG. CO. et al.

(Civ. 2050.)

(District Court of Appeal, Second District, California. March 28, 1917.)

1. Landlord and Tenant 🔑208(1) — Assignment of Lease—Release of Lessee.

The tenant was not released from obligation to pay rent by his assignment to a corporation, to which the landlord consented in writing; such consent being conditioned on the assignee complying with the terms of the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 821, 830, 831.]

2. Evidence 🔑466 — Parol Evidence to Vary Written Instrument.

Where tenant assigned his lease to corporation, the landlord consenting thereto in writing, evidence that landlord orally agreed to release tenant from payment of rent was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2145.]

3. Landlord and Tenant 🔑208(1) — Assignment of Lease—Surrender.

Where landlord consented to assignment of lease upon conditions not performed by assignee, written consent, however, not purporting to release tenant from payment of rent, such tenant cannot claim that the leasehold interest was surrendered to lessor by operation of law.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 821, 830, 831.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by E. C. Eddie against the Gage Manufacturing Company, a corporation, and others. From a judgment for plaintiff, and an order denying a new trial, defendant C. E. McClay appeals. Affirmed.

Hyman Schwartz, of Los Angeles, for appellant. T. C. Gould, of Los Angeles, for respondent.

SHAW, J. In this action plaintiff sought a recovery of money alleged to be due under the terms of a lease of real estate made by him to defendants McClay, Gage, Freeman, Lloyd, and Gage Manufacturing Company, a corporation, who thereafter by assignment transferred the same to the Union Car Company, a corporation. Judgment went for plaintiff, from which, and an order denying his motion for new trial, C. E. McClay alone appeals.

[1] The instrument whereby the transfer was effected was a naked assignment, and did not purport to impose any obligation upon the assignee to pay the rent reserved in the lease. Indorsed thereon, and signed by plaintiff, was an instrument in writing as follows:

> "I hereby consent to the transfer of a certain lease on 683 Antonio street, from Jay Gage, C. E. McClay, O. E. Freeman, and C. T. Lloyd to Union Car Company, a corporation, provided that said Union Car Company complies with all the legal formalities, through its board of directors, * * * in accepting this transfer and agreeing to comply with the terms of said lease. * * *"

While, as shown by the record, the assignee adopted a resolution accepting the assignment of the lease, it made no promise whatever to pay any rent thereunder, nor in any manner whatsoever agreed to comply with the terms of the lease. Under these circumstances, the court properly found this consent to the transfer of the leasehold estate did not release the defendants from their obligation upon the covenant to pay the rent. Indeed, had the consent been unconditional, or had the assignee complied with the conditions so exacted, the finding would not have been subject to attack upon the record here presented. Bonetti v. Treat, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151; Brosnan v. Kramer, 135 Cal. 36, 66 Pac. 979; Cyc. vol. 24, p. 1177.

[2] Neither, since it would have violated a fundamental rule of evidence, did the court err in refusing to permit defendants to introduce evidence tending to show that plaintiff orally agreed to release appellant and his colessees from any and all liability upon their covenant to pay the rent reserved in the lease.

[3] There is no ground upon which to base the claim of a surrender to the lessor of the leasehold estate by operation of law. As we have seen, the consent made by plaintiff to the assignment was not only upon conditions never complied with by the assignee, and who, as disclosed by the record, never paid any rent to plaintiff, but it did not purport to constitute a release of defendants. No facts whatsoever are made to appear which tend in the slightest degree, by implication or otherwise, to show an intent on the part of the lessor to accept a surrender of the lease. On the contrary, so far as shown, plaintiff looked to appellant and his colessees for the payment of rent and compliance with its terms.

We are unable to perceive any merit in the appeal, and the judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

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33 Cal. App. 343

YOUNG v. CANFIELD'S ESTATE.

(Civ. 1932.)

(District Court of Appeal, Second District, California. March 28, 1917.)

1. BROKERS ⟹71 — CONTRACTS AS TO COMPENSATION—CONSTRUCTION.

Plaintiff having rendered services to C. in the purchase of certain land, C. signed a writing stating that it was his understanding and agreement that plaintiff was to have one-third of the net profits arising from the operation or final sale of the property. The property was sold at an advance in price, but if C. were allowed interest on his investment, there would be no profits. *Held*, that the contract did not authorize C. to charge any interest, notwithstanding the use of the term "net profits."

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 56.]

2. INTEREST ⟹6 — EXPRESS CONTRACT — NECESSITY.

As a general rule interest is not recoverable, unless made the subject of an express agreement except in the case of a loan, which under the express provision of Civ. Code, § 1914, is presumed to be made upon interest unless otherwise stipulated.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 13–16.]

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by C. S. Young against the estate of C. A. Canfield. From a judgment for defendant, plaintiff appeals. Reversed, with directions.

James Donovan, of Los Angeles, for appellant. Goodwin & Morgrage, of Los Angeles, for respondent.

JAMES, J. [1] Appeal from a judgment entered against the plaintiff. The appeal is presented on the judgment roll. The facts as they may be gathered from the complaint are as follows:

Prior to December 17, 1903, the plaintiff had rendered services to C. A. Canfield, since deceased, in and about the purchase of certain land. Canfield became the owner of the land, and, as evidence of the compensation to be paid to the plaintiff for his services, wrote the plaintiff as follows:

> "Dear Sir: Relative to our understanding at the time of the purchase of the N. E. ¼ of Sec. 23—28—27, and in consideration of your services granted in connection thereof, it is my understanding and agreement that you are to have one-third (1/3) of the net profits arising from the operation or final sale of the above-mentioned property.
>
> "Yours truly, C. A. Canfield."

The total price paid by Canfield for the land, including taxes, was $6,765.79. Canfield sold the property on April 30, 1913, for $8,000; that amount being in excess of the purchase price by the sum of $1,234.21. The plaintiff duly presented his claim against the estate of Canfield for the sum of $411.40, being one-third of the apparent profit made by Canfield on his investment. The court found the facts as they were alleged by the plaintiff, but found that there was nothing due the plaintiff for the reason that by adding interest at the rate of 7 per cent. to the amount of Canfield's original investment and charging that interest as a part of the investment, no profits resulted by reason of the price obtained at the sale of the property. The one question is presented as to whether interest was properly chargeable under the contract made between Young and Canfield. On the part of respondent the cases of Hentz v. Pennsylvania Co., 134 Pa. 343, 19 Atl. 685, and Barry v. Bernays et al., 162 Mo. App. 27, 141 S. W. 933, are cited. In the case first noted the court refers to a work on partnership, and the opinion contains this statement:

> "There are no profits in a land speculation which does not return to the investor his purchase money with interest upon it."

This language is approved in Barry v. Bernays, supra. As applied to the facts of this case, we are not in accord with the determination of the Pennsylvania and Missouri courts. There was no agreement expressed here for the payment of any interest upon Canfield's investment. The plaintiff had rendered certain services, and his compensation was agreed upon in the manner declared in the letter written by Canfield to him. We are of the opinion that the term "net profits," as used in this letter, does not authorize the charge of any interest amount, and that if such had been in contemplation it should have been expressed. Furthermore, Canfield, for aught that is shown by the pleadings or record presented, might not have been able to have secured a 7 per cent. income on the money which he invested in the land, nor any per cent. at all, for that matter.

[2] The general rule is that the matter of the payment of interest must be made the subject of an express agreement, otherwise it cannot be charged; excepting, of course, a case of a loan of money which by our Code is made subject to the payment of interest by presumption. Civ. Code, § 1914. The general rule to which we have adverted finds expression in Tirrell v. Jones, 39 Cal. 655, and Adams v. Lambard, 80 Cal. 438, 22 Pac. 180.

The judgment is reversed, with directions to the trial court to enter judgment upon the findings of fact in favor of the plaintiff.

We concur: CONREY, P. J.; SHAW, J.

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33 Cal. App. 345

O'DEA v. ROBERTS. (Civ. 1903.)

(District Court of Appeal, Second District, California. March 28, 1917.)

1. Appeal and Error 🔑605—Transcript—Rule of Court.

Supreme Court rule 7 (119 Pac. xi), regulating the size, arrangement, indexing, etc., of transcripts on appeal, is intended to secure records of uniform size, arranged in orderly and convenient form, and an appeal not complying with such rule and misdescribing the judgment appealed from will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2660–2663.]

2. Appeal and Error 🔑608(1)—Record—Description of Judgment.

Where the judgment appealed from was entered on April 13th, a record containing a judgment rendered April 26th, which the clerk certified on April 23d to be a true copy, etc., is insufficient, and in connection with the failure to observe Supreme Court rule 7 (119 Pac. xi), regulating the form, indexing, etc., of transcripts on appeal, will cause the appeal to be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2673–2681, 2683, 2684.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by M. F. O'Dea against R. G. Roberts. Judgment for defendant, and plaintiff appeals. Appeal dismissed.

Crouch & Crouch, of Los Angeles, for appellant. Ingall W. Bull and Harold Larson, both of Los Angeles, for respondent.

PER CURIAM. [1] This appeal purports to have been taken under what is designated the alternative method of appeal and the record prepared and brought up pursuant to the provisions of section 953a, Code of Civil Procedure. No attempt, however, is made to comply with rule 7 of the Supreme Court (119 Pac. xi) as to the form and preparation of the transcript. This rule requires that:

> "Transcripts on appeal in civil cases, prepared under section 953a of the Code of Civil Procedure, * * * must be typewritten and the paper and the backs for binding the same must not exceed ten inches in length and eight inches in width. The leaves must be bound together on the left-hand side in volumes of convenient size. The papers required to be sent by the clerk * * * in civil cases under section 953a, * * * constituting the ordinary judgment roll are here designated as the 'Clerk's Transcript,' and the certified transcriptions of the phonographic reporter's notes required by * * * section 953a in civil cases are here designated as the 'Reporter's Transcript.' The respective papers in the clerk's transcript must be placed in chronological order, and if it is bound with the reporter's transcript, it must come first in order. The pages of the clerk's transcript and those of the reporter's transcript must be numbered separately by consecutive numbers. The lines of each page must be numbered separately and consecutively. An index of each transcript must be inserted at the beginning thereof, referring to each document and to the page beginning the examination, cross-examination, redirect, and recall of each witness."

The reporter's transcript here presented, in form and size only, complies with the rule. The clerk's transcript consists of what appear to be some discarded office copies of the pleadings, findings, and judgment, inserted in the reporter's transcript, which contain neither index nor paging that is intelligible. It is unnecessary to direct attention to other matters wherein the transcript is not in accordance with the rule; suffice it to say that it appears to have been prepared without reference to the existence of any rule governing the subject. Obviously, the purpose of the rule is not only to secure records of uniform size for the filing cases in the clerk's office, but the presentation of transcripts in orderly and convenient form, properly paged and indexed, for examination by the court in determining the questions involved in the appeal.

[2] Moreover, the appeal is from a judgment entered on April 13, 1915. The judgment brought up in the purported record which we are asked to review was not rendered nor filed until April 26, 1915. The clerk by his certificate dated April 23, 1915, certifies this judgment so rendered on April 26th, and being the only judgment embodied in the record, to be a true copy of the judgment entered in the above-entitled action. Not only is there no appeal from this judgment, but it is impossible to perceive how the clerk could, on April 23d, have certified to the correctness of a judgment which was not rendered nor filed until three days later. It thus appears that the judgment entered on April 13th from which the appeal is sought to be prosecuted is not contained in the record, and the judgment embodied in the record is not one the correctness of which is authenticated by the certificate of the clerk, or from which an appeal is prosecuted.

The appeal is dismissed.

33 Cal. App. 252

VAN DE WATER v. PRIDHAM et al., Board of Sup'rs of Los Angeles County. (Civ. 2277.)

(District Court of Appeal, Second District, California. March 17, 1917. Rehearing Denied by Supreme Court May 16, 1917.)

1. DRAINS 🔑18—ISSUANCE OF BONDS—STATUTES—CONSTRUCTION.

St. 1903, p. 354, entitled "An act to promote the drainage of wet, swamp, and overflowed lands, and to promote the public health in the communities in which they lie," was amended by St. 1915, p. 359. Sections 8b, 8c, and 8g relate to the issuance of bonds and determination of incidental cost to be charged against the contractor, and section 8d provides that, when signed, "said bonds shall be delivered by said treasurer to said contractor or to his order, assignee, or lawful representative." Section 8e provides for the raising of a fund by special tax for the discharge and payment of the bonds and interest thereon, etc., followed by the provision, "and the board of supervisors is hereby vested with the power and it is the duty of said board to advertise said bonds for sale by at least one insertion of a notice of sale in a newspaper * * * and to sell said bonds to the highest responsible bidder," etc. Pol. Code, § 4484, provides that, where there is a conflict between two provisions of a statute, so complete as to leave no possible room for giving effect to both, the one last in numerical order must prevail, unless such construction is inconsistent with the meaning of such chapter or article. *Held*, it was an intent of the Legislature that payment for work should be in bonds in a sum equal to the amount of the contractor's bid plus such sum as he, under the requirements of the act, shall advance for the payment of all incidental expenses connected with the work, delivered by the treasurer to the contractor or his assignees, while the provision for sale as a means of such administration is incomplete and uncertain as to acts necessary to accomplish the purpose of the law, and the provisions of section 8g have no reference to the sale of the bonds provided for in section 8e, but to the conditions under which the treasurer shall deliver the bonds to the contractor, etc.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 11, 13.]

2. DRAINS 🔑2(1)—STATUTES—VALIDITY.

St. 1903, p. 354, as amended by St. 1915, p. 359, § 1½, provides that whenever a portion of any drainage system passes through or forms the boundary line of any municipal corporation, or where adjacent territory within such municipality is found to be benefited, such adjacent territory may be included within the boundaries of such drainage district, provided petitioners obtain the consent of the governing body of such municipality, expressed by ordinance. The board of supervisors of a drainage district obtained from the legislative body of Long Beach its consent and permission to construct a drainage canal through certain specified streets in such city, which was operating under a freeholder's charter. *Held*, that the ordinance did not confer upon the district a control of the streets, violative of the provisions of the charter vesting in the city plenary control of all uses of its streets.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 17.]

3. MUNICIPAL CORPORATIONS 🔑683(1) — DRAINAGE DISTRICT—STATUTE.

Under St. 1903, p. 354, as amended by St. 1915, p. 359, § 1½, providing for inclusion of a portion of a municipality in a drainage district, an ordinance granting consent of the city of Long Beach to the construction of a drainage ditch through its streets was not rendered a nullity, because such consent was upon certain terms named in the ordinance, which were protective of public interest, germane to the subject, and violative of no provision of the drainage district act.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1471, 1472, 1475, 1479.]

4. DRAINS 🔑14(3) — DRAINAGE DISTRICT — STATUTE.

Under St. 1903, p. 354, as amended by St. 1915, p. 359, § 1, providing for the initiation of proceedings by filing a petition with the board of supervisors, defining the boundaries of the proposed district to be benefited, and for hearing upon objections, and section 5, providing that, at the conclusion of the hearing, the determination of the board shall be made in writing, to be filed and entered upon the minutes of the board, the board was impliedly authorized to deny, modify, or change the petition.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 5.]

5. DRAINS 🔑2(1) — DRAINAGE DISTRICT — STATUTE.

Although St. 1903, p. 354, as amended by St. 1915, p. 359, does not expressly provide that the doing of the work shall depend upon its being a public benefit, section 4 makes the determination of the board to proceed with the hearing therein referred to presumptive evidence of the existence of all facts upon which the power of the board to proceed depends, and the act is not rendered void by its failure to provide that the doing of the work shall depend upon its being a public benefit.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 17.]

6. DRAINS 🔑2(2)—STATUTE—REPEAL—FLOOD CONTROL ACT.

St. 1903, p. 354, as amended by St. 1915, p. 359, was not superseded by St. 1915, p. 1502, entitled "An act to create a flood control district, to be called 'Los Angeles county flood control district,'" since the purpose of the drainage act is to dispose of water as an injurious element, while the purpose of the flood control act is to conserve it as a beneficial agent, and it could not be the intent of the Legislature, by creating a flood control district, to repeal provisions for the drainage of wet and swamp lands.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 17.]

Certiorari by C. F. Van de Water against R. W. Pridham and others, as constituting the Board of Supervisors of the County of Los Angeles, to review the proceedings of respondents in creating and establishing a drainage district. Proceedings of board of supervisors affirmed.

A. J. Sherer and Robert Young, both of Los Angeles, for petitioner. A. J. Hill, County Counsel, and Charles E. Haas, Deputy County Counsel, both of Los Angeles, for respondents.

SHAW, J. Certiorari. The board of supervisors of Los Angeles county, claiming authority so to do under and by virtue of the provisions of a certain act of the Legislature, entitled "An act to promote the drainage of wet, swamp and overflowed lands, and to promote the public health in the communities in which they lie," approved March 21, 1903 (Stats. 1903, p. 354), the title to which and the act were amended in 1915 (Stats. 1915, p. 359), in a proceeding instituted therefor by petition, created and established a drainage district, designated as "Los Angeles County Drainage District No. 1," the boundaries of which embrace certain territory in the city of Long Beach. When the proceedings had progressed to a point where the contract for constructing the drainage improvement had been awarded for the doing of the work, and contract therefor executed, petitioner, as an owner of land in the district, brought this proceeding, attacking the proceedings as in excess of the jurisdiction of the board. Petitioner asserts that the law under which the board of supervisors assumed to act is invalid, and hence the proceedings so had and thereunder taken by the board of supervisors for the formation of the district, award of contract for the doing of the work therein, and providing for the payment of the cost thereof by bonds issued for and on behalf of the district to the contractor for the cost of the work, were had and taken without authority of law.

This contention is based upon the following grounds: First. That there is an irreconcilable contradiction between the different sections of the drainage act relative to the disposition to be made of the bonds to be issued by the county to represent the cost of the proposed work. Second. That the inclusion of part of the city of Long Beach within the proposed drainage district is unauthorized by law. Third. That the drainage act under which the proceedings were taken is wanting in any provision which restricts the power of the board acting thereunder to cases where the improvement would constitute a public benefit. Fourth. That the act has been superseded in Los Angeles county by a subsequent act adopted by the Legislature, known as the "Los Angeles County Flood Control Act." We will discuss the points made by petitioner in the order in which they are presented in his brief.

[1] 1. To meet the cost of the formation of the district, and the proposed improvement therein, the act provides for the issuance of bonds in form as prescribed. Section 8c of the act provides that if, upon a hearing had in accordance with section 8b, the board is of the opinion that the work contracted for has been completed, it shall by a resolution so declare, and accept the work, and state therein "the aggregate amount for which bonds shall be issued, and * * * the amount of the incidental costs and expenses of the work and the proceeding which are charged against and to be paid by the contractor," as provided in section 8g. Section 8d requires the clerk to transmit a copy of the order so made by the board of supervisors to the county treasurer, upon receipt of which such officer is required to issue bonds in the amount fixed by said board in said order, which bonds are to be signed by the presiding officer of the board and the county treasurer, and when so signed, "*said bonds shall be delivered by said treasurer to said contractor or to his order, assignee or lawful representative.*" Section 8e provides for the raising of a fund by special tax for the discharge and payment of the bonds and the interest thereon as the same become due, and to maintain and keep the works in repair, followed by the provision: "*And the board of supervisors is hereby vested with the power and it is the duty of said board to advertise said bonds for sale by at least one insertion of a notice of sale in a newspaper of general circulation within the county and to sell said bonds to the highest responsible bidder, and to do all and singular the things necessary for the purpose of selling said bonds and which in this section aforesaid it is declared shall be done.*" It thus appears that the act contains two provisions touching the disposition of the bonds, which are wholly repugnant. It is impossible to give effect to both, for it is apparent that, if the treasurer be required by the provision contained in section 8d to deliver them to the *contractor or to his order, assignee or lawful representative*, as payment for doing the work, it must necessarily render the provision for the sale thereof, contained in section 8e, wholly inoperative. Throughout the proceeding the board of supervisors acted upon the theory that the cost of the work and expenses incidental thereto should be paid for, not from the proceeds of the sale of bonds to be issued for and on behalf of the district, but in bonds issued and delivered directly to the contractor, who was required to advance all sums necessary to cover surveys, inspection, and incidental expenses.

The contention of petitioner is that, since the conflict between the two provisions is so complete as to leave no possible room for giving effect to both, the one last in numerical order must prevail (Turner v. Wilson, 171 Cal. 600, 154 Pac. 2), and this, indeed, is the provision of section 4484 of the Political Code, to which, however, must be added the qualification therein provided: "*Unless such construction is inconsistent with the meaning of such chapter or article*"—in which case the rule of interpretation is that the court should look to the language of the whole act, and if it finds in any particular clause an expression not consistent in its import with those used in other parts of the same statute and not in harmony with its plan, purpose, and scope, and if by taking a view of the whole act it can collect from such larger and more extensive expressions the real intention of the Legislature, it is its duty to give effect to that intention. State v. Jennings, 27 Ark. 419; Torrance v. McDougald, 12 Ga. 526; Mason v. Finch, 2 Scam. (Ill.) 223; In re Vanderberg, 28 Kan. 243; Pond v. Maddox, 38 Cal. 572. Applying this rule, we have no difficulty in reaching the conclusion that it was the intent of the Legislature that payment for the work should be in bonds in a sum equal to the amount of the contractor's bid, plus such sum as he, under the requirements of the act, should advance in payment of all incidental expenses connected with the work, delivered by the treasurer to the contractor or his assignees. So construed, the act provides a complete scheme for the financial administration of the undertaking, while the provision for sale as a means for such administration is incomplete and uncertain as to acts necessary to accomplish the purpose of the law. Among other provisions contained in the act, which support the interpretation given, are those found in section 8g, which provides that:

> "All the costs and expenses of the proceeding, inclusive especially of the compensation of the person appointed to furnish the specifications, of the superintendent of work, of the engineer of work, of the cost of all publications under this act required to be made, shall be chargeable to and paid by the contractor, and they shall have been paid before delivery of the bonds shall be made by the county treasurer: Provided, however, that the county treasurer may make delivery of such bonds, if there be deposited with him, subject to the order of the board of supervisors, money to the amount of the costs and expenses chargeable to the contractor as the same is stated in the attested order of the board of supervisors, provided for in section 8d of this act. The contractor and all persons claiming under him any interest in said bonds, whether of ownership, lien or otherwise, shall be deemed to have notice of the contents of this section."

The provisions of this section, later in numerical order than 8e, could have no reference to the sale of the bonds provided for in said last mentioned section, but unquestionably refer to the conditions under which the treasurer shall deliver the bonds to the contractor or upon his order or to his assignees, in which case the latter shall take notice of the provisions of the section as to the payments so required to be made by the contractor as a condition of having the bonds *claimed by him*, which shall represent the *total cost of the work* (section 8b), delivered to him by the treasurer (section 8d), for the *cost of the work*.

[2] 2. Section 1½ of the act provides:

> "Whenever a portion of any ditch or drain or system of ditches or drains for the drainage of any such body of wet, swamp, or overflowed lands passes through or forms the boundary line of any municipal corporation, or where adjacent territory within such municipality is found by said board of supervisors to be benefited by such work or improvement, such adjacent territory may be included within the boundaries of such drainage district in proceedings instituted for the creation of said drainage district: Provided, said petitioners first obtain the consent of the governing body of such municipality, expressed by ordinance, to the construction of such ditch or drain or ditches or drains within the limits of such municipality, and thereupon all such territory shall be subject to the provisions of this act, and any work of any improvement herein contemplated to be done may be done either within or without the boundaries of the district organized therefor as may be necessary to properly drain by a ditch or drain or a system of ditches or drains any body of wet, swamp or overflowed lands within said district."

Incorporated within the boundaries of the proposed district were certain lands located within the city of Long Beach, through which the proposed drainage canal was to extend. Under the authority of said section 1½ of the act, the board of supervisors sought and obtained from the legislative body of the municipality its consent and permission, expressed by ordinance, to the construction of the drainage canal through certain specified streets of said city. Notwithstanding this ordinance, which contained conditions upon which the consent was made, petitioner insists, first, that the legislative body of said city of Long Beach, operating under a freeholders' charter, was without power to make the grant of such use; and, second, that the attaching of conditions to such consent rendered it null and of no effect. The want of power to consent to the construction of the works through the streets of the city to an outfall emptying into the ocean is based upon the contention that such use thereof confers upon the district control of the streets, which is violative of the provisions of the charter vesting in the city "plenary control of all uses of its streets," together with all matters of internal sanitation; that hence the work proposed to be done by the district is a municipal affair, as to which the freeholders' charter under which the city is operating is the controlling law. Section 6, art. 11, Const.; Fritz v. San Francisco, 132 Cal. 373, 64 Pac. 566; Barber Asphalt Pav. Co. v. Costa, 171 Cal. 138, 152 Pac. 296.

In our opinion, the control of its streets, which under its freeholders' charter the city of Long Beach exercises over its streets, does not differ from that exercised by cities of the state operating under the general law. The act recognizes the right of such control in all municipalities, whether created under general law or operating under charter adopted pursuant to the Constitution. Without regard to the character of the charter, the consent of the legislative body of the city is a prerequisite condition to extending the drainage canal through the streets of the municipality. It has been repeatedly held that the Legislature may provide for the creation of districts such as that here involved and for the financial administration of their affairs, which include lands in municipalities. Modesto Irrigation Dist. v. Tregea, 88 Cal. 334, 26 Pac. 237; La Mesa Homes Co. v. La Mesa, etc., Irr. Dist., 159 Pac. 593; In re Madera Irrigation Dist., 92 Cal. 297, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106. In the case last cited the question involved was that of including a part of a municipality in an irrigation district, and it was there said:

> "Neither is it in violation of the Constitution to incorporate into such district a town or city that has been incorporated for other municipal purposes. A system of irrigation contemplated by the act in question cannot be considered as a

'municipal purpose' within the scope of the organization of a city or town, and there can be no conflict between a corporation organized under the act to produce a system of irrigation within the district, and the municipal incorporation of the town of Madera."

So in the case at bar the construction of a drainage system for the purpose of draining swamp and overflowed lands adjacent to Long Beach, although the drainage ditches extend through the streets of such city, cannot be deemed a municipal affair. Since the conditions existing, as where the lands are outside the city limits, or inclusive of lands both in and outside thereof, it becomes a matter of more than local concern. In the case of Pixley v. Saunders, 168 Cal. 152, 141 Pac. 815, where a like question was involved, the Supreme Court said (quoting from the syllabus):

> "While generally the question of sanitation is a municipal affair, in many instances it is one of broader scope, which cannot be adequately handled by the municipal authorities of a single town. Therefore it cannot be said to be a 'local' or 'municipal' affair within the inhibition of sections 12 and 13 of article 11 of the Constitution, but it falls within the class of public purposes for which the Legislature has the authority to provide governmental agencies or districts by general laws."

[3] In our opinion, there is no merit in petitioner's claim that the ordinance granting consent of the city of Long Beach to the construction of the drainage ditch through its streets is a nullity by reason of the fact that such consent is upon certain terms named in the ordinance. The conditions attached are terms protective of the public interest, germane to the subject, and violative of no provision or principle of the drainage district act; indeed, without being attached to the ordinance, they might be and, for ought that appears to the contrary, are incorporated into the specifications for the construction of the ditch through the streets of the city. At all events, since the city might, at its option, deny the use of its streets for the purpose of constructing the canals therein, it could attach any condition, not in conflict with the conditions of the act, which was germane to the subject and calculated to protect the public interest in the streets, thus exercising plenary control over the streets. A similar question arose in the case of Lake v. Ocean City, 62 N. J. Law, 160, 41 Atl. 427, where it is said:

> "It has been generally understood that a municipality that may lawfully consent to the formation of a private corporation for certain public purposes may lawfully condition its consent upon terms protective of such public interests, and germane to the subject. If the persons upon whom the stipulations impose terms do not complain, it is difficult to see how others are affected otherwise than beneficially."

It is optional on the part of the city whether or not it grant the use thereof for such purpose at all, and likewise optional with the district whether or not it accepts other than an unrestricted grant of such use. We perceive no legal objection, however, to the district accepting a conditional grant of the use of the streets where the terms imposed are not inconsistent with the purposes of the act and which it might adopt in doing the work (Railroad Co. v. Day, 73 Ohio St. 83, 76 N. E. 396), in the absence of such imposed conditions.

[4] 3. Section 1 of the act provides for the initiation of the proceeding by filing with the board of supervisors a petition defining the boundaries of the proposed district to be benefited by the construction of the improvement, upon which, after notice given, a hearing is had upon objections filed as provided in said section. While not in express terms authorizing the board to deny the petition, such power to deny, modify, or change, we think, must be deemed implied from the provision of section 5 that:

> "At the conclusion of the hearing, the determinations of the board shall be made in writing to be filed and entered upon the minutes of the board."

[5] Nor, in our opinion, is the act subject to the objection that it is void by reason of its failure to provide that the doing of the work shall depend upon its being a public benefit. True, it does not require in direct terms a finding on the part of the board that it shall be a public benefit, though the record discloses that the board did find that the public interest and convenience would be subserved by the doing of the work. In Page and Jones on Taxation by Assessment, § 334, it is said:

> "Possibly the special and local benefit is clearer in drainage than it is in any other of the public improvements for which assessments are levied. The improvements of drainage, and its beneficial effect upon the land drained are matters of general knowledge which have often been commented upon by the courts."

And again (section 335):

> "If land in its natural condition is generally or often covered with stagnant water it is likely to be a menace to public health. * * * Under these circumstances, there is no doubt that the drainage of such land, by artificial means, is an improvement which confers a benefit upon the public at large."

The Supreme Court of this state, in the case of Hagar v. Board of Supervisors, 47 Cal. 222, in discussing the validity of the drainage act of 1868, said:

> "But we think the power of the Legislature to compel local improvements, which, in its judgment, will promote the health of the people and advance the public good, is unquestionable. In the exercise of this power it may abate nuisances, construct and repair highways, open canals for irrigating arid districts, and perform many other similar acts for the public good, and all at the expense of those who are to be chiefly and more immediately benefited by the improvement."

In Lewis on Eminent Domain (2d Ed.) vol. 1, § 188, it is said:

> "The promotion of the public health is undoubtedly a public use within the meaning of the Constitution, and private property may be taken for the construction of drains, levees, or other works in order to accomplish this object."

See, also, Laguna, etc., District v. Charles Martin Co., 144 Cal. 209, 77 Pac. 933.

The power of the Legislature to authorize the doing of the work at the expense of those owning swamp and wet lands, who are chiefly benefited by the improvement, is, as we understand the law, founded, like municipal sanitation measures, not only upon its power to do all things necessary to conserve the health and general welfare of the public, but statutes authorizing drainage of swamp lands are upheld, independently of any effect upon the public health, as reasonable regulations for the benefit of those who are deemed owners of a common property. Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369, and cases cited. And hence the power to act does not depend upon any express provision contained in the act that the board of supervisors shall first determine that it is necessary for the public welfare. Moreover, section 4 of the act makes the determination of the board to proceed with the hearing therein referred to presumptive evidence of the existence of all facts upon which the power of the board to proceed depends.

[6] 4. Petitioner suggests that the act in question has been superseded, in so far as Los Angeles county is concerned, by "An act to create a flood control district, to be called 'Los Angeles county flood control district.'" Stats. 1915, p. 1502. We are unable to perceive any merit whatsoever in this contention, and agree with counsel for petitioner that:

> "There is a radical difference between the purposes of the drainage act involved in this action and the said Los Angeles county flood control act. The purpose of the drainage act is to dispose of the water and get rid of it as an injurious element, while the purpose of the Los Angeles county flood control act is to conserve it as a beneficial agent."

The purpose of one is "to promote the drainage of wet, swamp or overflowed lands"; the other, as declared by the first paragraph of section 2, is "to provide for the control of the flood and storm waters of said district (which embraces practically the entire county of Los Angeles), and to conserve such waters for beneficial and useful purposes by spreading, storing, retaining or causing to percolate into the soil within said district." The fact that in the proceedings mention is made of the proposed drainage ditch as the "construction of a storm drain," which purpose it might at times serve, is in no wise inconsistent with the purpose declared in the act itself. Certainly it was not the intent of the Legislature that by creating a flood control district, embracing almost the entire county of Los Angeles, such act should repeal all provisions for the drainage of wet and swamp lands in the county, any more than by the act under which irrigation districts are created it was intended to destroy all acts providing for the drainage of swamp lands embraced within such irrigation districts.

While the act is loosely drawn, nevertheless its purpose is clear, and we have reached the conclusion, not without some difficulty, however, that, taken as a whole, it affords a mean for effecting such purpose, the validity of which is not subject to attack upon the specific grounds urged by petitioner.

It is therefore ordered that the proceedings be affirmed.

We concur: CONREY, P. J.; JAMES, J.

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165 PACIFIC REPORTER

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In re SPAFFORD'S ESTATE.

SPAFFORD et al. v. CITIZENS' TRUST & SAVINGS BANK. (L. A. 5096.)

(Supreme Court of California. May 4, 1917. Rehearing Denied May 31, 1917.)

EXECUTORS AND ADMINISTRATORS 🔑510(2)—ORDERS APPEALABLE—ORDERS IN PROBATE.

An order refusing to set aside and vacate an order settling the account of an administrator not being embraced by the provisions of Code Civ. Proc. § 963, subd. 3, specifying the orders and judgments from which an appeal may be had in probate proceedings, is not appealable.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2236.]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Proceedings in the matter of the final settlement of the account of the Citizens' Trust & Savings Bank as administrator of Daniel E. Spafford, deceased. On motion of Gertrude E. Spafford and others to set aside and vacate an order settling the account. From an order denying the motion, the movants appeal. Appeal dismissed.

M. A. Fleming and Tobias R. Archer, both of Los Angeles, for appellants. Tanner, Odell & Taft, Hunsaker & Britt, and Le Roy M. Edwards, all of Los Angeles, for respondent.

VICTOR E. SHAW, Special Judge. This is an appeal from an order of court denying the motion of appellants, made September 5, 1916, under section 473 of the Code of Civil Procedure, to set aside and vacate an order of court, made on April 19, 1916, settling the account of the administrator of the estate of Daniel E. Spafford, deceased.

The order involved is not embraced by the provisions of subdivision 3 of section 963 of the Code of Civil Procedure, which specifies the orders and judgments from which an appeal may be had in probate proceedings. Not only is there a want of statutory authority upon which to base the prosecution of an appeal from such an order, but this court has repeatedly refused to entertain appeals from such orders. See Lutz v. Christy, 67 Cal. 457, 8 Pac. 39; Estate of Calahan, 60 Cal. 233; Estate of Wiard, 83 Cal. 619, 24 Pac. 45; Estate of Cahill, 142 Cal. 628, 76 Pac. 383.

Appellants rely upon the opinion in the Estate of Bauquier, 88 Cal. 302, 26 Pac. 178, 532, wherein the court, in sustaining the right of appeal from an order denying a new trial to one named as executrix of a will and who had been adjudged incompetent, held that subdivision 2 of section 963 of the Code of Civil Procedure, which then authorized an appeal from an order granting or refusing a new trial, embraced all such orders whether made in probate proceedings or civil actions. There is nothing said in this opinion, however, which can be construed as authorizing an appeal from the order made in the case at bar. Indeed, the cases above referred to are cited with approval in so far as they determine that an appeal does not lie from an order of court vacating or refusing to vacate orders like the one which is the subject of this appeal.

The appeal is dismissed.

We concur: SLOSS, J.; SHAW, J.

175 Cal. 34

SAN LUIS OBISPO COUNTY v. RYAL et al. (L. A. 3811.)

(Supreme Court of California. April 30, 1917.)

1. BAIL 🔑64—APPEAL BOND—LIABILITY OF SURETIES.

In view of Pen. Code, §§ 1273, 1279, 1292, providing that the essential requirement of bond as far as sureties are concerned is that they will pay a specified amount to the state in event the principal should make default, an appeal bond, providing upon failure of the principal to perform its conditions "that he will pay to the state of California the sum of $2,000," did not bind the sureties to pay anything themselves.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 278.]

2. BAIL 🔑71—ACTION ON APPEAL BOND—PLEADING—MISTAKE.

In a suit on a bond in a criminal appeal, where there were no allegations of inadvertence or mutual mistake in the preparation and giving of the bond, and it does not appear by whom it was prepared, but does appear that it was accepted and approved in the exact terms it contains, the plaintiff cannot contend that the word "he" was inadvertently used instead of the word "we," and that the real intent and purpose in giving the undertaking was to give a bond making the sureties primarily liable.

Department 2. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by the County of San Luis Obispo against A. M. Ryal and others. Judgment for plaintiff, and defendants appeal. Reversed.

Carpenter & Gibbons, of San Luis Obispo, for appellants. Chas. A. Palmer and Thomas Rhodes, both of San Luis Obispo, for respondent.

LORIGAN, J. This action was brought to recover from defendants the sum of $2,000, for which it is alleged they are liable upon an undertaking in that amount executed by them as sureties in a criminal action and which was declared forfeited by the superior court of San Luis Obispo county for breach of its conditions. These are all the allegations in the complaint respecting said undertaking save that it is annexed to the complaint as a part thereof.

The undertaking sued on is a bond on appeal. It is entitled People of the State, etc., Plaintiff, v. Teofil Klempke, Defendant, and recites and provides that:

> An order having been made by the superior court of San Luis Obispo county admitting said defendant to bail pending appeal in the sum of $2,000, "we, A. M. Ryal * * * and Henry C. Hansen, * * * hereby undertake * * * that Teofil Klempke will surrender himself in execution of the judgment upon its being affirmed or modified, or upon the appeal being dismissed, or * * * in case the judgment is reversed and the cause remanded for a new trial that he will appear in the court to which said cause may be remanded and submit himself to the orders and decrees thereof, or if he fails to perform either of these conditions, that *he* will pay to the state of California the sum of two thousand dollars." (The italics ours.)

Defendants signed the bond and justified upon it; it was thereupon approved and filed, and the defendant Klempke was released under it.

Defendants filed a general demurrer to the complaint which was overruled, and, having failed to answer within the time allowed, judgment for the penal amount of the bond was entered against them. They appeal from the judgment presenting thereunder the sole question of the validity of the order overruling their demurrer.

[1] This bond, set out in the complaint and sued on, is assumed to have been, and doubtless was, given as a bond on appeal under sections 1273, 1279, and 1292 of the Penal Code, which provide for such a bond and its form and conditions. One of the conditions provided by the Code to be inserted in such a bond, and in fact the essential requirement as far as sureties thereon is concerned, is that, in the event that the defendant in whose behalf the bond is given fails to do or perform any of the things provided therein (fully recited in the bond set out here), the sureties will pay to the state of California a sum particularly specified, being the amount in which the defendant is ordered admitted to bail; in fact, to pay a designated penal sum in the event of the delinquency of their principal. It is a familiar rule of law that sureties cannot be held beyond the terms of their contract of suretyship. They have a right to declare in their bond the terms and conditions upon which they shall be bound and to stand on the precise terms of that contract. This principle of law, when applied here, is decisive of this appeal. Though the Code has provided just what the essentials of a bond on a criminal appeal shall contain, as also what the sureties shall undertake in it, it is clear that in preparing the undertaking here in question there was not one word used in it whereby the defendants, as sureties therein, undertake or agree to do anything. The law requires, and the form of bond set out in the Code provides, that the sureties shall bind themselves in the event of the appealing defendant failing to do certain things they will pay to the state of California a specified penal sum. A valid bond would have provided that "we (the sureties) will pay" to the state in the event our principal fails to comply with any of the conditions the sum specified as a penalty. But in the bond sued on here the sureties did not agree to pay anything in default of their principal; they only promised their appealing principal—the defendant—would pay. There being then nothing in the bond which bound them to pay any penal sum in the event of the default of their principal, and standing upon the strict terms of their contract, they cannot be compelled to do it. This should require no further discussion.

[2] It is asserted by respondent that the bond is good in every particular, except that the word "he" was inadvertently used instead of the word "we," and that the real intent and purpose in giving the undertaking was to give a bond making the sureties primarily liable. But the trouble with this position is that there are no allegations of any inadvertence, lack of true intent, or mutual mistake on the part of any one in the preparation and giving of this bond. It does not appear by whom it was prepared or presented or approved. All that appears is that it was accepted and approved in just the terms it contains. There is no room for the application of any rules of construction. There is nothing uncertain or doubtful or indefinite about its terms. The language of the bond is clear. It is plain the sureties agreed that their principal would pay, but they did not agree thereunder to pay anything themselves. The Code provisions, it is true, contemplate that the sureties on a bail bond should so bind themselves and that the bond should so provide, but the trouble with the bond here is that it does not do so, and this court cannot make a different contract for the parties than they themselves have made.

The judgment appealed from is reversed.

We concur: MELVIN, J.; HENSHAW, J.

175 Cal. 37

KLEIN v. MARKARIAN. (S. F. 7322.)

(Supreme Court of California. May 2, 1917.)

1. SPECIFIC PERFORMANCE 🔑30—CERTAINTY OF CONTRACT.

Contract providing for balance of price being paid "in quarterly yearly payments" is one the terms of which are not sufficiently certain to make the precise act to be done clearly ascertainable, and so under Civ. Code, § 3390, subd. 6, not specifically enforceable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 83–85.]

2. SPECIFIC PERFORMANCE 🔑51 — JUST AND REASONABLE CONTRACT.

If it was the intention of the parties to an option contract, signed only by the vendor, requiring conveyance on payment of a quarter of the price, and not providing how the obligation to make the deferred payment is to be evidenced or secured, that he shall have no writing signed by any one else evidencing an obligation to pay the balance, nor any security therefor, beyond the inadequate security of a vendor's lien, specific performance thereof could be refused under Civ. Code, § 3391, subd. 2, as not "just and reasonable" as to the vendor defendant.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 153, 154.]

3. SPECIFIC PERFORMANCE 🔑28(1)—CERTAINTY OF CONTRACT.

Option contract for land not providing how obligation to pay balance of price is to be evidenced or secured, if contemplating the purchaser is to give some kind of secured evidence thereof, is not specifically enforceable, because of its uncertainty as to the manner thereof.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61, 65, 66.]

4. TENDER 🔑15(3)—OFFER OF PERFORMANCE —EFFECT—STATUTE.

Code Civ. Proc. § 2076, providing that objections not made at the time by a person to whom tender is made are deemed waived, is qualified by Civ. Code, § 1501, providing that failure to object does not waive a defect which could not, if specified, have been obviated by the person making the offer; and so where an option given by defendant to plaintiff is so indefinite as to time of payment and manner of evidencing and securing deferred payments, as not to be specifically enforceable, defendant is not bound by a tender of notes for a definite time secured by mortgage on the property, though he specified no objections thereto, as plaintiff could not have remedied the defects in the option, and to hold defendant bound by a tender outside its provisions would be to make a new contract for him.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 41, 42, 45.]

Department 1. Appeal from Superior Court, Fresno County; W. M. Conley, Judge.

Action by L. W. Klein against M. Markarian. From an adverse judgment and order, plaintiff appeals. Affirmed.

Everts & Ewing, of Fresno, for appellant. D. A. Cashin, Sutherland & Barbour, and L. L. Cory, all of Fresno, and Goodfellow, Eells, Moore & Orrick, of San Francisco, for respondent.

SLOSS, J. Appeal by plaintiff from a judgment and an order denying his motion for a new trial. The action was for specific enforcement of an alleged contract for the conveyance of real estate, or to recover damages for the breach.

The essential facts are stated in the court's findings, which may be summarized as follows: On November 16, 1910, Markarian, the defendant, executed a written option, whereby he offered to sell to L. W. Klein & Co. a tract of land in Fresno county "for the sum of $45,000, payable at the times and upon the terms and conditions following, to wit, $11,000 to be paid within ten days from and after said company shall have notified me of its acceptance of this offer. The balance to be paid as follows: In quarterly yearly payments, with interest at 6 per cent. annually. Upon the making of $11,000 payment of said purchase price, I will make, execute, and deliver to said company or to any person named or substituted by it my deed of conveyance of said property, with and containing the usual covenants." By the writing the defendant agreed, upon acceptance of his offer, to furnish an abstract showing good title. The offer or option was to remain in force until the 16th day of December, 1910, "and thereafter until the same shall be withdrawn by notice in writing." The option was never withdrawn. On February 17, 1911, said L. W. Klein & Co. gave to the defendant written notice that it accepted the offer, and demanded that defendant furnish an abstract and execute a conveyance to the plaintiff (named as substituted for L. W. Klein & Co.), offering, at the same time, to pay the defendant the sum of $11,000, and to execute and deliver to him plaintiff's four promissory notes for $8,500 each, payable, respectively, one, two, three, and four years after date, with interest at 6 per cent. per annum, payable annually, together with a mortgage on the said land to secure the payment of such notes. The defendant refused to convey the land or to accept the money or the notes or the mortgage offered, notifying plaintiff at the same time that he would not perform said contract. On the 4th day of May, 1912—some fourteen months later—the plaintiff made a renewed tender and demand, and the defendant again refused to accept the tender or to make the conveyance. The court finds that the contract was just and equitable, and that the purchase price of $45,000 was the reasonable value of the land at the time the option was given, and at the time it was accepted, i. e., on February 17, 1911. Since the last-named date, the land has increased in value, and it was, on the 4th day of May, 1912 (the date of the second demand), worth $60,000. It is found, contrary to the averment of the complaint, that plaintiff was not damaged in the sum of $15,000. The conclusions of law drawn from these facts were that the contract was and is "incomplete, uncertain, and indefinite; that by reason thereof said contract cannot be specifically enforced"; and that plaintiff had suffered no damage. Accordingly, judgment was entered denying plaintiff either equitable or legal relief.

[1] It is an old and unquestioned rule of equity that, whatever right there may be to maintain an action at law for damages, a contract will not be specifically enforced unless it be complete and certain in its terms. Pom. Contr. § 159; Agard v. Valencia, 39 Cal. 292, 301; Co-op. Ass'n v. Phillips, 56 Cal. 539, 546; Reymond v. Laboudigue, 148 Cal. 691, 84 Pac. 189. The Civil Code (§ 3390, subd. 6) includes, among the obligations which cannot be specifically enforced, "an agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable." The written option or offer upon which plaintiff relies is both uncertain and incomplete in its statement of the terms of payment. After providing for a cash payment of $11,000, it declares that the balance of $34,000 is to be paid "in quarterly yearly payments, with interest at 6 per cent. annually." This is, at the best, a vague or ambiguous provision. The clause would seem, at first glance, to call for "quarterly" or "quarter yearly" payments; i. e., payments at intervals of three months. But, so understood, it fails to indicate the number of such payments, or the amount of each. The uncertainty in this respect is fatal to the claim for specific performance. Williams v. Stewart, 25 Minn. 516; Platt v. Stonington Sav. Bk., 46 Conn. 476; Potts v. Whitehead, 20 N. J. Eq. 55; Schmeling v. Kriesel, 45 Wis. 325. The appellant contends that the expression was designated to provide for annual payments, each covering a quarter of the balance. This, however, is a strained reading of the language. In any event, the words used are far from expressing the suggested purpose with anything like clearness or certainty.

[2, 3] Furthermore, the contract fails to provide how the obligation to make the deferred payments is to be evidenced or secured. The option was signed by the defendant alone. He was to convey his land upon payment of less than one-fourth of the purchase price. Thereupon he would have no writing signed by any one evidencing an obligation to pay the balance, nor any security for such balance beyond the inadequate security of a vendor's lien. If this was the intent of the parties, specific performance might have been properly refused upon the ground that the contract was not "just and reasonable" as to the defendant. Civ. Code, § 3391; Godwin v. Collins, 3 Del. Ch. 196; Diamond, etc., Co. v. Todd, 6 Del. Ch. 163, 14 Atl. 27. If, on the other hand, the parties contemplated that the purchaser should give some form of secured evidence of indebtedness to cover the deferred payments—and this the plaintiff's own conduct shows to have been his view—the agreement was entirely uncertain with respect to the manner in which the balance should be evidenced and secured. Marsh v. Lott, 8 Cal. App. 385, 97 Pac. 163.

[4] The appellant concedes, virtually, that the writing is, on its face, so uncertain as to preclude specific enforcement. He claims, however, that all uncertainty was removed by his act of tendering four notes, together with a mortgage to secure them. The defendant having then failed to specify any objections to the terms of the instruments tendered, he was, it is argued, precluded from objecting thereafter. Section 2076 of the Code of Civil Procedure, providing that objections not made by a person to whom a tender is made are deemed waived, is cited in support of this claim. This section is qualified by section 1501 of the Civil Code, which provides, in effect, that the failure to object does not waive a defect which could not, if specified, have been obviated by the person making the offer. Allen v. Chatfield, 172 Cal. 60, 69, 156 Pac. 47. No matter what the defendant might have said in response to the offer, the plaintiff could not, of course, have remedied the defects in the written option. The writing was so indefinite that the plaintiff could not, within its terms, lay the foundation for a decree of specific performance. To hold the defendant bound by a tender outside of the provisions of the option would be to make a new contract for him. His mere silence, when the unauthorized offer was made to him, did not constitute an assent to such new contract.

Under the findings, the court properly refused to award damages for the breach of the contract. There was no increase in the value of the land between the signing of the option and the defendant's breach, which occurred when he refused to comply with the first demand, that of February 17, 1911. So that, assuming that the case presents the element of bad faith which, under section 3306 of the Civil Code, is essential to a recovery of the difference between the contract price and the value at the time of the breach, the findings (amply supported by the evidence) show that there was no such difference. There is no claim that plaintiff suffered any other item of damage recoverable under section 3306.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; LAWLOR, J.

175 Cal. 21

DROWN v. NEW AMSTERDAM CASUALTY CO. et al. (S. F. 7308.)

(Supreme Court of California. April 30, 1917.)

1. Insurance 🔑448—Right to Proceeds—Beneficiary Killing Insured.

Public policy prevents a beneficiary who unlawfully kills the insured from recovering on the insurance policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1150.]

2. Criminal Law 🔑308—Presumption—Innocence.

Under the direct provisions of Pen. Code, § 1096, defendant in a criminal trial is presumably innocent until his guilt is proved beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 731.]

3. Evidence 🔑60 — Presumptions — Innocence of Crime.

In a civil action under Code Civ. Proc. § 1826, a party is presumed innocent of crime until contrary is proven to a moral certainty.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 81.]

4. Insurance 🔑635—Pleading 🔑8(3) — Sufficiency of Complaint—Beneficiary Killing Insured.

In an action on an insurance policy, allegations that the beneficiary discharged a loaded pistol at insured and killed him, and therefore could not recover on the policy, do not preclude recovery, since the killing may not have been premeditated or unlawful, and the last allegation is merely the pleader's conclusion.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1599–1602.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Willard N. Drown, administrator of the estate of Archer Cullen Drown, deceased, against the New Amsterdam Casualty Company and Amelia C. Drown. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

J. F. Leicester and Drown, Leicester & Drown, all of San Francisco, for appellant. Lilienthal, McKinstry & Raymond, of San Francisco, for respondents.

SHAW, J. The plaintiff has appealed from the judgment upon the judgment roll alone. The court below having sustained the demurrer to the complaint without leave to amend, the sole question presented is whether the complaint states a cause of action.

The action is by the administrator of the estate of Archer Cullen Drown to recover the proceeds of a policy issued by the defendant company insuring the said Archer Cullen Drown against death by accidental means. The complaint alleges that on June 22, 1912, the defendant issued the policy sued on whereby the company agreed "to pay, * * * in the event of the accidental death of said Archer Cullen Drown, * * * to the beneficiary designated in said policy, if surviving, otherwise to the executors or administrators of said Archer Cullen Drown," the proceeds of the policy; that Amelia C. Drown, wife of the insured, was and is named therein as the beneficiary; that while the policy was in full force and effect, on the 24th day of October, 1913, the said Archer Cullen Drown met with death by accidental means in the following manner: That while the said Archer Cullen Drown was "reclining and reposing in his bed, and whilst he was wholly unarmed, and was resting and endeavoring to or was sleeping, his said wife Amelia C. Drown took a loaded pistol in her hand and discharged the same at the said Archer Cullen Drown, and shot and killed her said husband, Archer Cullen Drown"; that the injuries resulting therefrom were not intentionally or otherwise self-inflicted, and that the injuries and resulting death were without design, unforeseen, and unexpected on the part of the said Archer Cullen Drown; that claim of loss under said policy was duly presented to the defendant company; that said Amelia C. Drown, the beneficiary designated in the policy, caused the accidental death of said Archer Cullen Drown, as above related, and that "because such death was caused by her act, as aforesaid, she is not herself entitled to take any advantage or benefit under said policy, * * * but that the liability of the said defendant New Amsterdam Casualty Company upon and under said policy continues in full force and effect, and any and all moneys upon or under said policy belong to and form part of the estate of said Archer Cullen Drown, deceased"; that said Amelia C. Drown claims an interest adverse to plaintiff in the proceeds of said policy as the designated beneficiary and is a necessary party defendant; that said Amelia C. Drown after the death of the said Archer Cullen Drown did assign and transfer to the plaintiff, as such administrator, all her right and interest under the said policy; that demand was duly made by plaintiff upon the defendant company for the payment of the proceeds of the said policy, but that the said defendant company has refused to make such payment to plaintiff or to the said Amelia C. Drown, or to any other person on account of or in satisfaction of the amount due under said policy.

[1] On the part of the appellant it is conceded that where one insures his own life for the benefit of another person, and the beneficiary murders or unlawfully kills the person insured, public policy will not allow such beneficiary to recover upon the policy. It is contended, however, that in such a case if the terms and conditions of the policy have been fully performed by the person insured, the law will not permit the policy to lapse in favor of the insurer, but will raise a resulting trust in favor of the estate of the insured person and allow a recovery upon the pol-

icy by his personal representatives. Both parties have presented their views on this proposition with much force and ability.

[2-4] We cannot find in the allegations of the complaint any statement of the facts necessary to raise the question. One of the strongest disputable presumptions known to the law is the presumption "that a person is innocent of crime." Code Civ. Proc. § 1963, subd. 1. In a criminal action the defendant is presumed to be innocent until his guilt is proved beyond a reasonable doubt. Pen. Code, § 1096. In a civil action proof to a moral certainty, which may fall short of proof beyond reasonable doubt, is sufficient. Code Civ. Proc. § 1826. It is an invariable rule that if the fact that another person has committed a felony is essential to a cause of action or defense, the person asserting such cause of action or defense must, in order to maintain it, show that such other person has committed such felony. In his pleading of the cause of action or defense he cannot rely on a statement of the mere conclusion that the other person did commit the offense, or that he was guilty thereof, but must state every fact which it would be necessary to prove against such person to establish the crime and his guilt thereof in a criminal prosecution therefor, except, perhaps, the venue. If the facts essential to the crime are not alleged there can be no presumption that such crime has been committed and the person concerned must be presumed to be innocent thereof.

If we apply these principles to the present case it will clearly appear that there is no foundation in the complaint for the argument that Amelia C. Drown was guilty of the murder or of the unlawful killing of Archer Cullen Drown. Murder is the unlawful killing of a human being with malice aforethought. Pen. Code, § 187. Such malice may be either express or implied. Pen. Code, § 188. Manslaughter is the unlawful killing of a human being without malice, either voluntarily, "upon a sudden quarrel or heat of passion," or involuntarily, "in the commission of an unlawful act, not amounting to a felony or in the commission of a lawful act which may produce death, in an unlawful manner, or without due caution or circumspection." Pen. Code, § 192. There are no allegations in the complaint to the effect that the killing of Archer Cullen Drown was done with that malice, either express or implied, which is necessary to make the act a murder. In order to constitute voluntary manslaughter there must be an intent to kill, though it is not that deliberate and malicious intent which is an essential element in the crime of murder. People v. Freel, 48 Cal. 437. There is no allegation that the killing, though without malice, was done upon the sudden quarrel or heat of passion which is necessary to reduce an unlawful and intentional killing to manslaughter. It is not averred, either directly or indirectly, that the killing was done in the commission of an unlawful act, or in the commission of a lawful act in an unlawful manner, or without due caution or circumspection. There is, therefore, no basis for the claim that the complaint shows an involuntary manslaughter. It is not alleged that it was unlawful or that it was intentional. The pleader seems to have been careful to avoid making either of these allegations. The complaint alleges that the death was accidental, that it was "effected solely and exclusively by accidental means," that "said accidental death" resulted from the act of said Amelia C. Drown. It described the act which caused his death as follows: "Amelia C. Drown took a loaded pistol in her hand and discharged the same at the said Archer Cullen Drown, and shot and killed" him. All this might have occurred without any intention on her part either to shoot him or kill him. A loaded pistol may be discharged at a person by another without any intent whatever to kill. In the connection in which "at" is used in the sentence it means merely that she shot the pistol in the direction of said Archer Cullen Drown. It carries no necessary implication of intent, and no intent is alleged in the complaint in any other manner. If, after taking the pistol in her hand, she accidentally discharged it without any intention whatever of doing so, and the pistol was then pointed in the direction of the decedent, it could truthfully be said that she had shot the pistol at him. The language is as consistent with an unintentional and accidental discharge as with a discharge with the intent to shoot the decedent. It does not expressly declare that it was accidental, although that fact might be implied from the language describing it as "the accidental death" and as a death caused by "accidental means." In view of the lack of any showing in the complaint that the killing was felonious, the case cannot be considered upon the theory that she is estopped by her conduct and on grounds of public policy from claiming the benefits of the policy of insurance. Even an intentional killing, if done in her lawful self-defense, would not prevent her from claiming the benefits of the policy. The facts alleged, however, exclude the theory of self-defense. There is an allegation that because of the facts relating to the cause of his death, as above stated, Amelia C. Drown is not entitled to enforce the policy or take the benefit thereof. But this is a conclusion of law, and it in no wise alters or enlarges the legal effect of the facts. If the plaintiff seeks to recover on behalf of the estate on the ground that the beneficiary cannot claim the benefits of the policy, he must state the facts upon which the principles of public policy denying her right must rest. Upon this complaint such statement would be unnecessary because upon the face of the complaint the beneficiary is entitled to recover upon the policy, it being alleged that the proper proof of death and claim of loss was made, and the allegation that she has assigned her interest to plaintiff for the benefit of the estate is sufficient to entitle him to maintain the action. If the defendant desires to make a defense on the ground stated, an answer will be necessary setting up the facts upon which it is claimed the beneficiary of the policy is debarred from recovery thereon. Upon the facts stated in the complaint we can see no ground for holding that it does not state a cause of action in favor of the plaintiff. It would be manifestly improper for this court to render a decision upon an assumed fact of so grave a character, unless such fact is shown by the record before it. It may be remarked that it is stated in the briefs that she has been acquitted of criminal homicide.

The judgment is reversed.

We concur: SLOSS, J.; LAWLOR, J.

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175 Cal. 31

STATE BANK OF LANSING v. McLAURY et al.

SAME v. McLAURY.

(Sac. 2333, 2334.)

(Supreme Court of California. April 30, 1917.)

1. JUDGMENT 🔑894—SATISFACTION—ORDER TO ENTER SATISFACTION—WHEN PROPER.

Where judgment debtor moved for order to satisfy judgment under Code Civ. Proc. § 675, authorizing such order whenever a judgment is satisfied in fact otherwise than upon an execution, there was no error in denying the motion, where the only evidence as to satisfaction was affidavits in direct conflict.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1706–1709, 1712.]

2. JUDGMENT 🔑894—SATISFACTION—ORDER TO ENTER SATISFACTION—WHEN PROPER.

Though, in proceeding to have a judgment satisfied of record under Code Civ. Proc. § 675, it may be that the court should not decide the issue of satisfaction on affidavits alone, a movant, who fails to ask independent trial by jury or a reference of such issue, cannot complain that the court should not have decided such issue on affidavit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1706–1709, 1712.]

3. APPEAL AND ERROR 🔑523(2)—SCOPE OF REVIEW—RECORD—REQUISITES AND SUFFICIENCY.

The court cannot, on appeal from granting or denial of a motion to satisfy judgment under Code Civ. Proc. § 675, consider affidavits or other evidence used in the court below, unless they are authenticated by incorporation into a bill of exceptions, within court rule 29 (119 Pac. xiv).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2374.]

Department 1. Appeals from Superior Court, Tulare County; W. B. Wallace, Judge.

Actions by the State Bank of Lansing against C. S. McLaury and Harry Thompson and against C. S. McLaury. On defendants' motions for orders satisfying the judgment. From orders denying the motions, defendants appeal. Affirmed.

Everts & Ewing, of Fresno, for appellants. Bradley & Bradley, of Visalia, for respondent.

SLOSS, J. Appeals in two cases are here presented. The plaintiff is the same in both actions. C. S. McLaury and Harry Thompson are defendants in the one action, and McLaury is the sole defendant in the other. Except for this circumstance, and a difference in the amounts involved in the two cases, the facts are identical, and the two appeals have been submitted upon a single set of briefs. A brief statement of the facts in No. 2334 will illustrate the legal questions common to the two appeals.

The plaintiff brought an action against McLaury on a promissory note, and recovered judgment by default. More than a year after the entry of the judgment, McLaury gave notice that he would move the court for an order satisfying the judgment and recalling an execution issued thereon. The notice of motion was accompanied by the affidavit of McLaury in which he stated, in effect, that since the entry of the judgment, the plaintiff had come into the possession of money, sufficient in amount to cancel the indebtedness represented by the judgment. Said money was declared to be the proceeds of securities belonging to McLaury, and held by the plaintiff under an agreement that money collected thereon should be applied upon said indebtedness. The plaintiff filed an affidavit denying the holding of any securities for McLaury, or the collection of any money applicable to McLaury's debt. The court made an order denying the motion to satisfy the judgment and recall the execution. The appeal is from this order.

[1] The motion was made under section 675 of the Code of Civil Procedure, which authorizes the court to order entry of satisfaction "whenever a judgment is satisfied in fact, otherwise than upon an execution." Buckeye R. Co. v. Kelly, 163 Cal. 8, 124 Pac. 536, Ann. Cas. 1913E, 840. The order is to be made only where the judgment has in fact been satisfied. In the case before us, the only evidence touching this vital question consists of affidavits which are in direct conflict. It is difficult to see, therefore, how it can be contended that the court erred in denying to the defendant the relief for which he asked.

[2] The appellant's argument is that, where the fact of satisfaction by payment is in controversy, the court should not, upon a motion under section 675, decide this issue upon affidavits alone. The payment being denied, the court, it is claimed, should either remit the defendant to an independent action, or should provide for determination

of the disputed fact by means of a reference or a submission to a jury. 23 Cyc. 1498. There is much force in the suggestion that an issue of this kind could better be determined otherwise than by the summary procedure of a motion made and resisted upon affidavits. Woodford v. Reynolds, 36 Minn. 155, 30 N. W. 757; Atkinson v. Harrison, 153 Pa. 472, 26 Atl. 294. It may well be that, where the fact of payment is disputed, a reference would be proper. Dwight v. St. John, 25 N. Y. 203. But the appellant is not, on the record before us, in a position to question the action of the court below. There is nothing to indicate that he requested a reference, or the submission of the issue of fact to a jury. He undertook, apparently, to present his motion for decision on affidavits, and, having so presented it, he cannot now insist that the court below should, of its own motion, have directed a procedure different from that which he himself initiated and invited.

[3] We have discussed the case on the assumption that the record properly shows that the motion was presented to the court upon the two affidavits to which we have referred. But, in fact, the record does not show this. The transcript consists merely of copies of the complaint, the judgment, defendant's notice of motion, a written motion, defendant's affidavit, a counter affidavit, the order denying the motion, and the notice of appeal. These papers are certified by the clerk as correct copies of the originals on file. They are not incorporated in any bill of exceptions. Under the settled rule of this court, we cannot, on an appeal from the granting or denial of a motion like the one here involved, consider affidavits or other evidence used in the court below, unless such affidavits or evidence be authenticated by incorporation into a bill of exceptions. Rule 29 of this court (119 Pac. xiv) provides for this method of authentication where no other mode is authorized by law. There is no law authorizing another mode in such cases as this, unless, perhaps, the evidence taken can be brought up in a transcript prepared under the alternative method provided by sections 953a, 953b, and 953c of the Code of Civil Procedure. There is no pretense of any attempt to procure a record under these sections. Not only, therefore, are we precluded from considering the affidavits printed in the transcript, but we must assume, in support of the order, that any additional evidence which would support it was presented to the court below. Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299; Von Glahn v. Brennan, 81 Cal. 261, 22 Pac. 596; Shain v. Eikerenkotter, 88 Cal. 13, 25 Pac. 966; Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491; Ramsbottom v. Fitzgerald, 128 Cal. 75, 60 Pac. 522; Skinner v. Horn, 144 Cal. 278, 77 Pac. 904; Estate of Dean, 149 Cal. 487, 87 Pac. 13. It is incumbent upon the appellant to show error, and this he has not done, where he fails to present to the appellate court the evidence on which the trial court acted. In support of the order, we would be entitled to assume, if that were necessary, that the court below did order a reference or submit the issue to a jury, as the appellant urges it should have done, and that the reference or the jury trial resulted in favor of the respondent's contention.

We are not called upon to decide here whether the denial of defendant's motion would operate as a bar to an independent action in equity to enjoin the enforcement of the judgment. It is enough, for present purposes, to say that error in the denial of the motion is not shown.

In each of the above-entitled cases, the order appealed from is affirmed.

We concur: SHAW, J.; LAWLOR, J.

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175 Cal. 59

BANK OF COMMERCE & TRUST CO. v. KENNEY. (L. A. 3969.)

(Supreme Court of California. May 4, 1917.)

1. Appeal and Error 🔑901—Review—Presumptions.

Every presumption is in favor of the regularity of the proceedings in a court of general jurisdiction upon which a judgment is based, and it devolves upon the appellant to affirmatively show the error upon which he relies for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1771, 3670.]

2. Courts 🔑35—Jurisdiction—Presumptions.

In a suit to quiet title to land acquired by defendant in a partition suit, and purchased by plaintiff at sheriff's sale, where the return of summons and service thereof in that suit upon this defendant is not brought up in the record, the court in examining the recitals in the judgment roll in the partition suit will not examine for proof of personal service upon this defendant; but, since the presumption is that the court would not have acted illegally, will examine only for showing in the record of want of such personal service.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 140, 141, 145, 146.]

3. Courts 🔑35—Jurisdiction—Presumption.

In a suit to quiet title to land acquired by defendant in a partition suit and purchased by plaintiff at sheriff's sale, where the recital in the partition suit is that legal process "was duly served upon all persons who had or claimed to have any interest in said property who are in this state," and that as to others service by publication was had, as this defendant, who had an interest in the property, will be presumed to have been within the state, in the absence of a contrary showing, and as he is not shown to be within the excepted class upon whom service was had by publication, the appellate court must accept as true that he was "duly served," which under the circumstances shown could not be other than "personally served," since any condition of facts consistent with the validity of the judgment will be presumed to have existed, rather than one which will defeat the judgment, and hence the judgment is binding upon defendant, although designating him as "Kinney" instead of "Kenney."

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 140, 141, 145, 146.]

Department 1. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Suit to quiet title by the Bank of Commerce & Trust Company against Patrick Kenney. Judgment for plaintiff, and defendant appeals. Affirmed.

E. H. Lamme and E. I. Kendall, both of San Diego, for appellant. Sam Ferry Smith, of San Diego, for respondent.

VICTOR E. SHAW, Judge pro tem. From a judgment rendered in favor of plaintiff quieting its title to certain real property described in the complaint as lots 17 to 20, both inclusive, in block 39 of Middletown addition, according to partition map thereof on file in the county clerk's office of San Diego county, in the case of Roark et al. v. Forward et al., and an order denying his motion for a new trial, defendant appeals.

It appears in the statement on the motion for a new trial that Middleton addition is a subdivision of pueblo lot 1121 of the public lands of the city of San Diego; that after the title of the said pueblo lot had vested in a number of persons as tenants in common, among whom was Patrick *Kenney*, the defendant, an action was instituted wherein all owners thereof were made parties, the purpose of which suit was to obtain a decree partitioning said pueblo lot 1121. A summons was issued by the clerk in form as directed by section 756 of the Code of Civil Procedure, which, as shown by the judgment roll in the partition suit, the court found to have been served as follows:

> "That legal process of this court was duly served upon all the parties and all the tenants in common and all persons having any interest in or lien of record by mortgage, judgment or otherwise upon said tract of land or any particular portion thereof and all persons who had or claimed to have any interest in said property who were in this state, and that as to all persons or parties having any share or interest who were unknown or who resided out of this state or who had departed from this state or could not, after due diligence, be found within this state or conceal themselves to avoid the services of summons, or who was a foreign corporation, having no managing or business agent, cashier or secretary within this state, and the facts were made to appear by affidavit to the satisfaction of the court, and it appearing by such affidavit and the verified complaint on file that a cause of action existed against said defendants in respect to whom the service was made and that they were each necessary and proper parties to the action, and the said court made an order that a service be made by publication of the summons and said summons was duly served upon all and each of said parties by publication as provided by law and directed by said order."

At the trial a judgment was rendered wherein it was, among other things, decreed that Patrick Kinney was the owner of and entitled to have set apart to him as such owner all of block 39, as designated upon the partition map, subject, however, to the payment of $140.50 costs assessed against said lot. Default being made in payment of said costs, block 39 was, by the sheriff, sold and conveyed to one H. C. Gordon, from whom, by mesne conveyances, the plaintiff acquired title to the lots in question.

The proposition presented is, conceding defendant's ownership of an individual interest in the pueblo lot represented by block 39, was he divested of title thereto by the sheriff's sale to Gordon, to whose interest plaintiff succeeded? That upon this record he was so divested of title admits of no doubt, unless the proceedings in the partition suit are void as to him by reason of designating Patrick *Kinney* as the owner of such interest when, in fact, the true name of such owner was Patrick *Kenney*. Appellant concedes that had there been personal service upon the defendant, then the use of the name Kinney for Kenney might be deemed a mere misnomer, or the doctrine of idem sonans be applied, and hence, in either view of the case, no cause for complaint exist; but he contends that such rule has no application to cases where service is obtained by publication, in support of which contention he cites a number of authorities from other jurisdictions. In our view of the case, it is unnecessary to determine this proposition.

[1, 2] Every presumption is in favor of the regularity of the proceedings in a court of general jurisdiction upon which a judgment is based, and it devolves upon the appellant to affirmatively show the error upon which he relies for reversal. The return of the summons and service thereof is not brought up in the record. We must therefore look to the recitals in the judgment roll, not necessarily for proof of personal service upon the defendant, without which appellant insists a binding decree as to defendant could not have been made, but since the presumption is that the court would not have acted thus illegally, for a showing in the record of want of such personal service.

[3] Now the recital is "that legal process * * * was duly served upon all * * * persons who had or claimed to have any interest in said property who were in this state," and that, as to others, service by publication was had. Conceding, as claimed by the appellant, that under the circumstances shown service upon the defendant by publication would not warrant the rendition of the judgment against him, nevertheless, since he admittedly had an interest in the property, and since the contrary is not made to appear, the presumption is that he was within the state, and being in the state and not shown to be within the excepted class upon whom service was had by publication, we must accept as true the recital that he was "duly served," which under the circumstances shown could not be other than "personally served." "Any condition of facts consistent with the validity of the judgment will be presumed to have existed, rather than one

which will defeat the judgment." In re Eichhoff, 101 Cal. 600, 36 Pac. 11; Canadian, etc., Co. v. Clarita, etc., Co., 140 Cal. 672, 74 Pac. 301. Hence, conceding the recitals in the judgment roll to be applicable to substituted service, in which case, as claimed by appellant (though not decided), the judgment is invalid, they are likewise equally applicable to and consistent with personal service, so presumed to have been made, hence the judgment is binding upon defendant.

It is significant that, while defendant disclaims being a party to the partition suit, and asserts that he was not served with process therein, he nevertheless claims ownership, not of an undivided interest in the said pueblo lot, but title to the segregated portion thereof designated as block 39 according to the partition map prepared and filed in the case of Roark et al. v. Forward et al., as set apart to Patrick *Kinney*, which claim, in the absence of any conveyances thereto shown, finds support in the sole theory that he, as owner of an interest therein and as a party to said action sued as Patrick *Kinney*, derived his title to such segregated parcel of land through and by virtue of the partition proceedings. As to such interest as he had in the property, he, as Mr. Patrick *Kinney*, affirms the proceeding in so far as it sets aside and confirms to him that portion of the pueblo lot designated on the map as block 39 which, except for the proceeding, would have no location or habitat. But as to the other matters connected with the proceeding, which may prove burdensome, he, as Patrick *Kenney*, disaffirms and repudiates the same.

The judgment is affirmed.

We concur: SLOSS, J.; SHAW, J.

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175 Cal. 26

In re KEITH'S ESTATE. (S. F. 7965.)

(Supreme Court of California. April 30, 1917.)

1. Appeal and Error ⟹757(1) — Review — Record in Briefs.

Under Code Civ. Proc. § 953c, providing that the parties must print in their briefs such portions of the record, brought up in typewritten form, as they desire to call to the attention of the court, it is not required to consider any more thereof than is incorporated in the briefs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092.]

2. Appeal and Error ⟹757(3) — Briefs — Setting Out Evidence.

To prevent affirmance on the ground that any alleged error in rulings on evidence does not appear to have been prejudicial, enough of the evidence brought up in typewritten form should, under Code Civ. Proc. § 953c, be given in the briefs to enable the court to determine whether the rulings had any bearing on the result.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092.]

3. Descent and Distribution ⟹71(6) — Claims Against Estate—Children of Testator—Evidence.

Evidence *held* to show that one claiming against a will, making no provision for her, on the ground that she was testator's only child, was not his daughter.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 235.]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of John M. Keith, deceased, Louise K. Thomson petitioned for distribution to her, and appeals from a judgment of dismissal. Affirmed.

See, also, 159 Pac. 705.

E. B. Mering, of San Francisco, for appellant. John L. McNab, Gavin McNab and Nat Schmulowitz, all of San Francisco, for respondents.

SLOSS, J. John M. Keith died on the 27th day of April, 1914, leaving a large estate. On May 28, 1914, a paper, dated March 3, 1913, was admitted to probate in the superior court of the city and county of San Francisco as the holographic will of said decedent, and letters testamentary were issued to J. J. Mack named therein as executor. The order admitting the will to probate has long since become final. In June, 1915, the executor filed his first annual account, and soon thereafter various beneficiaries named in the will filed applications for partial distribution. While matters were in this condition, Dr. Sarah J. Tedford presented a paper, dated April 20, 1914, as the last will of John M. Keith, and filed a petition for its admission to probate. The alleged will purported to give the entire estate to Louise Keith Thomson, described as Keith's "only daughter," and named Dr. Tedford "truste to carry out the exicutive work of probating" the will.

The petition for probate was filed on September 3, 1915. The petitioner having been advised that the time for questioning the probate of the will of March 3, 1913, had long gone by, she dismissed her petition on September 15, 1915. On the last-named day, Louise K. Thomson, the appellant herein, filed a petition asking that the entire estate be distributed to her. In this petition she alleged that Keith had been married twice; that she, the petitioner, was the sole issue of the first marriage, and that there was no issue of the second; and that she, as sole heir, was entitled to receive the entire estate because of the omission of the decedent to make any provision for her in his will. She subsequently filed a petition for partial distribution, based upon similar allegations, and the proceedings here under review were had under this petition and the oppositions thereto. The court found that Keith was married only once, and that there was no issue of this marriage; that Louise K. Thomson was not a child of John M. Keith, and was not entitled to inherit any part of his estate. Judgment was entered denying and dismissing her petition for partial distribution. From this judgment she appeals. The record was brought up in typewritten form under the provisions of sections 953a, 953b, and 953c of the Code of Civil Procedure.

[1, 2] The truth of appellant's claim that she was the daughter of John M. Keith presented the one vital issue of fact in the case. She has not included in her brief, or in a supplement thereto, any part of the record, or of the evidence upon which the lower court acted in determining the fact of her alleged relationship to the decedent against her. She contents herself with referring to a few rulings in the admission and rejection of evidence, and with the claim, unsupported in most instances by argument or citation of authority, that these rulings were erroneous. Under the provisions of section 953c, the court is not required to consider any more of the record than the parties have seen fit to incorporate in their briefs. O'Rourke v. Skellenger, 169 Cal. 270, 146 Pac. 633. The bald references by appellant to alleged errors in the admission or rejection of evidence do not enable us to determine whether the rulings complained of, if erroneous, had any bearing upon the result of the trial. Abstract error is not a ground for reversal, nor is error which does not appear to have been prejudicial. The judgment appealed from might well be affirmed on this ground alone.

[3] We have, however, made a sufficient study of the evidence (the essential parts of which are carefully collated by the respondents in their brief), to convince us that the same result must be reached upon a review of the entire record. The appellant's claim rested, in the main, upon the testimony of Dr. Tedford. Stated in barest outline, Dr. Tedford's story was that she met John M. Keith in San Francisco in the year 1862. He told her that he was a native of England or Scotland. In September, 1864, Keith was married to Nina Kirby. On November 7, 1865, the appellant, Louise Keith, now Louise Keith Thomson, the issue of this marriage, was born. Her mother, Nina Kirby Keith, died within a few hours after giving birth to the child. In January, 1867, Keith was married to Adelaide M. Sheldon. The first marriage, the birth of the child, the death of the mother, and the second marriage all took place at Chicago, and Mrs. Tedford was present on each of these occasions. In 1886, at San Francisco, Keith obtained a divorce from his second wife. In 1887, Keith and his daughter Louise made a journey to Alaska, and both were thought to have been lost in a shipwreck. Dr. Tedford learned in 1898 that the daughter had survived the wreck, but neither she nor the appellant saw or heard anything of Keith until April 20, 1914, just one week before Keith's death, when they met him walking on the street in San Francisco. A mutual recognition ensued. The three went into a store, where Keith wrote his will in favor of the petitioner. This document, according to Mrs. Tedford's story, is the paper which she offered for probate many months after Keith's death. In addition to the testimony of Dr. Tedford, that of some other witnesses was offered in support of the claim that the appellant was Keith's daughter. One of these witnesses knew Keith as manager of a railroad eating house at North Platte, Neb., during the period from 1869 to 1879, Keith then having a little girl with him. Although this witness had not seen the girl for nearly 40 years, he was able, at the trial, to identify her with the petitioner. Another witness testified that he had seen the petitioner with Keith at Bakersfield in the years from 1884 to 1887. This, with some further testimony of minor corroborative value, was the evidence introduced to establish the appellant's case. We need not stop to point out its inherent weakness. A more detailed statement would disclose abundant ground for saying that the testimony of Mrs. Tedford, which formed the main reliance of the appellant, was on its face improbable and unworthy of belief. It is not, however, necessary to go so far. The respondents introduced evidence, unimpeached and convincing, making it entirely clear, either that the appellant was not the daughter of any man named Keith, or that, if her father did bear that name, he was not the Keith whose estate is here involved.

This evidence, consisting of the testimony of reputable witnesses, supported by an abundance of documentary proof, showed that John M. Keith was a native of the state of Georgia; that he came to California "in the '50's," locating in Gilroy somewhere about 1860. He was shown to have been at Gilroy, or in the San Joaquin valley, at the various times when Mrs. Tedford claimed to have seen him in Chicago. He lived in Gilroy until 1874, when he was married to Lucy Goodman. From the date of his marriage to her, he lived with his said wife until her death in 1907. Shortly after the marriage, Keith moved to Kern county, and he lived near or in Bakersfield until 1901, when he removed to San Francisco. It is abundantly shown that during the entire period of his marriage he had no child, and no child was living with him. During the years when, according to appellant's claim, he was living in North Platte, Neb., he was, beyond question, residing continuously in this state.

The appellant's case is so obviously without merit that a decision against her was inevitable. The respondents are well within the bounds of moderation when they characterize the claim as one "devoid of truth and lacking even plausibility." Under these circumstances, it would be idle to discuss, or even to enumerate, the assignments of error which are presented. If the rulings complained of had not been made, it would still be perfectly apparent that the appellant's pretensions have no substantial foundation. At no stage of the law would an appellate court, on such a record as the one before us, have felt justified in reversing this manifestly just judgment, even though some technical error may have been committed during the trial. Much less can the rulings be given any weight since the adoption of section 4½ of article 6 of the Constitution. Our examination of the record convinces us that, if there were errors in the proceedings below, they did not result in a miscarriage of justice. On the contrary, it would be a glaring miscarriage of justice to require a new trial in a case like this.

The claim of the petitioner should never have been presented to any court. When it had been rejected by the learned judge of the trial court, after a patient hearing of all the evidence there was no justification or legitimate reason for an appeal. The case is an eminently proper one for the imposition of a penalty for the protracting of baseless litigation.

The judgment is affirmed, and it is adjudged that the respondents recover from the appellant the sum of $100 as damages for the taking of a frivolous appeal.

We concur: SHAW, J.; LAWLOR, J.

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175 Cal. 72

DYNES v. BEKINS VAN & STORAGE CO.

(L. A. 3768.)

(Supreme Court of California. May 7, 1917.)

1. Appeal and Error 🔑856(5)—New Trial—Grounds for Granting.

An order granting new trial will be affirmed, if it can be justified upon any of the statutory grounds urged by the mover.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3408, 3410, 3423, 3424.]

2. Appeal and Error 🔑1015(2) — New Trial—Grounds for Granting.

An order granting a new trial will not be disturbed where the evidence is decidedly and substantially conflicting.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3866.]

Department 1. Appeal from Superior Court, Los Angeles County; George E. Church, Judge.

Action by Paul Dynes against the Bekins Van & Storage Company. From an order granting defendant a new trial, plaintiff appeals. Affirmed.

Earle & McLaughlin and Williams, Goudge & Chandler, all of Los Angeles, for appellant. Collier & Clark and Jones & Evans, all of Los Angeles, for respondent.

SHAW, J. The plaintiff appeals from an order granting the motion of the defendant for a new trial.

The action was to recover the sum of $3,000 as damages caused by the destruction of the plaintiff's goods by fire while they were stored in a warehouse belonging to the defendant. It is alleged that the plaintiff shipped the goods to the defendant and was informed by defendant that they had been received and were stored in a fireproof warehouse in Los Angeles, and that defendant agreed to store the same in said fireproof warehouse until wanted by the plaintiff; that afterwards plaintiff demanded of the defendant the possession of said goods, but defendant neglected and refused to return the same and converted the same to its own use. In a second count plaintiff alleges that while the property was in the possession of the defendant for storage defendant informed plaintiff that the goods were perfectly safe and stored in a fireproof warehouse in Los Angeles, and that plaintiff relied upon said representations and agreed to allow the goods to remain in the possession of the defendant and paid the storage charges therefor; that the said warehouse was not fireproof; that while the said goods were stored therein they were totally destroyed by fire; and that defendant failed and neglected to store said goods in a fireproof warehouse. The defendant denied that it agreed to store the goods in a fireproof warehouse, or that it received storage charges for storage of that character. It further denied that plaintiff was informed by defendant that the goods had been received by defendant and stored in a fireproof warehouse, or that the defendant undertook or agreed to do so, or that by reason of any failure to store the same in a fireproof warehouse the goods were lost or destroyed. It will be observed that there was no charge in the complaint that the fire which destroyed the goods was caused by the negligence of the defendant, or by its failure to take due care of the goods, except in so far as it may be implied from the fact that it did not store the same in a fireproof warehouse. The case was tried by a jury, a verdict of $3,000 damages in favor of plaintiff was returned, and judgment given accordingly.

[1] Defendant's motion for new trial was based on various grounds, including the ground that the verdict was contrary to the evidence, and specifically that there was no evidence of any contract to store the goods in a fireproof warehouse, or of any representations that the same had been or were stored in such warehouse.

> "It is only necessary to discover whether any of the grounds are sufficient; for the rule is well settled that the order granting a new trial will be affirmed if it can be justified on any ground made by statute the subject of a motion for a new trial." Churchill v. Flournoy, 127 Cal. 361, 59 Pac. 793.

It should be added, of course, that such ground must be properly specified in the notice of intention to move for new trial and in the specifications of error or insufficiency of the evidence in the statement or bill of exceptions on which the motion is heard.

[2] We deem it unnecessary to consider the matter at further length. A perusal of the evidence on the issues above stated shows that it is decidedly and substantially conflicting. Under these circumstances "the judge should set aside the verdict whenever he is not satisfied with it upon the evidence, and his order in that regard will not be disturbed on appeal if the evidence is substantially conflicting." Curtiss v. Starr, 85 Cal. 376, 24 Pac. 806; Condee v. Gyger, 126 Cal. 546, 59 Pac. 26.

The order is affirmed.

We concur: LAWLOR, J.; SLOSS, J.

175 Cal. 67

DES GRANGES v. DES GRANGES et al. (L. A. 3732.)

(Supreme Court of California. May 7, 1917.)

1. Deeds 🔑61—Estate Conveyed.

Where husband deeded to wife fee title to his lands, and wife subsequent to his death and pursuant to his wishes executed and delivered deeds to children to be recorded upon her death, the effect of such deeds was to vest in children the legal title, with a tenancy reserved for life to the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 140, 141.]

2. Appeal and Error 🔑607(1)—Review—Record.

On appeal, a transcript of evidence cannot be reviewed where appellant failed to give a ten-day notice after entry of judgment to the clerk of the superior court for its preparation, as required by Code Civ. Proc. § 953a, and where appellant asked for no relief under Code Civ. Proc. § 473, or attempted to excuse or explain her failure to give a statutory notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2665.]

3. Appeal and Error 🔑607(1)—Review.

Code Civ. Proc. § 953a, requiring ten days' notice after entry of judgment to clerk of court for preparation of transcript of evidence, is mandatory, not merely directory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2665.]

Department 1. Appeal from Superior Court, Orange County; Curtis D. Wilbur, Judge.

Action to quiet title by Josephine Des Granges against John C. Des Granges and others. From a judgment quieting title in plaintiff to a life estate and in the defendants as remaindermen, plaintiff appeals. Affirmed.

Edwin A. Meserve, Shirley E. Meserve, and Paul H. McPherrin, all of Los Angeles, for appellant. Avery & French, of Los Angeles, and Williams & Rutan, of Santa Ana, for respondents.

LAWLOR, J. This is an action to quiet the plaintiff's title to 80 acres of improved orchard land situated in Orange county. A trial was had before the court sitting without a jury. It was found that on June 11, 1898, Otto Des Granges, Sr., the deceased husband of the plaintiff and the father of the three defendants, was the owner of the land; that on that day he made various instruments in contemplation of his death for the purpose of conveying the property, excepting for a small plot reserved as "Mausoleum Premises," in severalty equally to his four children, subject, however, to the provision of a certain writing, designated as his last will, which purported to reserve a life interest in the property in favor of his wife; that on June 19th following he duly published and declared the said writing as his will, and delivered to his four children the four instruments which purported to convey the property to them; that also in connection with this transaction he acknowledged and delivered to his wife an instrument which "purported to convey to [her] the absolute title in fee simple to the premises, * * * but which said instrument was in truth and fact signed and acknowledged by said Otto Des Granges, Sr., solely and only for convenience in order to avoid the expense of administration upon his estate after his death, and to simplify the disposition of said property according to the wishes of said Otto Des Granges, Sr., after his death, which was then impending and momentarily expected by him, and with the intention and purpose on the part of said Otto Des Granges, Sr., of putting the legal title to said premises in his said wife, Josephine Des Granges, plaintiff herein, in trust for the four children of said Otto Des Granges, Sr., and Josephine Des Granges, then living, the interest of each to be a remainder in fee respectively in the separate tracts, * * * after the termination of a life estate in her, the said Josephine Des Granges, and without any purpose or intention of vesting in her the absolute title thereto in fee, and the said plaintiff well knew and understood and acquiesced in and consented to said purpose and intention, and then and there knew and understood and consented that any right or interest which she might acquire or appear to acquire by or through said instrument was and should be subject to such trust; that the said Otto Des Granges, Sr., husband of plaintiff, reposed great trust and confidence in his said wife, and at said time there was an understanding and agreement between them that she would retain the title to a life estate in said property for and during her natural life, and would execute conveyances of the remainder in fee to the four children then living; * * * that no valuable consideration of any sort was paid by or on behalf of the said Josephine Des Granges * * * except love and affection as the consideration for said life estate in said plaintiff"; that Otto Des Granges, Sr., died on June 24th, and on July 2d the plaintiff, in accordance with his instructions, executed four deeds and delivered them to the defendant John C. Des Granges, one of the children, which deeds respectively purported to convey to each of the four children the particular portion of the property which the husband had designated in the instruments first referred to, and instructed him to keep the same until her death, "and then to cause the same to be placed on record"; and that on July 7th she conveyed the plot of land set aside as the mausoleum premises to her children for a burial place for themselves and their descendants forever. From these findings the court concluded, as matter of law, "that the plaintiff is the owner of a life estate for the term of her natural life in the premises," and that the defendants are respectively the owners of the remainder estates, and accordingly entered its decree quieting the titles of the respective parties. The plaintiff appeals from the judgment.

[1] It is contended that the findings are inconsistent, and that the conclusions drawn therefrom are contrary to law. In support thereof the plaintiff claims that, according to the findings, the husband conveyed to her by his deed of July 19th merely a life estate with the remainders over to the children. But notwithstanding this proposition, argues the plaintiff, the court further found that the plaintiff by her deeds of July 2d conveyed the present title to the children, thus in effect finding that "she conveyed away a fee title which she never had." There is nothing in the findings to support this contention. The court clearly states that the plaintiff received the complete title from her husband. The children acquired no legal interest in the property, therfore, until the plaintiff, acting in accordance with her deceased husband's wishes, on July 2d delivered the deeds to John C. Des Granges, at which time, as the court finds, she "then and there relinquished and gave up all control and dominion over the same, and did not retain any power to retake or repossess herself of the same." The effect of this transaction was to vest the legal title at once in the children, with a tenancy for life reserved to herself. As regards three of the deeds, John Des Granges, the depositary, became the trustee for the three children respectively named therein as the grantees. The situation in this respect is identical with that considered in Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186, and is conclusively determined by the holding of that case. The fourth deed, like the others, was absolute in terms and its delivery by the plaintiff directly to the grantee himself, John C. Des Granges, vested the title in him, but not absolutely, for the circumstances surrounding the making of the delivery, the transactions which preceded it and of which the conveyance to him was merely a part, impressed the title thereof with an equitable life estate in favor of the plaintiff, and to that extent constituted the grantee a trustee.

[2] The plaintiff's briefs are almost exclusively directed to the sufficiency of the evidence to support the findings. It is argued at great length that the evidence is in most respects insufficient. In support of the contentions, the plaintiff offers a transcript of the evidence which was attempted to be prepared by the alternative method of appeal, although, it should be mentioned, the judgment roll also appears before us in the usual form of a printed transcript. The transcript of evidence, however, cannot be reviewed on appeal, for the reason that the plaintiff utterly failed to give the ten days' notice to the clerk of the superior court for its preparation which section 953a of the Code of Civil Procedure requires. This fact is fully brought out in special findings made by the court "upon hearing the matter of the settlement and allowance of said transcript," following the defendants' objection to its certification. Those findings were:

> "That there had been no request to cause said transcript to be prepared, filed with said clerk prior to the 18th day of October, 1913; that the plaintiff had notice of the entry of the judgment herein on the 20th day of August, 1913, and that on the 1st day of October, 1913, the plaintiff filed in the office of said clerk her notice of appeal from the judgment theretofore entered therein; and that the plaintiff had not filed any request for the preparation of such transcript with said clerk within ten days after notice of entry of judgment."

Thus it appears that nearly two months elapsed after the plaintiff had notice of the entry of the judgment and before the required notice was given to the clerk. And it does not appear that the plaintiff at the hearing, or at any other time, asked for any relief under section 473 of the Code of Civil Procedure, or attempted to offer any explanation to excuse her failure to comply with the provisions of section 953a.

[3] There was presented, in fact, no opportunity for the exercise of any discretion by the court. Yet, as shown by the bill of exceptions prepared in accordance with the rule laid down in Hecker v. Baker, 19 Cal. App. 667, 127 Pac. 654, the trial court "announced, as a matter of law, his holding that the provision of the law, limiting the period of time for the filing of such request to ten days after notice of the entry of the judgment or decree, is directory and not mandatory," and thereupon certified to the record. This holding is clearly erroneous. It finds no support in the decisions of this court, and is in no wise justified by the scheme embodied in the alternative method of appeal. On the contrary, the application of such reasoning to the facts of this case practically nullifies the clear provisions of the Code relating thereto. The obvious conclusion is, therefore, that, by failing to give the notice within the time fixed by law, the plaintiff lost her right to proceed with the preparation of the transcript of the evidence on appeal in the manner provided by the section. See Fiske

v. Gosbey, 168 Cal. 334, 143 Pac. 611. This disposes of the appeal.

Judgment affirmed.

We concur: SLOSS, J.; SHAW, J.

175 Cal. 91

ÆTNA LIFE INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 7943.)

(Supreme Court of California. May 9, 1917.)

1. Master and Servant 🔑366—Compensation Act—"Employé"—Parent and Child.

Under Workmen's Compensation Act,[1] § 14, defining an employé as a person in the service of a person, as defined by section 13, under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including minors, and Civ. Code, § 197, providing that the father and mother of a legitimate unmarried child are equally entitled to its custody, services, and earnings, and section 1965, providing that a contract of employment is a contract by which one, who is called the "employer," engaged another, who is called the "employé," to do something for the benefit of the employer, or a third person, an unmarried minor son, living with and supported by his parents, and doing such work as directed by father, without any agreement as to wages, is not an "employé," entitled to compensation under the Workmen's Compensation Act for injuries received while serving father, and entitling father to reimbursement from insurance carrier on policy protecting him against claims on the part of his employés.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

2. Master and Servant 🔑366—Workmen's Compensation—Minor Child of Employer—"Emancipation."

That a father from time to time gave a son 19 years old small sums of money did not constitute "emancipation," where son's services belonged to his father, who supported and controlled him.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Emancipation.]

In Bank. Proceeding by the Ætna Life Insurance Company against the Industrial Accident Commission and another, to review an award under the Workmen's Compensation Act. Award annulled.

Redman & Alexander, of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

HENSHAW, J. Review of an award of the Industrial Accident Commission. Arthur Rieck was discovered on his father's ranch, unconscious and with a fractured skull. He was at the time a minor of the age of 19 years, who was living with his parents at their home on the ranch. He did such work on the ranch as he was directed to do by his father. No one was an eyewitness to his accident, but the evidence points with strong probability to the fact that, while riding a horse to round up mules in a field on the ranch, he was thrown and struck on his head. The evidence unquestionably, then, supports the Commission's findings that his injury arose out of the services which he was rendering to his father. The vital question is whether, under the evidence, he was an employé within the meaning of our law. The case arises under the demand of the father against the petitioner for the payment of medical and other expenses incurred by the father and growing out of this injury to his son. The Ætna Life Insurance Company had issued its policy, protecting the father against such claims on the part of his employés. This present claim was pressed upon the ground that the son was such an employé, and the Commission so held, making its award accordingly.

Section 197 of our Civil Code provides that:

> "The father and mother of a legitimate unmarried minor child are equally entitled to its custody, services and earnings."

In this class belongs Arthur Rieck, and unquestionably, unless there had been some legal change in the status of father and son, each and both were subject to the provisions of this Code section, and the provisions of section 196 of the same Code, which declares that:

> "The parent entitled to the custody of a child must give him support and education suitable to his circumstances."

Section 14 of the Compensation Act defines an employé as:

> A "person in the service of an employer as defined by section 13 under any appointment or contract of hire or apprenticeship express or implied, oral or written, including aliens and also including minors."

In this connection section 1965 of the Civil Code defines a contract of employment in the following language:

> "The contract of employment is a contract by which one, who is called the employer engages another, who is called the employé, to do something for the benefit of the employer, or of a third person."

The evidence upon this matter (that of the father) is as follows:

> "Q. What was the agreement or arrangement between you and your son with reference to his employment? A. There was really no arrangement; he is not of age, and simply works for what I tell him, and there was no contract or agreement whatever between us; he does whatever I tell him to do. * * * Q. Your book does not show any payments made to him by check or cash? A. I have no record of that at all. He is not of age. His wages belong to me. I don't have to pay him any wages. * * * Q. How does it happen that you never had any charge against Felix in this book? A. He is my son, and I am supposed to furnish him everything until he is of age."

[1] It would seem that this law and this evidence was conclusively determinative of the matter against the award of the Commission. But the argument in support of the award is that a minor is invested with the power to make a contract of hiring under sections 33 and 34 of the Civil Code; that section 14 of the Compensation Act above quot-

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[1] St. 1913, p. 284.

ed includes in its definition of employés minors; that from the evidence the Commission was justified in finding an implied contract of service; that such an implied contract of service will support this award; that this implied contract of service need not be for a fixed wage, but may be upon the basis of the usual payment for such services, or upon the expectations of the parties; that therefore any testimony which warrants the inference that services were rendered under such expectations, and were accepted by the other party with knowledge, actual or constructive, of such expectations, is sufficient to establish the relationship of employer and employé; and, finally, that herein it is "notable" that both father and son are insisting that the relationship existed, while it is only an outstanding third party—the insurance company—which is denying it.

It is indeed notable that father and son have combined in their demand against the insurance company, but it has not the slightest persuasive value as tending to establish the relationship which they claim to have existed. Their interests in this particular action are identical, and together they are working for a common end. But, aside from this, the fault and fallacy of respondent's argument will at once become apparent when it is pointed out that the reasoning upon which respondents rely and the authorities which they bring to the support of that reasoning (where the relationship between parent and minor child is involved) all have to do with the case of an emancipated child, who has by virtue of that emancipation become entitled to contract for himself.

We need not here enter into any lengthy discussion of what acts or omissions will effectuate the emancipation of a child, for the simple reason that no emancipation can be here asserted, and the father's testimony, showing rather an unusually clear conception of his rights and corresponding duties, is an absolute denial of emancipation:

> "There was no contract or agreement whatever between us." "He does whatever I tell him to do. * * * His wages belong to me. I don't have to pay him any wages." "He is my son, and I am supposed to furnish him everything until he is of age."

Suffice it, upon the question of emancipation, to quote from our own case of Lackman v. Wood, 25 Cal. 147, and to refer to 25 Cyc. 1672. In Lackman v. Wood, it is said:

> "The power of a father to emancipate his minor child cannot be questioned; nor can there be any doubt as to the effect of such emancipation upon the relations of the persons who are parties to it. The child is freed by emancipation from parental control; he can claim his earnings thereafter as against his father, and is in all respects his own man. Emancipation is defined as 'an act by which a person, who was once in the power of another, is rendered free,' and the adjudged cases show that the doctrine of emancipation, as actually administered, is not less comprehensive than the definition."

[2] Nor, finally, does the fact that the father from time to time gave the son small sums of money, even though both father and son should testify that these sums were on account of payment of wages, at all militate against the incontrovertible fact that the son had not been emancipated. A son 19 years of age was surely entitled to some spending money, and, as his earnings belonged wholly to his father, it would be strange indeed if his father did not give him such sums for his own purposes. Many fathers are called upon to do the same thing, and many, to encourage their sons to form habits of industry and frugality, and "to learn the value of money," make these donations dependent to a greater or less extent upon the conduct and services of the child. But such payments in no sense work an emancipation of the child himself. Schouler on Domestic Relations (5th Ed.) § 267; Arnold v. Norton, 25 Conn. 92.

The award is therefore annulled.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; SLOSS, J.

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175 Cal. 74

SAN JOAQUIN LIGHT & POWER CORP. v. RAILROAD COMMISSION.

(S. F. 7884.)

(Supreme Court of California. May 8, 1917.)

1. ELECTRICITY 🔑11—FIXING RATES—POWERS OF COMMISSION—JURISDICTION OF COURT.

The function of making rates to be charged by an electric power company is legislative, and the only ground upon which the courts may interfere with it is that the specific order impairs constitutional rights, and interference will not be made unless on a clear showing that the constitutional rights have been invaded.

2. ELECTRICITY 🔑11—FIXING RATES—POWERS OF COMMISSION—JURISDICTION OF COURT.

Where Railroad Commission fixed 8 per cent. as reasonable return on investment of electric power corporation, and apportioned rates which the corporation asserted would produce but 6½ per cent., the court could not hold as a matter of law that the rate was confiscatory.

3. ELECTRICITY 🔑11—FIXING RATES—"PROPERTY."

A power corporation owning hydroelectric plants with extensive water rights is entitled to have the value of such water rights considered in fixing its rates; the water rights being "property."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property.]

4. ELECTRICITY 🔑11—FIXING RATES—REVIEW—BURDEN OF PROOF.

The burden is upon an electric power corporation, in certiorari to review an order fixing its rates, to show the existence of any value of property claimed by it.

5. ELECTRICITY 🔑11—FIXING RATES—VALUATION OF PROPERTY—METHODS.

In estimating the value of an electric company's plant for purpose of fixing rates, the value of the company's right to divert 6 per cent. of the water from a stream could not be fixed at 6 per cent. of the total damage that would accrue to the riparian owners if the entire flowage were withdrawn; such a basis being too speculative.

6. Electricity 🔑11—Fixing Rates—Valuation of Property.

In computing rates of electric power corporation, it was not entitled to have charged off a deficit incurred during development period, where the rates indicated that after the development period such deficits had been more than overcome by profits in excess of the standard 8 per cent.

In Bank. Certiorari by the San Joaquin Light & Power Corporation, to review an order of the Railroad Commission fixing rates. Order affirmed.

Short & Sutherland, of Fresno, and Jared How, of San Francisco, for petitioner. Douglas Brookman, of San Francisco (Max Thelen, of San Francisco, of counsel), for respondent.

SLOSS, J. This is a proceeding in certiorari to review an order of the Railroad Commission fixing the rates to be charged by the petitioner, San Joaquin Light & Power Corporation, for electric energy.

From the exhaustive and painstaking opinion accompanying the order it appears that the Commission fixed the value of the petitioner's property "used and useful in electric business," at the sum of $10,054,540. On this value the Commission then undertook to allow a return of 8 per cent., or $804,363.20 per annum, and the sum last named was found to be a fair, just, and reasonable sum to be received by the petitioner as an annual return on the fair value of its property. Specific rates for the different kinds of service rendered by the utility were fixed in accord with this basis.

It is not claimed that the rates thus fixed will not yield to the petitioner the estimated return of $804,363.20. The contention is that in fixing the fair value of the property of the petitioner devoted to its electric business, the Commission failed to make allowance for two items of property, and that, in consequence, the earnings of the petitioner will fall below the rate of 8 per cent. determined by the Commission to be fair, just, and reasonable. These items consist of: (a) The value of certain water rights; and (b) the "going concern" value of the petitioner's plant. The petitioner contends that, under the undisputed evidence before the Commission, a valuation of at least $650,000 should have been allowed for the first of these items; of $1,651,021 for the second. If these sums were added to the value placed upon the plant by the Commission, the estimated return of $804,363.20 would realize to the petitioner a net earning of 6.51 per cent. instead of 8 per cent.

[1] The petitioner does not point out any evidence in the record which would force, or even justify, the conclusion that a limiting of its return to 6½ per cent. on the value of its property would amount to confiscation, or, in other words, that it would, if held to so low a rate of earning, be deprived of its property without due process of law. "The function of ratemaking is purely legislative in its character, and this is true whether it is exercised directly by the Legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated." Knoxville v. Knoxville Water Co., 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371.

The only ground upon which the courts may interfere with the exercise of this function is that the action in question impairs constitutional rights. The rates will not be set aside except upon a clear showing that such rights have been invaded. Knoxville v. Knoxville Water Co., supra; Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034.

[2] In view of our decision in Contra Costa Water Co. v. Oakland, 159 Cal. 323, 113 Pac. 668, it cannot be claimed that a return of 6½ per cent. net upon the value of property devoted to such a public use as the one in question is, as matter of law, confiscatory. As we pointed out in that case, the court is not called upon to determine the rate which it, if vested with the power of fixing rates, would determine to be just and reasonable. Its right to interfere exists only where the rate-fixing body has confined the public utility to a return below that which, under the evidence in the particular case, can fairly be regarded as the lowest reasonable percentage of profit. "If the ordinance gives a rate of return which, although low, is not palpably unreasonable, the court is not to upset the action of the council because it may think a higher rate more appropriate." In the Contra Costa Case we held that the evidence did not show that a return of 4.682 per cent. was less than the lowest rate of return which the city council might fairly have determined to be just. The petitioner contends that because the Commission fixed 8 per cent. as a reasonable rate of return, anything below that rate is, for the purposes of this case, necessarily confiscatory. We cannot accept this view. The ultimate question is whether the rates fixed for electric service deprived the petitioner of its property without due process of law. The value of the property devoted to the public use, the return which should be earned upon this property, and the specific rates which will produce this return, are all elements in the problem. The final question for the court is merely whether the rates fixed will deprive the utility of its property without due process of law. The Commission might have fixed rates without making a finding, in figures, of the value of the property, or of the rate of return which, in its judgment, should be realized. If it had so done, or if it had declared its purpose of allowing an earning of only 6½

per cent., we should have been confronted with the same question that is now before us, namely, whether the rates fixed will produce a confiscation, in whole or in part, of the petitioner's property. This question must be answered upon a consideration of the evidence tending to show the lowest rate of return which the Commission might reasonably have allowed. If it has not gone below this minimum, the courts are powerless, even though the rates fixed may not produce as high a return as the regulating body believed and intended.

But apart from this, we think the petitioner does not substantiate its claims with respect to either of the items of valuation alleged to have been improperly ignored.

[3] The San Joaquin Light & Power Corporation operates a plant for furnishing electric energy in a number of counties in the San Joaquin Valley. It is the successor in interest of various corporations, the first of which was organized in 1895. Its power is generated, in part, by means of hydroelectric plants. To this end it maintains power stations upon various streams; and in connection with these stations it has acquired and owns the right to divert a portion of the flow of such streams, returning the water in due course to the streams below the point of diversion. These water rights are property, and the petitioner is unquestionably entitled to have their value considered in the fixing of its rates. San Joaquin, etc., Co. v. County of Stanislaus, 233 U. S. 454, 34 Sup. Ct. 652, 58 L. Ed. 1041.

[4] The Commission, in the present case, made an allowance for such value, based upon the cost incurred in the acquisition of these rights. The petitioner claims that a further allowance should have been made. Concededly, the burden is upon the public utility, in cases of this kind, to show the existence of any value claimed by it. In the effort to establish the value of its water rights, the petitioner proceeded upon two theories.

The first of these is described in the briefs as the "comparative steam cost theory." It is well described in the respondent's brief as "based on the assumption that the value of petitioner's water rights can fairly be determined by capitalizing, at 8 per cent., the difference in the cost of service resulting from the operation of petitioner's hydraulic installations and what the cost of service would be if petitioner's electric energy were generated in a steam plant located near the oil field and burning oil." Of this element of the case it is sufficient to say that there was substantial evidence before the Commission to the effect that, at the ruling price of oil at the time of the hearing, the petitioner could generate electricity by means of steam plants at a less cost than that involved in the operation of its hydroelectric plants, after making due allowance for all charges in connection with the installation of the necessary steam plants. According to this testimony, the advantage in favor of generation by steam would continue until the price of oil had increased by 50 per cent. Without expressing any opinion regarding the propriety of this method of fixing the value of a water right, it is perfectly obvious that the Commission did not impair the petitioner's rights, when it concluded that application of the comparative steam cost theory did not show that the water rights had any value beyond their cost.

[5] The other theory was advanced with reference to a water right on the North fork of the San Joaquin river. There the corporation had constructed and was maintaining the Crane Valley reservoir, in which it stored a portion of the water flowing in the river, in order to equalize the flow during different portions of the year. Ultimately, the water stored found its way back into the river. The result of this course was to decrease the flow of the river from January to June, inclusive, and to increase it from July to December, inclusive. The petitioner's diversion is subject to a prior right to the first 1,500 second feet of the San Joaquin river. There are some 170,000 acres of land riparian to the San Joaquin river which are, or may be, affected by the withholding and storage of water by the petitioner. The effect of the storage in the Crane Valley reservoir is to diminish the water which would otherwise flow to these lands by 8.1 per cent. in the month of March, and 2.6 per cent. in the month of April. During these months irrigation upon a considerable portion of the riparian lands begins, and the use of water upon them is beneficial. The argument made is, in effect, the following: The right to store and withhold water is a detriment to these riparian lands. If that right were not already owned by the San Joaquin Light & Power Corporation, it would have to be acquired from the lower riparian owners, either by purchase or by condemnation, and the value of the right is to be measured by the price which would have to be paid for this acquisition. The difficulty with the argument is, however, that the petitioner, upon whom rested the burden of proof, failed to furnish data from which any satisfactory estimate of value could be deduced. Evidence was introduced tending to show that the 170,000 acres of land would be worth $65 per acre less, if the entire flow of the San Joaquin river were stopped, than they would if the flow continued undiminished. On this basis the damage which the entire acreage would suffer from total deprivation of water would amount to $11,050,000. The diminution during the months of March and April caused by the storage in the Crane Valley reservoir averaged about 5 or 6 per cent. of the total flow during these months. Hence, it is said, the lands are damaged to the extent of 5 or 6 per cent. of the damage which they would suffer if all of the water were

withdrawn. So estimated, the value of the water rights amounts to $650,000. The basis of this computation is too speculative, not to say fanciful, to be entitled to any serious weight. It assumes that the benefit derived by riparian land from the flow through or by it of a stream is in direct proportion to the volume of the stream. Such is not the fact. In point of legal right, of course, the owner of land bordering upon a stream has a right to have the usual flow of the stream unimpaired, and may enjoin any unauthorized diminution. But the amount of damage which he will suffer by the subtraction of any fractional part of the water depends upon a multitude of circumstances. In some instances the damage resulting from the removal of a part of the flow might be very great, while in others it might be nominal. Furthermore, the petitioner's position involves the additional assumption that the withdrawal of water during two months will have the same detrimental effect upon lower lands as that which would follow a diversion for the entire irrigating season. Certainly, no fair estimate of the value of a water right can be based upon such broad and unsupported generalizations as underlie the appellant's argument here.

[6] It is further claimed that the Commission refused to make a proper allowance for "going concern" value. It is recognized by the authorities that a business in active and successful operation has a value over and above that of its component parts. Knoxville v. Knoxville Water Co., supra. The decision of the Commission states that the tangible propery "is being valued as property in successful operation by a going and successful utility." We see no reason to question the propriety of this declaration, unless we accept the claim of petitioner that the evidence required the inclusion of an additional sum of $1,651,021. This figure is reached by computing the company's deficit in revenue, during the development period, in 8 of its 15 districts, and extending the averages derived from such computation so as to make them apply to the entire system. The "development period," thus referred to, covers the period from the inception of the enterprise until the given district earned a net revenue of 8 per cent., which is taken as the standard earning. The opinion of the Commission declares, and the record sustains the statement, that since the development period the petitioner's earnings over and above the 8 per cent. standard have been sufficient to balance all of the deficits of the development period, with interest thereon for the entire period. Under these circumstances the Commission was fully justified in excluding the item of development cost as an element of going concern value. The question is not essentially different from that before the Supreme Court of the United States in Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 35 Sup. Ct. 811, 59 L. Ed. 1244. The following quotation is in point:

> "Included in going value as usually reckoned is the investment necessary to organizing and establishing the business which is not embraced in the value of its actual physical property. In this case, what may be called the inception cost of the enterprise entering into the establishing of a going concern had long since been incurred. The present company and its predecessors had long carried on business in the city of Des Moines, under other ordinances, and at higher rates than the ordinance in question established. For aught that appears in this record, these expenses may have been already compensated in rates charged and collected under former ordinances. As we have said, every presumption is in favor of the legitimate exercise of the rate-making power, and it is not to be presumed, without proof, that a company is under the necessity of making up losses and expenditures incidental to the experimental stage of its business."

Here the evidence showed affirmatively that the company was under no such necessity.

We see no ground for interfering with the action of the Commission. The order is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

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174 Cal. 703

FARLEY v. REINDOLLAR et al.

(S. F. 7143.)

(Supreme Court of California. March 26, 1917. On Petition for Rehearing in Bank, April 25, 1917.)

1. MUNICIPAL CORPORATIONS ⚷298—PUBLIC IMPROVEMENTS—PRELIMINARY PROCEEDINGS—PROTESTS.

Under the Improvement Act of 1911 (St. 1911, p. 734) § 6, providing that protests against the doing of proposed work shall be heard by the city council at its next regular meeting after expiration of the time within which protests may be made, and that the council "may adjourn said hearing from time to time," a council, taking up the matter of a protest at such next regular meeting, did not lose jurisdiction to proceed further because it did not decide the protest at such meeting, but duly adjourned the hearing to a date two weeks later; such date not being unreasonably later.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 799.]

On Petition for Rehearing.

2. MUNICIPAL CORPORATIONS ⚷298—PUBLIC IMPROVEMENTS—PRELIMINARY PROCEEDINGS—PROTESTS—OBJECTION BY NONPROTESTING OWNER—"JURISDICTION."

A nonprotesting property owner cannot urge that the city council lost or failed to acquire jurisdiction to proceed under the Improvement Act of 1911, § 7, by failing to hear protests of other property owners "at the next regular meeting * * * after the expiration of the time within which * * * protests may be made," as required by section 6 of the act, where all of the protestants have been heard and no one of them is complaining; for the "jurisdiction" spoken of in section 7 of the act means only that, if the council has not duly disposed of the protests, then, so far as protestants are concerned, it shall have no power to proceed further.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 799.

For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

Department 2. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by W. S. Farley against C. F. Reindollar and another. From judgment for the named defendant, plaintiff appeals. Reversed. Petition for rehearing denied.

Phil J. Strubel and W. T. Kearney, both of San Francisco, for appellant. Walton C. Webb, of San Francisco, and Ben F. Woolner, of Oakland, for respondents.

HENSHAW, J. Plaintiff having performed certain street work upon a street of the city of Oakland under the Improvement Act of 1911 (Stats. 1911, p. 730), brought his suit to foreclose an assessment lien on the property of defendant Reindollar. A general demurrer to his complaint was sustained, and from the judgment which followed plaintiff has appealed.

It is conceded that in all respects saving one the complaint is sufficient. The particular in which it was found to be insufficient is the following: The complaint alleged that a protest against the doing of the proposed work was made by certain owners of property. That defendant was not one of the protestants, and—

> "that the said city council proceeded to hear and pass upon said protest at the next regular meeting of said city council, after the filing of said protest, to wit, on the 11th day of July, A. D. 1911, and thereupon and at said time, by resolution, duly continued and adjourned said hearing to the 24th day of July, A. D. 1911, at the hour of 11:30 a. m. of said last-named day, and that due notice was given to said protestants of the time and place of hearing said protest. That the hearing of said protest came on regularly before said city council at a regular meeting thereof, at the time and place set for said hearing, and said protestants being personally present, or being duly represented at said hearing, the said council, after due consideration by its resolution No. 111, N. S., duly and unanimously overruled and denied said protest, and sustained the aforesaid resolution of intention No. 38,299."

[1] The law governing the right to protest and the procedure after protest is found in section 6 of the act of 1911, and so far as it pertains to this consideration the language of the section is as follows:

> "At the next regular meeting of the city council after the expiration of the time within which said protest may be so made, the city council shall proceed to hear and pass upon all protests so made and its decision shall be final and conclusive. * * * The city council may adjourn said hearing from time to time."

Respondent's view, which successfully he impressed upon the trial court, was that this language made it imperative upon the city council to pass on the protest and to decide the protest at its next regular meeting, or, failing to do this, its jurisdiction to proceed further was lost. Even if this statute did not authorize, as in terms it does, an adjournment of the hearing from time to time, no court would hold that such a tribunal lost jurisdiction to proceed with a matter which it had regularly taken up for hearing because it continued that hearing to some other not unreasonable or forbidden date. It would require some positive declaration of law to abridge the general right which belongs to all legislative, ministerial, and judicial officers to continue the hearing and consideration of a matter over which they have acquired jurisdiction within reasonable limits and bounds of time. Thus, to instance but one of many similar conditions which will readily occur, if the law declared that all protests must be heard and disposed of within one month after the filing of the protest or all power and jurisdiction to proceed further should be at an end, here would be a peremptory and mandatory time limit fixed within which the council must act or lose the power to act. But all this is superfluous in view of the fact that the law itself makes express provision for continuances and adjournments of the hearings—just such continuance and adjourned hearing as the pleading declares was regularly ordered and at which adjourned hearing, as the pleading further declares, every protestant was present and was heard. But two cases from our state are cited by respondent in support of his most untenable position. Unhesitatingly we declare that if either in fact supported that position it would call for immediate reversal in the light of the plain language of the law. But neither does so. The first of these is Stoner v. City Council of Los Angeles, 8 Cal. App. 607, 97 Pac. 692. There a protest was filed under a law which declared that the protest should be laid before the council at its next regular meeting, and that the "council shall hear all such objections at said meeting, or at any other time to which the hearing thereof may be adjourned." The protest was not laid before the council either at its next or at any of several succeeding regular meetings. The council thus never acquired jurisdiction, and so never, after having acquired jurisdiction, did it continue the hearing. After a considerable lapse of time the council took up the matter of the protest, and the Court of Appeal very properly held that there had been a failure on the part of the council to acquire jurisdiction of the proceeding by virtue of its neglect to take up the matter of the protest for hearing at its next regular meeting. Here the matter of the protest was taken up at the next regular meeting of the council, and the hearing was duly adjourned to a later and not unreasonable date. The second case is Southern Construction Co. v. Howells, 21 Cal. App. 330, 131 Pac. 756. In that case the law provided for an appeal to the council by disaffected property owners, and declared that after the filing of such an appeal "notice of the time and place of the hearing shall be published for five days." The required publication was not made, and again the Court of Appeal, with strict legality, held that the publication was made jurisdictional to the right of the council to pass on the appeal. Enough has been said to show the inappositeness of both of these cases, and for the reasons given the judgment appealed from is reversed.

We concur: MELVIN, J.; LORIGAN, J.

On Petition for Rehearing.

PER CURIAM. Upon petition for rehearing respondent urges that this court failed to apprehend and so to discuss and to decide the principal proposition upon which he relies, and there is merit in respondent's contention. Respondent's position as it now appears is that protests were filed before the 11th day of July, 1911, but that the time for filing protests did not expire until July 13, 1911; nevertheless that on the 11th day of July, before the expiration of the time within which protests might be filed, the city council took up the matter of the protests already filed and continued and adjourned the hearing of the protests until the 24th day of July, 1911; still further that the street law provides (Stats. 1911, pp. 734, 735) that "at the next regular meeting of the city council after the expiration of the time within which said protests may be so made, the city council shall proceed to hear and pass upon all protests so made"; that the city council having continued the hearing of the protests until July 24th did not, as the law required, proceed to hear and pass upon the protests "at the next regular meeting of the city council after the expiration of the time" because such next regular meeting was upon July 14th, the day after the expiration of the time for filing protests. Such being the facts, respondent's contention is that the council never acquired jurisdiction to proceed further with the matter, because in cases where protests have been filed (so respondent argues) only after the regular disposition of those protests in accordance with the law is the council deemed to have acquired jurisdiction to order the proposed improvements. Street Law, Stats. 1911, p. 730, pt. 1, § 7.

[2] It is to be noted that no question is here presented of the regularity of the notice to property owners, giving them an opportunity to protest; still further that this defendant was not himself a protestant. His proposition, then, is that because of this asserted irregularity in the matter of the hearing of the protests of those who actually did protest, the council failed to acquire jurisdiction to proceed with the work, and that this failure so to acquire jurisdiction can be urged by a nonprotesting property owner. But such is not our law, nor does respondent cite any authority in support of the law. In Stoner v. City Council of Los Angeles, 8 Cal. App. 607, 97 Pac. 692, the property owners who urged the objection that the city council had failed to acquire jurisdiction were the very ones whose protests had not met with hearing in accordance with the law. In Construction Co. v. Howells, 21 Cal. App. 330, 131 Pac. 756, the objection to the failure to give notice was heard in an action of a property owner who had appealed to the city council objecting to the assessment. Preliminarily it may be said that the law looks with steadily decreasing favor on property owners who sit by without urging any objections which they may have to the proceedings about to be taken, for the hearing of which objections the law affords ample opportunity, and then, after their property has been improved, endeavor to deprive the contractor of his just remuneration by ultra technicalities. Harney v. Benson, 113 Cal. 314, 45 Pac. 687; O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020; Haughawout v. Raymond, 148 Cal. 311, 83 Pac. 53; McCaleb v. Dreyfus, 156 Cal. 204, 103 Pac. 924.

Therefore to this objection it must be made answer that whatever force might attach to it were it an objection made by a protestant who had, for failure of the council to observe the requirements of the law, been deprived of a legal hearing of his protest, from the lips of this respondent, who never made a protest at all, it is entitled to no weight. The jurisdiction spoken of in section 7 of the street act means no more, as used in that section, than that if the council has not duly disposed of the protests, then so far as protestants are concerned it shall have no power to proceed further. If it has duly disposed of the protests, then as to all the world it has the power to proceed. But where, as here, all of the protestants have been heard, and no one of them is complaining, and the sole complainant is one who has sat by in silence, it is too well settled to require more than a citation of authority, that such a property owner cannot object to the disposition of protests to which he was not a party. Harney v. Heller, 47 Cal. 15; Lent v. Tillson, 72 Cal. 404, 14 Pac. 71; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661; Chase v. Trout, 146 Cal. 350, 80 Pac. 81.

Wherefore the petition for a rehearing is denied.

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33 Cal. App. 300

SOULE v. NORTHERN CONST. CO. et al.

(Civ. 1907.)

(District Court of Appeal, First District, California. March 22, 1917. Rehearing Denied by Supreme Court May 21, 1917.)

1. WORDS AND PHRASES—"SLAB"—"BEAMS"—"GIRDERS"—"REINFORCING STEEL BARS"—"TYING WIRE"—"FABRIC."

A "slab" in concrete construction is that portion of the structure underneath and supporting the floor and extending between the beams and girders. The "beams" support the slabs, while the "girders" are the long supports running a few feet apart longitudinally through the interior of the building and generally supported by the columns. "Reinforcing steel bars" are small sections of steel made into straight or twisted bars embedded in the concrete to take up tensional and shearing strains due to the longitudinal load of the structure. "Tying wire" is No. 16 black fencing wire used to fasten the steel together. "Fabric" consists of a union of drawn wires made up in rows.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fabric; Second Series, Slabs; Beams.]

2. CONTRACTS ⚷199(1) — CONSTRUCTION — CONFLICTING CLAUSES.

Where contract specifications for concrete work were conflicting as to whether reinforcing bars or fabric should be placed in floors and roofs, the provision definitely giving contractor such option will be given preference over a contrary provision of general nature.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 884, 884½, 885, 887–889.]

3. CONTRACTS ⚷152—CONSTRUCTION—"ETC."

A subcontract with plaintiff "to furnish and set in place all the reinforcing bars, tying wire, etc.," according to contract specifications, referred to other reinforcing material, including fabric specified in contract, the court not being justified in holding the term "etc." meaningless, since the words "et cetera," abbreviated to the form "etc.," are equivalent to the phrase "others of like kind; and the rest; and so on."

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 732, 733, 738.

For other definitions, see Words and Phrases, First and Second Series, Et Cetera—Etc.]

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Edward L. Soule against the Northern Construction Company and others. Judgment for plaintiff, and defendant named appeals. Reversed.

N. A. Dorn, of San Francisco, for appellant. Jordan & Brann, of San Francisco, for respondent Soule. Henry Ach, of San Francisco, for respondent Abrams. Cushing & Cushing, of San Francisco, for respondent First Federal Trust Co.

KERRIGAN, J. This is an action to foreclose a mechanic's lien. From the judgment given and entered against it, the defendant Northern Construction Company has appealed.

The sole point in the case is whether or not, under a fair construction of a contract entered into between the plaintiff and said company, the former was required to install reinforced steel bars or fabric in the floor and roof slabs entering into the construction of a certain building. From the record it appears that the Northern Construction Company on the 21st day of April, 1913, entered into a written contract with Albert Abrams for the construction of a garage upon a lot in San Francisco. Under the terms of this contract the company was required to construct a concrete building, to be reinforced by steel bars, fabric stirrups, and tying wire. In the specifications, which were a part of the contract, there was a general provision reading: "Bars will be used in all footings, beams, girders, walls, but in no floor or roof slabs." Following upon the execution of this contract the company entered into a contract with plaintiff, who was a dealer in and a contractor for the installation of reinforcing steel, by the terms of which plaintiff agreed "to furnish and set in place in a workmanlike manner all reinforcing steel bars, tying wire, etc., required to be used in the construction of that certain building to be erected on the lands hereinafter described in accordance with the plans and specifications for the construction of said building." It is the contention of the plaintiff that under the terms of this contract he was not required to furnish and set in place reinforcing steel for the floors and roof of the building.

[1] Before discussing this point it may not be amiss to say that a slab in concrete construction is that portion of the structure underneath and supporting the floor and extending between the beams and girders. The beams support the slabs, while the girders are what are commonly termed the long supports, which run a few feet apart longitudinally through the interior of the building, and which are generally supported by the columns. Reinforcing steel bars are small sections of steel made into straight or twisted bars, which are imbedded in the concrete to take up the tensional and shearing strains which are due to the longitudinal load of the structure where such strains are encountered. Tying wire is No. 16 black fencing wire, and is used to fasten the steel together. Fabric consists of a union of drawn wires made up in rows. In passing it may also be stated that no personal judgment is sought against Albert Abrams or against the First Federal Trust Company. They are merely formal parties defendant to the action.

[2] Under one provision of the specifications no bars are to be used in the slab reinforcement of the floors and roof, while under another provision it is optional with the contractor as to whether or not in the slab reinforcement of the floors and roof bars or fabric shall be used. There is a conflict between those two provisions of the specifications; but the provision stating that no bars shall be used in the floor and roof reinforcement is general in its character, while the other provision refers specially to floors and roof, and perhaps that provision therefore should control as to the nature of the work to be done on that part of the building. We have no doubt, however, but that under these two provisions the original contractor was required to furnish and set in place either bars or fabric for the floor and roof reinforce-

ment; and this, of course, is required of the subcontractor unless, as asserted by him, the expression "etc." found in his contract is without force, and means nothing.

[3] He took over the contract for the general installation of the reinforcing steel for the building, and when he did so it was doubtless expected that all work of that character would be done by him; and we think this contract when fairly construed so provides. The contract requires him to furnish and set in place all the reinforcing bars, tying wire, "etc.," according to the plans and specifications for the building. The words "et cetera," abbreviated to the form "etc." are said by Webster to be equivalant to the phrase "others of like kind; and the rest; and so on." In the case of Gray v. Central R. R. Co., 11 Hun (N. Y.) 70, 75, it was held that the term "etc.," as used in a contract for the sale of a boat, where the parties agreed to take the boat, "provided, upon trial, they are satisfied with the soundness of her machinery, boilers, etc.," meant "other things," referring to other material parts of the boat. The expression "etc.," as used in the contract before us, certainly must have been used for some purpose; and we think it means "other reinforcing material," which, of course, would include fabric. There is nothing in the case which would warrant us in holding the term to be meaningless. In our opinion its effect, taken in connection with the provision of the specifications above quoted, was to require the contractor to furnish and install bars or fabric in the slab reinforcement of the floor and roof. We think the trial court was in error in exempting the plaintiff from this obligation, and that the judgment should be reversed. It is so ordered.

We concur: LENNON, P. J.; RICHARDS, J.

On Resubmission.

LENNON, P. J. The judgment is reversed, for the reasons stated in an opinion filed February 23, 1917, which opinion is hereby adopted as the opinion of the court following the resubmission of the cause, and said opinion is hereby ordered refiled as of this date.

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33 Cal. App. 310

CALL et al. v. JENNER LUMBER CO.

(Civ. 2034.)

(District Court of Appeal, First District, California. March 26, 1917. Rehearing Denied by Supreme Court May 24, 1917.)

1. Logs and Logging 🔑3(14)—Sales—Standing Timber.

A contract for the cutting of timber on plaintiff's land provided that the cutting and removal should be completed within five years from the time of commencement and in no event later than July 1, 1915; that upon ceasing to cut timber the premises were to be surrendered to plaintiff; and that no right existed to enter upon the land after the time specified. Defendant's assignor entered the land and cut timber for about three months upon which it suspended operations entirely. Before July 1, 1915, but after the expiration of five years from the commencement of the cutting, defendant entered the land to continue operations. *Held*, that the right to cut timber had been forfeited, since a sale of standing timber, the same to be removed within a specified time, is a grant of only so much thereof as shall be removed within that period.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 11; Contracts, Cent. Dig. §§ 890, 898.]

2. Logs and Logging 🔑3(14)—Sale of Timber—Conditions—Covenants.

A provision, in a contract for the cutting of standing timber on the land of another, that the cutting should be completed within five years and in no event to be carried on beyond a given date, the premises to be surrendered upon the completion of the cutting, is a condition of the same and not a mere covenant to remove the timber.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 11; Contracts, Cent. Dig. §§ 890, 898.]

3. Logs and Logging 🔑3(14)—Sale of Timber—Forfeiture—Timber Contracts.

A contract for the sale of standing timber provided that the cutting should be completed within five years and in no event to be carried on after a specified date, at which time the premises were to be surrendered to the owner. The vendee of the timber commenced operations but suspended them after three months, but the owner of the land continued in possession during the three months and for the remainder of the five years. *Held* that, upon the happening of the default, it was not necessary for the owner of the land by any overt act to assert his right of forfeiture.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 11; Contracts, Cent. Dig. §§ 890, 898.]

4. Logs and Logging 🔑3(14)—Sale of Timber—Forfeiture—Notice.

Where operations under a contract to cut standing timber within a specified time were abandoned, no other notice of forfeiture of the contract was necessary than the service of such notice upon the vendee's assignee when he attempted to recommence operations after the time limited in the contract.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 11; Contracts, Cent. Dig. §§ 890, 898.]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Suit by Mercedes L. Call and others against the Jenner Lumber Company to enjoin cutting of timber. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. R. Leppo, of Santa Rosa, for appellant. Geary & Geary, of Santa Rosa, for respondents.

KERRIGAN, J. Action to enjoin the defendant from entering upon certain lands of the plaintiffs and cutting and removing the redwood and pine timber thereon. The judgment went for the plaintiffs as prayed, and defendant appeals.

The predecessor of the plaintiffs on June 15, 1906, entered into a contract with the

Western Redwood Lumber Company, the assignor of the defendant, by which it granted and conveyed to said lumber company the redwood and pine timber upon a tract of land known as Mayer's ranch or tract. Said contract was entered into pursuant to an option previously given fixing the price to be paid and providing that the timber should be removed by July 1, 1915. Among the provisions of the contract by which the timber was conveyed to the lumber company were the following:

> "It is further mutually agreed and made an express condition hereof that said party of the second part is to and will fully complete the cutting and removal of the said pine and redwood timber and trees hereby conveyed to it within the period of five years from the time when it shall commence to cut the same, but in no event later than the 1st day of July, 1915; that when it shall commence to cut and remove the said timber and trees it shall thereafter proceed with the cutting and removal thereof with due diligence and dispatch; and that as soon as it shall stop the cutting and removal thereof it is to and will surrender, turn over and deliver to said parties of the first part the full, actual and exclusive possession of the said Mayer tract, and of every part and parcel thereof, to be by them thereafter held, possessed, used and enjoyed as of their first and former estate therein. * * *
>
> "It is further mutually agreed and made an express condition hereof that all of the timber and trees purchased by or hereby granted and conveyed to said party of the second part are to and shall be cut and removed from the said Mayer tract before the said 1st day of July, 1915, and that upon the expiration of the period ending on said last named day, and by reason of the expiration thereof, this conveyance and all rights of the said party of the second part hereunder, if not previously determined, shall forthwith and wholly cease, determine, lapse and become void, and that it shall not have any right whatever at any time after said last named day to enter upon the said Mayer tract, or any part of the same, or to cut or to remove any of the timber, trees or wood growing or standing or lying or being thereon; also that any and all timber, trees, wood, logs or other products of the said land, or of the trees or timber thereon, which shall on said last named day, or on the sooner determination of the rights of the said party of the second part hereunder, remain or be upon the said tract, shall belong absolutely and exclusively to said parties of the first part."

In the month of August, 1907, the Western Redwood Lumber Company proceeded to cut and remove the timber, and in a period of three months had cut and removed about one-half of the standing timber, at which time it became insolvent and ceased operations. Some three years thereafter the defendant succeeded to the rights, if any at that time existed, under its said grant and contract, but did nothing towards resuming operations until some time during January, 1914, some 6½ years after the Western Redwood Lumber Company had commenced the removal of the timber, and over 6 years after its cessation of operations, at which time it began to make preparations therefor. Immediately thereupon, to wit, on February 5, 1914, the plaintiffs served written notice upon the defendant not to enter upon the said tract of land or to cut or remove timber therefrom, and notifying it that the rights to the timber formerly owned by the Western Redwood Lumber Company had been terminated and had reverted to said plaintiffs. The plaintiffs through their predecessor and tenants were at all times, including the brief period of operation by the lumber company, in possession of the land involved in the action, using the same in connection with an adjoining tract for dairying purposes. After the shutting down of operations by the lumber company, no attempt was made to preserve the railroad and other improvements upon the premises constructed by it to facilitate its work; the railroad was partly destroyed by slides and washouts; the cabins and cookhouse remained unoccupied; the wire rope and machinery were left out in the woods to rust. The doors and windows of the cabins were at all times left open and the stove in the cooking house fell to pieces. After the abandonment of the work of cutting and removing the timber and until early in the year 1914, an employé of the lumber company or its successor, designated as a "caretaker," visited the Mayer tract about once a month; but such visits were unknown to the plaintiffs, and resulted at no time in any effort or steps taken to preserve the improvements or personal property left by the lumber company at the scene of its former operations. The land both before and after the execution of the contracts upon which the defendant's rights are founded was at all times assessed to the plaintiffs and their predecessors, who paid all taxes thereon, and at no time was any interest therein assessed to the defendant or its assignor.

Upon evidence establishing the foregoing state of facts, the court found that on October 30, 1907, the Western Redwood Lumber Company and all of its agents and employés entirely withdrew from the land; and that neither they nor the defendant has thereafter ever been in possession thereof or exercised acts of ownership with regard thereto, but that the plaintiffs ever since said 30th day of October, 1907, have been in possession of the lands and of all the standing and growing timber thereon; and as a conclusion of law found that the defendant has no interest in the pine or redwood timber growing upon said tract.

[1] In support of the appeal, it is the principal contention of the appellant that under the contract in suit, construed in connection with the option which preceded it, no forfeiture of the right to cut and remove the timber could occur before July 1, 1915. With this contention we cannot agree. We are of the opinion that the rights granted to the assignor of the defendant are to be found in the contract of June 15, 1906, entered into upon the exercise by said assignor of the option previously given to it, and that the plain meaning of the provisions of that contract above quoted is that the right of the grantee thereunder to cut timber should expire ipso facto at the end of five years from the com-

mencement of the cutting, and in any event should expire on July 1, 1915, so that, if the grantee delayed the commencement of its operations until a point of time less than five years prior to said last-mentioned date, the five-year period would be thereby correspondingly curtailed. It is not necessary in sustaining this judgment to go so far as to hold that the grantee's rights were forfeited by its discontinuance of operations on October 30, 1907. It is sustainable upon the theory that those rights continued in force five years from the commencement of the removal of the timber, which would be in August, 1912. As we have seen, it was nearly two years later than this date that the defendant prepared to re-enter the lands for the purpose of resuming operations. It has been frequently and expressly held that a sale of standing timber, the same to be removed within a specified time, is a grant of only so much thereof as shall be removed within that period.

The rule applicable to contracts such as the one in suit is stated in 25 Cyc. 1551:

> "It is customary, where standing timber is sold without the land, to provide in the contract that the timber shall be removed within a specified time. Where such clause is inserted, the time usually begins to run from the execution of the conveyance, although sometimes a different time is agreed upon, such as the time of the commencing of the cutting. The general rule is that where the contract requires the timber to be removed within a given time the sale is only of so much timber as is removed within that time, and confers no authority to remove after the expiration of the time specified. The majority of cases hold that the title to the timber not removed reverts to the owner, but some of the cases merely hold that the buyer has no right of entry. Each case depends upon the terms of the particular contract."

In the case of King v. Merriman, 38 Minn. 47, 35 N. W. 570, an action for damages for the conversion of a quantity of sawlogs, the court used this language:

> "Contracts relating to an interest in standing timber, with an express limitation as to the time of removal, are familiar to the American courts in the timbered states. * * * Sometimes these contracts are in the form of conveyances of timber; sometimes of a sale, coupled with a license to enter; sometimes of a formal license to enter and cut, and again of a reservation of the timber by the grantor in the conveyance of the land. But, whatever the form, the limitation as to the time of removal has been almost invariably held to be a limitation of the grant or reservation itself. The reasons are manifest. Any other construction would be against the expressed intention of the parties. Moreover, if the right of entry be not limited to the time fixed, it would be practically unlimited, which would amount to so serious an incumbrance upon the land as to materially interfere with the owner's right to use or dispose of it."

In Utley v. S. N. Wilcox Lumber Co., 59 Mich. 263, 26 N. W. 488, the Supreme Court of Michigan says:

> "The legal effect of this contract was that Wilcox, the owner of the land, sold to Utley the pine timber thereon for $2,500, Utley to cut and remove the same therefrom during the winter of 1877–78, or, if it could not be done for lack of snow, then he was to cut and remove the same during the winter of 1878–79, and before May 1, 1879. The title of the timber passed to Utley immediately upon the execution of the contract. * * * The license to enter, and remove the timber, continued, * * * until May 1, 1879. The express agreement of Utley was that he would commence at once on the job" and finish by May 1, 1879. "The intention is clearly expressed to limit the time in which he might cut and remove the sawlogs. * * * From all the contracts and acts of the parties in connection therewith the intention clearly appears to limit the time in which the timber * * * should be cut and removed, and that the sale was confined to such timber as should be cut and removed within the specified time."

In Null v. Elliott, 52 W. Va. 229, 43 S. E. 173, the owner of the land granted, bargained, and sold all the timber, tanbark, and ties on the premises. The contract provided that the grantee was to have two years from date to take off and remove said timber and not later, and to have all the privileges of going on said land with roadways, millsites, etc. The time limit in the contract expired, and the grantor notified the grantee not to further trespass upon the land by cutting any more timber, or removing that already cut, or the temporary buildings erected by the grantee upon the land. The grantee filed his bill, setting out the hardships of the contract, the great loss he would sustain if he was prevented from reaping the benefits thereof, and asking the court to relieve him by extending the time for the execution of the contract. The court in deciding the case says:

> "A contract for the sale of all the timber, tanbark, and ties on a certain tract of land, and providing that the purchaser is to have two years to take off and remove such timber, and not later, does not authorize the purchaser to sever any timber standing on the land after the two-year limit has expired. Such a provision as this in timber contracts is held to be a condition of the sale, and not a covenant to remove, and that the purchaser only takes such of the timber as he may cut and remove in the specified time; otherwise it remains the property of the landowner as part of the land. * * * Such being the law, the plaintiff could not ask a court of equity to extend the time limit, for it would be making a new and entirely different contract between the parties."

[2] The appellant further contends that the provision in the contract that the removal of the timber should be completed within five years from the time of its commencement is a mere covenant on the part of the grantee such as is alluded to in the case from which we have just quoted, the breach of which entails no forfeiture; and cites the case of Peterson v. Gibbs, 147 Cal. 6, 81 Pac. 121, 109 Am. St. Rep. 107. The facts of that case, however, were different from those here. The contract gave to the grantees ten years within which to remove the timber, followed by a provision that for every year thereafter that the timber was allowed to remain on the land the grantees should pay the sum of $200. The court held that in such a case the removal within ten years was not a condition attached to the grant of the timber, but it also laid down the rule that "the question in each case is as to what is the contract between the parties."

[3] The next contention of the appellant is that if the right of forfeiture existed before July 1, 1915, it was not self-executing, but upon the happening of the default it was necessary for the plaintiffs by some overt act to assert their right of forfeiture, and that if they failed to do so, or thereafter recognized the defendant's interest as continuing, no forfeiture accrued. We think that this contention is sufficiently answered by the finding of the trial court that the plaintiffs at all times were in possession of the land after the withdrawal by the defendant's assignor, and by what we have already said as to the five-year limitation upon the right to cut timber upon the plaintiff's land.

The adverse findings of the trial court also dispose of the further contention that the plaintiffs expressly, impliedly, and by laches waived any right of forfeiture that existed in their favor, and were estopped by their conduct to claim any termination of defendant's rights prior to July 1, 1915.

The further claim is made by the appellant that any limitation of time for the cutting of timber was superseded by express agreement; but the evidence upon which this contention is based, viz. an expression in a letter written by one of the plaintiffs to the defendant, was not considered by the trial court as susceptible of receiving this construction, and we think the trial court was entirely correct in its conclusion.

[4] It is finally urged in support of the appeal that the court's finding, "That prior to the service of said notice (of February 5, 1914) plaintiffs did no other act to indicate a claim of forfeiture," entitled defendant to judgment; but we think it sufficiently apparent from what we have already stated that under the facts of this case it was not necessary for the plaintiffs to do more than they did to permit them to exclude defendant from their lands from and after the month of August, 1912; and the only occasion or necessity for serving the defendant with the written notice of February 5, 1914, alluded to in the finding of the trial court in question, arose from the asserted intention of the defendant at that time to resume lumbering operations upon the plaintiffs' land.

For the foregoing reasons, the judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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33 Cal. App. 319

PEOPLE v. KUHN. (Cr. 532.)

(District Court of Appeal, Second District, California. March 27, 1917.)

1. FORGERY 🔑14 — FRAUDULENT INTENT—QUESTION FOR JURY.

In a prosecution for forging a check, the fraudulent intent of defendant was a question for the jury.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 49.]

2. FORGERY 🔑47 — SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to sustain a conviction of employé for forging employer's check.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 123.]

3. FORGERY 🔑44½—NECESSITY FOR ACTUAL DAMAGE.

It is not necessary to sustain a conviction for forgery that the party whose name has been forged has suffered actual damage; it being only essential that it appear that if manifest intent of defendant culminated in success, such damage would follow.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

A. Kuhn was convicted of forgery, and appeals from judgment and from an order denying motion for new trial. Affirmed.

Albert D. Trujillo, of San Bernardino, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of forgery and sentenced to a term of imprisonment. He appeals from the judgment and from an order denying his motion for a new trial.

[1, 2] It was charged by the information that the defendant forged the name of G. W. Dewey to a check for the sum of $25, drawn on the Farmers' Exchange National Bank of San Bernardino. The defendant did not deny having drawn the check, and did not deny having signed the name of Dewey thereto. He claimed in his defense to have obtained some authority authorizing him so to do, although he did not assert that this authority expressly authorized him to draw checks, but rather that he was authorized to do business for Dewey. In the city of San Bernardino Dewey owned a furniture business, which was conducted by an agent named Lipphard. Dewey lived in the city of Los Angeles. Lipphard had full control of the business in San Bernardino, including the making of deposits of money in bank, and drawing checks thereon. Such checks were drawn in the name of Dewey, with the initials of Lipphard following the signature. The defendant had made some collections and attended to the sales of some merchandise on behalf of the Dewey store in San Bernardino. The manager, however, testified that no authority had at any time been given to defendant to draw checks, either by himself or by Dewey. The check described in the information was cashed by the defendant at a saloon in Colton. Defendant testified that of the $25 which he received he paid to Lipphard, manager of the store of Dewey, $10, and retained the remaining $15 for the purpose of paying his expenses on a trip to the city of Los Angeles, where he claimed to have had some business to do with Dewey himself. Lipphard denied having received the $10 men-

tioned by the defendant. The check upon being presented to the bank for payment was declared to be a forgery, and the arrest of defendant followed in consequence. Upon this state of the evidence the defendant here contends on his appeal that there was no showing made of any intent to defraud Dewey. The matter of the intent of the defendant was a thing to be determined by the jury, and upon the whole evidence, which has been briefly stated in the abstract, we think the verdict of guilty was wholly authorized.

[3] It is not necessary, as has been held, that a party whose name has been forged has suffered actual damage; it is only essential that it appear that if the manifest intent of the defendant culminated in success, such damage or detriment would follow. People v. Turner, 113 Cal. 280, 45 Pac. 331.

We have examined very fully the statement of the evidence as brought here in the reporter's transcript, as well as the instructions given by the trial judge. We can discover no error which prejudiced the defendant in his right to a fair trial, and we think that the proof was ample to sustain the verdict.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

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33 Cal. App. 321

GROTEFEND v. MAY et al. (Civ. 1634.)

(District Court of Appeal, Third District, California. March 27, 1917. Rehearing Denied by Supreme Court May 24, 1917.)

1. ACTION 🔑22—NATURE OF CAUSE OF ACTION—HOW DETERMINED.

Where a plaintiff sets up two different causes of action upon the same contract, the real nature of the cause of action will be determined from the contract itself.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 124–139, 143, 145.]

2. TRUSTS 🔑35(1)—EXPRESS TRUST—DISTINGUISHED FROM SALES CONTRACT.

An agreement under which plaintiff withdrew his claim for a land patent and defendant agreed that, upon obtaining a patent, he would convey to plaintiff a portion of the land so obtained, is a sales contract and does not create an express trust so as to make the doctrine of laches inapplicable until defendant repudiated its terms.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 45, 49, 50.]

3. SPECIFIC PERFORMANCE 🔑105(3)—DEMAND FOR PERFORMANCE—LACHES.

Plaintiff's cause of action upon an agreement, under which he withdrew his claim to a patent for land and defendant agreed to convey to him for a certain consideration a portion of such land after obtaining a patent, accrued when defendant obtained the land, and no demand for performance was necessary to make the doctrine of laches applicable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 327–341.]

4. LIMITATION OF ACTIONS 🔑66(15)—COMPUTATION.

Where a demand for performance of a contract is necessary to start the statute of limitations running, the demand must be made within a reasonable time.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 373, 374.]

5. CONTRACTS 🔑211—CONSTRUCTION—TIME OF PERFORMANCE.

Whether time is of the essence of a contract is ordinarily determined from its terms, although some consideration may be given the character of the property involved when the contract is silent.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 938–943.]

6. SPECIFIC PERFORMANCE 🔑105(3)—LACHES.

If a demand to perform a contract to convey mining property was necessary to make the doctrine of laches applicable, more than a reasonable time elapsed for such demand where made eight years after defendant obtained the land.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 327–341.]

Appeal from Superior Court, Trinity County; J. W. Bartlett, Judge.

Action by George A. Grotefend against Edward F. May, George L. Taylor, and H. White, surviving trustees of the Trinity Dredging & Hydraulic Gold Mining Company. Judgment for plaintiff, and defendants appeal. Reversed.

W. C. Sharpstein, of San Francisco, for appellants. Thomas B. Dozier, of San Francisco, for respondent.

HART, J. The following, extracted from the initial brief of the appellant, comprehends a complete and an accurate statement of the facts of the controversy presented for solution by this appeal:

"The second amended complaint alleges two causes of action, both of which, however, are founded on a single written instrument, Exhibit A, which is annexed to the pleading.

"It appears therefrom and from the allegations of the first cause of action that the Trinity Dredging & Hydraulic Gold Mining Company, to which we shall hereafter refer as the 'corporation,' was an applicant before the local United States Land Office for a patent to certain mineral lands, including the premises in controversy; that plaintiff filed an adverse to said application as to practically all of said land, including the premises in controversy, and commenced an action in the superior court pursuant to Revised Statutes U. S. § 2326 (Comp. St. 1916, § 4623), 'to determine the question of the right of possession' to the lands embraced in said adverse; that while said action was pending the parties to it entered into an agreement by the terms of which plaintiff was to dismiss said action and his adverse, the corporation was to proceed with its application for patent upon the issuance of which it was to convey the premises in controversy to plaintiff free of incumbrance, who was thereupon to pay the corporation $50 in cash and deliver to it his promissory note for $50, without interest, payable in six months; that pursuant to this agreement plaintiff did dismiss said action and his adverse, and the corporation prosecuted its application for patent with the result that the patent was issued June 30, 1906; that on November 30, 1907, the corporation became dissolved for nonpayment of the corporation license tax, and the defendants are the survivors of the directors of the corporation in office at the date of the dissolution; that on April 30, 1914, plaintiff tendered performance on his part and demanded of defendants the deed provided by the agreement, which demand was refused; that this action was commenced May 15, 1914.

"The second cause of action omits all reference to the adverse proceedings by plaintiff in the land office and in the court, but in lieu thereof alleges that the corporation agreed to sell to plaintiff the premises in controversy upon receipt of the patent. Otherwise the allegations are identical with those of the first cause of action."

The defendants interposed a demurrer to each of the causes of action stated upon the grounds: (1) That there was no cause of action stated; (2) that the cause of action was barred by the provisions of section 337, subd. 1, and section 343, of the Code of Civil Procedure; (3) that the plaintiff has been guilty of laches. The demurrer being overruled, the defendants answered, and thus, without denying the allegations of the complaint, pleaded the statute of limitations, basing said plea upon the sections of the Code of Civil Procedure invoked and specified in the demurrer; and also pleaded laches. It was stipulated by the parties that the cause be submitted to the trial court for its decision upon the second amended complaint and the answer thereto; it being further stipulated, in support of the allegations of the answer, that the original complaint in the action was filed and said action commenced on the 19th day of May, 1914. Findings were by said stipulation waived, and it was further stipulated that "this stipulation shall form a part of the judgment roll." Upon the issues framed as indicated and the above-mentioned stipulation, the court rendered and entered its judgment, decreeing and adjudging that the defendants, within 30 days from and after "the date of service of notice of entry of this decree, make, execute, acknowledge and cause to be certified, a good and sufficient deed, conveying and assuring the title, and all of the title" to that portion of the lands referred to in the complaint which is described as the N. E. ¼ of the N. W. ¼ of section 28, township 36 N., range 7 W., M. D. M., situated in the county of Trinity. This appeal is prosecuted by the defendants from said judgment.

It will be observed from the above statement that the parcel of land in controversy is a fractional portion of all the lands mentioned in the complaint, and that the adverse filed by the plaintiff to the application of the defendants for a patent involved all of the lands so mentioned and described, "save and except the N. E. ¼ of the N. W. ¼, and the E. ½ of the W. ½ of the N. W. ¼ of section 28, township 36 N., range 7 W., M. D. M.," within which section all the lands described in the complaint are situated.

The questions submitted for decision by this appeal, as must be obvious from the above statement of the issues, are whether the causes of action set out in the complaint are barred by the provisions of the statute of limitations invoked and pleaded by the defendants or by the laches of the plaintiff.

As seen, the first cause of action stated proceeds upon the theory that the corporation, in prosecuting its application for and obtaining a patent to the land in dispute, acted for and in behalf of the plaintiff, and that, upon securing the patent, it became the holder of the legal title in trust for the plaintiff. In other words, the contention is that by the agreement an express trust was created. It is hence argued that, since the statute of limitations cannot run against a trust until the repudiation thereof by the trustee, and, inasmuch as there was no repudiation of said trust until the 30th day of April, 1914 (15 days preceding the commencement of this action), the statute cannot be invoked to defeat the plaintiff's right of action.

In the second count or cause of action, the complaint, as shown, alleges that by the written agreement referred to the corporation agreed to sell, and the plaintiff agreed to purchase, the land in question upon the issuance to the former by the general government of a patent to said land. Thus a contract for the purchase and sale of the property is stated.

The plaintiff, however, relies mainly upon the theory upon which the first cause of action proceeds, and, while we may properly assume that the decision of the trial court was founded upon said theory, we are of the opinion that, in either case, the plaintiff's cause of action has lapsed by reason of laches.

[1, 2] Although the plaintiff has set up two different causes of action under the written agreement upon which the action is founded, we must, nevertheless, determine the nature of the cause of action which is available to him under the contract upon which he declares from the nature of the contract itself. Burling v. Newlands, 112 Cal. 476, 494, 44 Pac. 810. Thus considering and viewing the action, we are constrained to the opinion that it is not, nor could it be, under the agreement, one for the enforcement of an express trust, as counsel for the plaintiff contend, but merely one for the specific performance of the terms of a contract whereby a prospective vendor has agreed, for a specified consideration, to convey to a prospective vendee a certain parcel of land, after the former had acquired title thereto. In other words, we are unable to perceive in the contractual relation established between the parties by the agreement the essential elements of an express trust. Of course, in a sense, there existed between the parties a trust relationship. Nearly all contracts and every agency embrace a trust relationship, but it does not follow that in all such contracts or agencies an express trust is created or that the running of the statute is affected thereby.

Boyer v. Barrows, 166 Cal. 757, 758, 759, 138 Pac. 354. Here neither of the parties, although claiming a conflicting priority of right to purchase the land, was vested with the legal title, the perfection of which in either the one or the other rested upon the event of the prosecution to completion of the requisite proceedings before the land department of the general government. The plaintiff withdrew his application or adverse, and, when this was done and the suit arising thereon dismissed, the parties in legal effect conceded that the land in contest was the property of the corporation, subject, of course, to the paramount title of the government. Thereupon the agreement or contract between the parties supervened, which alone formed the basis of any right of action in the plaintiff. Stevens v. McChrystal, 150 Fed. 85, 87, 80 C. C. A. 39. The agreement, however, bears a close analogy to and is, in effect, one whereby the parties agreed to join in the acquisition for their joint benefit a certain parcel of land, the one to obtain the legal title and thereupon, for a stated consideration, to convey to the other an interest therein. Boon v. Chamberlain, 82 Tex. 480, 18 S. W. 655. In that case, the parties had entered into an agreement for the joint acquisition of land, one of the parties impliedly agreeing that, upon securing the legal title, he would convey to the other a half interest therein. The point submitted for decision was whether the action was one for the specific performance of a contract for the conveyance of real property, and therefore subject to the operation of the statute of limitations as to such actions, or whether the agreement, which formed the basis of the action, created an express trust and the action thereon not barred until there had been a repudiation of the trust. The Texas court thus disposed of the respective contentions of the parties:

> "Was the contract between Clark and appellant a contract for the conveyance of real estate? We think it was. It is true that it was a contract for the joint acquisition of lands, and not a contract for the sale of lands. It is none the less true that by its terms Clark impliedly bound himself to convey to appellant a half interest in the land as soon as he acquired the legal title. This suit seeks to enforce that contract; that is to say, to have it specifically performed. * * *
>
> "The last question which suggests itself in this case is: When did the cause of action accrue? Did it arise as soon as Clark acquired the legal title, or not until there was some act repudiating the trust? In suits for specific performance of contracts to convey land, the cause of action accrues upon the happening of the condition upon which the vendor binds himself to make the title. Glasscock v. Nelson, 26 Tex. 150. And so in case of a contract for the joint acquisition of land, in which it is contemplated that one party shall acquire the title and convey an interest to the other, we see no reason why the latter may not sue as soon as the title is acquired. It may be that, by reason of the trust existing between the parties, equity would not hold the plaintiff guilty of laches until the defendant had done some act which showed that he no longer recognized the trust; yet the defendant binds himself to make the title to the plaintiff for his interest in the land as soon as he acquires title himself, and we are of opinion that upon a mere failure to do so a cause of action arises."

We can perceive no substantial distinction between the agreement in the Texas case and that with which we are here concerned.

The cases cited by the respondent are not conceived to be in point here. For instance, the cases of Love v. Watkins, 40 Cal. 547, 6 Am. Rep. 624, and Luco v. De Toro, 91 Cal. 405, 18 Pac. 866, 27 Pac. 1082, cited by respondent, were where the parties who were to receive the conveyances had rendered services which were the consideration for the deeds. But in neither of those cases did the agreement create an express trust. Of course, a resulting trust arose, and this from the nature of the transaction—not only because of the nature of the agreement, but by reason of the fact that the party to receive the conveyance had performed or executed the consideration for the deed.

In the instant case, no money was paid nor service performed as a consideration for the conveyance. Indeed, it does not appear that the plaintiff paid any part of the expense incident and essential to the prosecution of the claim for a patent. There was no relation of confidence subsisting between the parties at the time of the making of the agreement. They were, in fact, in antagonism with each other relative to the contested land until the agreement was entered into between them. Recapitulating, the transaction simply amounted to this: That each of the parties claimed the prior right to apply for a patent. One withdrew his claim, and the other agreed that, upon obtaining the patent, he would convey to the former for a specified consideration a certain portion of the land so obtained. As before stated, we can discern in this transaction nothing more than either a mere agreement for the sale of real property or one for the joint acquisition of real property by the parties for their joint benefit.

But it is claimed that the fact that the effect of the agreement was to create an express trust is evidenced by the recital therein that:

> "The parties hereto have reached an agreement and understanding as to the rights of the several and respective parties."

The complaint, however, nowhere directly alleges that the corporation ever at any time acknowledged or conceded that the plaintiff was the owner or entitled to the property described in the agreement. Assuming therefore that the recital referred to was amenable to the interpretation to which the plaintiff subjects it, it cannot be considered as in aid of or as supplying pretermitted averments essential to the making of that proposition an issue. In Hayt v. Bentel, 164 Cal. 680, 686, 130 Pac. 432, 434, a similar point was made. The court said:

> "But there is no allegation, in either the complaint or the answer, that plaintiff ever did re-

ceive or take possession of the lot. The contract is annexed to the complaint and made a part thereof. But all that is averred is that the parties made an agreement for possession, not that possession was in fact delivered. Recitals in a contract incorporated in a complaint will not supply the want of essential averments in the pleading"—citing a number of cases.

The reason underlying this rule is that it is only by inference or argument from the recital in the contract that it can be assumed that the fact to which the recital relates existed, "and the rule is as much in force under the Code as at common law that argumentative pleading is not permissible." Hibernia S. & L. Soc. v. Thoronton, 117 Cal. 483, 49 Pac. 578.

[3, 4] No reason is to be perceived for doubting that the agreement upon which this action is predicated is a "writing" within the contemplation and meaning of section 337, subd. 1, of the Code of Civil Procedure; and, while we are of the opinion that a cause of action arose in favor of the plaintiff eo instanti upon the acquisition of the legal title to the land by the corporation (Gray v. Dougherty, 25 Cal. 266, 282; Danielson v. Neal, 164 Cal. 748, 130 Pac. 716), and that therefore no demand for performance was necessary to start the statute to running, yet, assuming that a demand was necessary for that purpose, the proposition remains that such demand should have been made within a reasonable time after the acquisition by the corporation of the legal title to avoid the intervention of the presumption of abandonment of the agreement.

> "Where a party's right to sue depends for its perfection solely upon the necessity of a demand by him to put his adversary in default, he cannot indefinitely and unnecessarily extend the bar of the statute by deferring such demand, but must make it within a reasonable time." Thomas v. Pac. Beach Co., 115 Cal. 136, 142, 46 Pac. 899, 900; Palmer v. Palmer, 36 Mich. 494, 24 Am. Rep. 605; Hintrager v. Traut, 69 Iowa, 746, 27 N. W. 807; Steele v. Steele, 25 Pa. 154; Bills v. Silver King Mining Co., 106 Cal. 9, 39 Pac. 43; Hopkins v. Lewis, 18 Cal. App. 107, 113, 122 Pac. 433.

[5, 6] Conceding, then, that a demand was necessary in this case, the question arises: Was the demand made within a reasonable time? The answer must be in the negative.

What is a reasonable time in a given case must always depend, of course, upon the circumstances thereof; and, in determining this question where the contract is for the sale of property, and where, as is so in this case, there is no express provision in the contract fixing the time within which the conveyance is to be made, some consideration is to be given to the character of the property which is the subject of the contract, although the general rule is that whether time is of the essence of the contract is to be determined from the terms of the writing itself. Skookum Oil Co. v. Thomas, 162 Cal. 539, 546, 123 Pac. 363.

Judge Lindley, in his treatise on Mines (volume 2, § 859), says:

> "The authorities, both in England and America, recognize that, where mines or mining property are the subject of the contract, time is of the essence, independent of any express stipulation inserted in the instrument."

In Waterman v. Banks, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479, one of the syllabi reads:

> "Time may become of the essence of a contract for the sale of property, not only by the express stipulation of the parties, but from the very nature of the property itself; mineral property requires the parties interested in it to be vigilant and active in asserting their rights."

This rule is approved in Skookum Oil Co. v. Thomas, supra. The reason of this rule is that mining property is of that peculiar character that it is subject to frequent, sudden, or great fluctuation in value, and to permit an advantage to be gained or great loss to be suffered by long and unreasonable delay in demanding a conveyance or the money stipulated to be paid for such land would constitute the transaction an unconscientious one.

Under the above-stated principles and the facts as they are made to appear here, the conclusion is inevitable that the plaintiff, by postponing the taking of steps looking to the acquisition of his rights under the contract, was guilty of laches, and that by reason thereof his right of action on the contract is barred. Marsh v. Lott, 156 Cal. 643, 648, 105 Pac. 968; Hopkins v. Lewis, 18 Cal. App. 107, 113, 122 Pac. 433.

The land involved in this controversy is admittedly mining property. By the agreement, as we have seen, the corporation bound itself to convey to the plaintiff when it acquired title to the land. This agreement necessarily implied that at the same time the plaintiff would perform his part of the contract. And thus the time was definitely fixed when either, by offering to perform the condition to which he had bound himself, could put the other in default. The corporation failed to perform its obligation, and, of course, the plaintiff knew it. He further knew, or at least was well justified in assuming, from the fact that the corporation was as against him an applicant for a patent to the land, that the latter desired to retain it, and this, too, notwithstanding its agreement to relinquish the title to him after the patent was received. If, then, it was his intention or desire to secure the conveyance, he should have been active and vigilant in the matter of the enforcement of his rights thereunder and not have been guilty of that procrastination or inaction or passiveness which will be held to constitute acquiescense in the breach of a contract of this character or to raise the presumption of the abandonment thereof. Nor has he shown any admissible reason or valid excuse for his long period of inaction and passiveness.

A court of equity does not encourage the litigation of stale claims. It will not grant aid to those who slumber upon their rights. Nothing can call that court into activity but conscience, good faith, and diligence, and, where these (or any of them) are wanting, it will remain passive and do nothing.

It is further to be suggested that it is to be presumed, from the fact that the title to the property has been in the corporation or its successors (the trustees) during the entire period intervening between the date of the issuance of the patent to the corporation and the date upon which the plaintiff for the first time made a move to secure a conveyance, that the corporation and its successors have paid the annual taxes accruing against said property. The agreement provides that the corporation shall convey the property to the plaintiff "free and clear of all incumbrances," which include taxes and assessments levied upon and against property. Civ. Code, § 1114. It will hardly be contended that the agreement contemplates that the corporation should be charged indefinitely with the payment of the taxes levied against the property, and, since the duty or obligation of taking the initiative in the consummation of the agreement rested upon the one no less than upon the other of the parties thereto, it would seem that the failure of the plaintiff to offer to pay the taxes which had presumably been paid by the corporation upon the property for over seven years means a failure to offer to do complete equity in the premises.

The appellant makes a number of other points in impeachment of the judgment; but, as we believe the action here is barred by laches, those points need not be considered.

The judgment is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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33 Cal. App. 303

TAUGHER v. RICHMOND DREDGING CO. et al. (Civ. 1626.)

(District Court of Appeal, Third District, California. March 22, 1917. Rehearing Denied by Supreme Court May 21, 1917.)

1. APPEAL AND ERROR ©=1011(1)—REVIEW—FINDINGS OF FACT.

The finding of a trial court as to a matter of fact based upon conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988.]

2. APPEAL AND ERROR ©=1073(1)—HARMLESS ERROR—JUDGMENT.

In a suit against a corporation and a stockholder thereof owning almost all of the stock, there was no prejudice in entering judgment in a fixed sum against each, since the payment by the corporation will discharge the liability of the stockholder, and the payment by him of the amount adjudged payable by him will discharge the corporation pro tanto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4240.]

Appeal from Superior Court, City and County of San Francisco; W. M. Conley, Judge.

Action by Edward B. Taugher against the Richmond Dredging Company and another. From a judgment for plaintiff and the denial of a new trial, defendants appeal. Affirmed.

W. H. H. Hart, of San Francisco, for appellants. J. L. Taugher, of San Francisco, for respondent.

CHIPMAN, P. J. The action is by the assignee of the claim of J. L. Taugher for legal and professional services as attorney at law alleged to have been rendered and performed at the special instance and request of defendant Richmond Dredging Company, at divers times between May 1, 1910, and March 8, 1912, both dates inclusive, which said services were of the alleged value of $13,180, no part of which has been paid. Cutting was made a party defendant as a stockholder in said dredging company. The complaint specifies five different matters in which said attorney performed services of considerable consequence to the dredging company. One of these matters related to services rendered in commencing and conducting an action in the superior court of Contra Costa county wherein said dredging company was plaintiff and the Santa Fé Railroad Company the defendant, in which plaintiff recovered judgment for $25,925. Another was for services in connection with the recovery of the possession of the dredger "Richmond No. 1" prior to the filing of a libel in the United States District Court, in Admiralty, and also for services in said admiralty court in connection with said libel. Other services are alleged to have been rendered for said dredging company in and about two certain actions commenced in the superior court of the city and county of San Francisco by the Richmond Light & Power Corporation against said dredging company. Also for services in connection with a certain contract wherein the Santa Fé Railroad Company was party of the first part, the said dredging company party of the second part, and the East Shore & Suburban Railway Company party of the third part. It is alleged that the capital stock of said dredging company was $200,000, divided into 2,000 shares, each of the par value of $100, and that all of said shares were subscribed, of which said stock said Cutting was, at all times mentioned in the complaint, the owner of 1,998 shares in his own right. The pleadings are verified.

In their answer the defendants made certain admissions, but denied in substance that said attorney performed the services alleged to have been performed by him, and denied any indebtedness to him or to plaintiff on account of any said alleged services; denied, on information and belief, that J. L. Taugher "ever was, or now is, a duly, or otherwise qualified, or licensed attorney, or counselor at law, or licensed, or practicing as such, or entitled to practice at any time as such"; denied that the subscribed capital stock of said company was or now is greater in number than 38 shares; and alleges that Cutting "was the subscriber of one share and no more." It is alleged as further answer in substance that Cutting engaged Attorney Taugher (plaintiff's assignor) "to help him, the said Cutting, with the cases and legal affairs of him, said Cutting, and the various corporations in which he, the said Cutting, was interested," including the corporation defendant herein, and that said Taugher agreed "to do all of said Cutting's legal work and the legal work of said corporations in which said Cutting was interested, for and in consideration of said $200 per month, with the express understanding that nothing further whatever would be charged or paid except such further sums as would be satisfactory to said Taugher in the event that he (said J. L. Taugher) should succeed in winning said cases satisfactorily to said Cutting," and that said Taugher "promised to see the whole work through and get nothing over $200 per month until the work was finally finished and the money collected, and then only such further sum as would be satisfactory to said Cutting." It is further alleged "that no moneys as yet have been collected from any of the judgments, and said J. L. Taugher has not completed his said service and has not complied with or performed the terms of said contract," wherefore said Taugher is not entitled to any further compensation; that defendants have and each of them has complied with every condition of said contract on their part to be performed; and that, before the assignment made to plaintiff, said J. L. Taugher "had been fully paid for all work that he had performed in the premises and for all the work mentioned and described in plaintiff's complaint herein"; that said J. L. Taugher "refused to perform further services for said defendants, or either of them, in said business; and that by reason thereof said defendants, and each of them, were not satisfied with said J. L. Taugher's services in the premises."

The court found as facts: Finding 1. That J. L. Taugher was a duly qualified and licensed attorney practicing as such under the laws of this state. Finding 2. That Richmond Dredging Company was at all times mentioned a duly organized corporation under the laws of California. Findings 3, 4, 5. That the capital stock of said company is as alleged in the complaint and was all duly issued, "and, at all and every of the times mentioned in plaintiff's complaint, H. C. Cutting was and now is the owner in his own right of 99.9 per centum of the whole capital stock of said company, and of the subscribed stock thereof and was the owner of 1,998 of said shares." None of the foregoing findings is now challenged, although in their verified answer defendants denied that said J. L. Taugher was an attorney at law, denied that more than 38 shares of the capital stock of said company had been issued, and alleged that Cutting "was the owner of one share and no more." Findings 6 to 12, both inclusive, are challenged as not supported by the evidence. They may be summarized as follows: That J. L. Taugher performed services for the dredging company as alleged in the complaint, of the reasonable value of $4,650, no part of which has been paid, and that plaintiff is the owner of said claim by assignment to him prior to the commencement of the action. Findings 6, 7, 8. That there is now due and owing to plaintiff for said services, from said dredging company, the sum of $4,650, and from said Cutting the sum of $4,645.33. Findings 9, 10, 11. Finding 12 is as follows: "That all the allegations of the answer of defendants are untrue, except the express admissions contained therein."

As conclusions of law the court found that plaintiff was entitled to recover from defendant dredging company, the sum of $4,650 and costs of suit and from defendant Cutting the sum of $4,645.33 and 99.99 per centum of the costs. Judgment passed accordingly. Defendants appeal from the judgment and the order denying their motion for a new trial.

There is abundant evidence that plaintiff's assignor performed services as attorney practically as averred in the complaint, and there was ample evidence to support the findings as to the value of said services. The evidence would have justified a larger judgment. The evidence was that much important successful litigation was conducted by Attorney Taugher for defendant dredging company, occupying substantially all his time for nearly two years.

The only questions as to which there was any serious controversy were: First, were the services rendered by Attorney Taugher performed for the Richmond Dredging Company at its instance and request? Second, were these services performed under the contract alleged in the answer which in effect was alleged to have been that Mr. Taugher "would do all of said Cutting's legal work and the legal work of the corporations in which said Cutting was interested, for and in consideration of said $200 per month" and, when the work was finished, "only such further sum as would be satisfactory to said Cutting"? Third, did Mr. Taugher fail to perform the terms of said contract? Fourth, has he been fully paid?

It appeared that Mr. Cutting was president of the Richmond Dredging Company and also president of the Point Richmond Canal & Land Company, and owned substantially all of the shares of these corporations. In the course of his testimony concerning the alleged contract he claimed to have made with Mr. Taugher, Mr. Cutting testified:

"Q. Did you at that time explain to him with reference to the different corporations that you had? A. Oh, yes. He thoroughly understood that. Q. Tell what you said to him on that subject. A. I told him all about it; I told him the whole layout. That the Point Richmond Land & Canal Company and the Richmond Dredging Company were practically myself, the same thing; and I explained to him the business and the construction of the whole thing. We went clear through it with long explanations."

He testified that he had a great deal of private business outside of these corporations.

[1] It appeared that Mr. Taugher performed services for the Richmond Land & Canal Company and also for Mr. Cutting individually, and there was evidence that payments were made by Cutting and by the Point Richmond Canal & Land Company to Mr. Taugher, as shown by checks and receipts, amounting to $3,669.50. Defendants claim that this amount should have been deducted from the amount found by the court to be due for said services, to wit, $4,650. Mr. Taugher contended, and so testified, that these payments were made by Cutting and the Richmond Canal & Land Company for services rendered by him to them, and that he had applied the payments on account of such services, and that there remained an unpaid balance due him from Cutting and said corporation. None of these payments appeared to have been made by the Richmond Dredging Company or on account of services for that company. As to the alleged contract that Attorney Taugher was to receive only $200 per month and such further compensation as Cutting might feel disposed to allow, the testimony of Cutting and Taugher was in sharp conflict, the latter testifying that no such contract was made. The finding of the court that defendants' claim in this respect is untrue is, under the rule, conclusive upon us. As the court found that the contract alleged by defendants was not entered into, it would follow that there was no breach of such contract by Attorney Taugher.

There was no formal employment of Attorney Taugher evidenced by a resolution of the directors of the dredging company. His employment was by Cutting on its behalf, and it received the benefit of the services rendered. Cutting was for all practical purposes the corporation and was managing its business much the same as if it were his own. We do not think the corporation can escape liability on the theory that Cutting was unauthorized to incur it. The finding of the court that the services of Attorney Taugher were performed at the instance and request of the defendant company, and not under the contract alleged by defendants, finds support in the evidence.

This action was commenced March 9, 1912. After the judgment had been recovered against the Santa Fé Railroad Company in favor of the Richmond Dredging Company and some time prior to the commencement of the present action, a disagreement arose between Attorney Taugher and Cutting as to the compensation due to the former for his services, who at the time was urging further payment on account. Some of the matters in the attorney's charge had been finally disposed of, while others were yet unfinished and an appeal by the Santa Fé Company in the dredger case was impending. It is not necessary to burden this opinion with the testimony bearing upon the merits of this dispute. It arose mainly out of Cutting's contention that Taugher was working under a contract for $200 per month, which the court found was not true. Much bitterness of feeling between the two men was engendered which resulted in the substitution by Cutting, with Taugher's consent, of another attorney to conduct the Richmond Dredger Company case for respondent on the appeal and the severing of all relations as client and attorney, followed by the present action.

We think the evidence abundantly showed that Taugher had not been paid in full for his services, as is now contended by appellant, and treating the payments made, as probably the court did, as justly applicable, as far as they went, towards compensating the attorney, his services were shown to be reasonably worth an additional amount quite equal to that found by the court.

Nor do we think the evidence showed that there was an agreement on Taugher's part, as is claimed, "to prosecute each of the cases mentioned in plaintiff's complaint, to a finality, which he did not do." No doubt he expected to be retained in the business to a finish, but the evidence would not have justified the court in finding that his compensation depended upon such a condition. Besides, he did not voluntarily throw up his brief, but was relieved from further responsibility in the business by Cutting himself. His action was for services rendered up to the date of his discharge, which was early in March, 1912. The evidence was directed to the value of his services rendered, and the witnesses based their estimate of such value upon the successful manner in which he had conducted the business prior to his discharge.

[2] It is claimed that the court erred in entering judgment against the dredger company for $4,650 and costs of suit, $56.25, and a separate judgment against defendant Cutting for $4,645.33 and $56.19 costs. There is in fact but one judgment; but, inasmuch as Cutting's liability was that only of a stockholder, the amount of the judgment chargeable to him was necessarily less than that against the dredging company because he did not own all of its capital stock. A payment of the judgment by the dredging company would discharge his liability under it, and the payment by him of the amount adjudged payable by him would discharge the dredging company pro tanto. We do not see how either appellant is prejudiced by the form of the judgment.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

33 Cal. App. 287

SQUIRES v. ESTEY. (Civ. 1871.)

(District Court of Appeal, First District, California. March 22, 1917. Rehearing Denied by Supreme Court May 21, 1917.)

1. TAXATION 🔑800(1)—TAX SALES—CANCELLATION—REIMBURSEMENT OF PURCHASER.

Where owner of property seeks equitable relief against tax deed or sale as a cloud upon his title or seeks to obtain judgment invalidating such sale or deed, relief will be refused unless he first repay to the tax purchaser or his grantee or assignee the taxes, penalties, interest, and costs justly chargeable against the land and paid by such purchaser, with legal interest from time of payment, less such rents as the purchaser in possession may have received, even though the assessment and levy of the taxes for which the property was sold was irregular or void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1586.]

2. TAXATION 🔑809(3)—TAX SALES—REIMBURSEMENT OF PURCHASER—PLEADING.

In action to quiet title against defendant claiming under tax deed, defendant's amended answer and cross-complaint alleging amount of taxes paid *held* sufficient as to details of assessment and levy of taxes in absence of special demurrer.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1586, 1602.]

3. TAXATION 🔑814(1)—TAX SALES—REIMBURSEMENT OF PURCHASER.

The right of a purchaser of a tax title upon the cancellation of his tax deed to recover taxes, interest, and penalties paid by him rests upon equitable principles, and is not dependent upon Pol. Code, § 3898, subd. 5, as amended in 1913 (St. 1913, p. 560).

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1612.]

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action to quiet title by Raymond J. Squires against Charles V. Estey. From a judgment directing the reimbursement of defendant for taxes paid as a condition of the judgment quieting title, plaintiff appeals. Affirmed.

L. A. Kottinger and Milton Shepardson, both of Oakland, for appellant. John G. Lawlor, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from the judgment in defendant's favor in an action commenced by the plaintiff, as the owner of a certain tract of land, to quiet title thereto against the defendant claiming under a tax deed. The defendant in his answer and cross-complaint set up his tax deed as a defense to the action, and also averred that he had paid out and expended the sum of $905 as taxes, penalties, costs, interest, and charges which were assessed and a lien upon said property at the time he obtained said tax deed to the same, and the payment of which was a condition precedent to the issuance of said tax deed; and the defendant prayed that, should the court find his tax deed for any reason invalid, and adjudge the plaintiff to be the owner of the property, it should also in its judgment decree that the plaintiff be required to repay to the defendant the sums so expended. Upon the issues as thus made up the trial court found the defendant's tax deed to be invalid, but directed the repayment to the defendant by the plaintiff of the sum of $835.90 so expended by him for taxes and so forth, and decreed that its judgment quieting the plaintiff's title should be ineffectual until such sum was paid. From this judgment the plaintiff prosecutes this appeal.

[1] The main contention of the appellant is that the various items of taxes, etc., alleged to have been paid by the defendant as a prerequisite to the issuance to him of the tax deed were based upon assessments and levies of taxes by the state and by the city of Oakland which were void on account of numerous defects and irregularities as shown in the proofs and pointed out in the briefs of appellant. Conceding that such defects and irregularities exist, and that they were such as would have rendered void the tax deed issued to the defendant, and uncollectible the taxes based thereon in any proceedings initiated by the state to compel the plaintiff as the owner of the property to pay the same, or even in any proceeding initiated by the defendant to quiet his title to the property, we are still unable to distinguish this case from the case of Holland v. Hotchkiss, 162 Cal. 366, 123 Pac. 258, L. R. A. 1915C, 492, wherein the rule is laid down that:

> "Where the owner comes into equity asking equitable relief to remove or cancel a tax deed or sale as a cloud upon his title, or to obtain a judgment which, in effect, will invalidate such sale or deed, the court should refuse any relief except upon the condition that he first repay to the tax purchaser, or his grantee or assignee, the taxes, penalties, interest, and costs justly chargeable upon the land and which the purchaser has paid at the sale, or afterward upon the faith of it, with legal interest from the time of such payment, less rents received, if any, if the purchaser has been in possession."

It is contended, however, by the appellant that this rule has only application to cases where the assessment and levy of the taxes sought to be recovered were so far legal as to have created a lien upon the property. But the case above cited does not make this distinction in its application of the broad principle that he who seeks equity must do equity; but, on the contrary, the most recent cases which are cited therein as upholding the doctrine, or which have been decided since, are cases in which the assessments and levies of taxes were void for irregularities as vital as those relied upon by the appellant in the case at bar, notwithstanding which the owners of the property going into a court of equity, seeking the equitable relief of a decree quieting their title as against void tax deeds, were required in each case to pay or offer to pay a sum equal to the taxes which would be justly due. Couts v. Cornell, 147

Cal. 560, 82 Pac. 194, 109 Am. St. Rep. 168; Sav. & Loan Soc. v. Burke, 151 Cal. 616, 91 Pac. 504; Campbell v. Canty, 162 Cal. 382, 123 Pac. 266; Johnson v. Canty, 162 Cal. 391, 123 Pac. 263; Cordano v. Kelsey, 28 Cal. App. 9, 151 Pac. 391, 398. Upon the authority of those cases we find no merit in the foregoing contention on the part of the appellant.

[2] The appellant also contends that the defendant's amended answer and cross-complaint were insufficient in respect to their affirmative averments as to the details of the assessment and levy of the taxes sought to be recovered. We are of the opinion that, however uncertain and indefinite the defendant's pleading may be in the respects indicated, it was sufficient to raise the issue in the absence of a special demurrer.

[3] As to the appellant's contention that section 3898, subd. 5, of the Political Code, as amended in 1913 (St. 1913, p. 560), is void in its attempted application to assessments and levies of taxes made before the passage of such amendment, it is sufficient to say that the respondent's right to a recovery in the case at bar does not depend upon this or any other section of the Code, but rests upon a principle of equity well established in the decisions of the courts long prior to the amendment of the Code.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

On Resubmission.

LENNON, P. J. The judgment is affirmed, for the reasons stated in an opinion filed March 2, 1917, which opinion is hereby adopted as the opinion of the court following the resubmission of the cause, and said opinion is hereby ordered refiled as of this date.

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33 Cal. App. 347

FRED MEDART MFG. CO. v. WEARY & ALFORD CO. (Civ. 2019.)

(District Court of Appeal, Second District, California. April 3, 1917.)

1. Sales 🔑52(6) — Seller's Action for Price—Sufficiency of Evidence.

In a seller's action for price, evidence that plaintiff's alleged agent notified defendant buyer that he was acting as such agent, and that the goods were billed directly from the plaintiff to defendant, does not sustain a finding that defendant purchased from the agent and not from plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 138.]

2. Principal and Agent 🔑105(4)—Authority of Agent to Collect Purchase Price.

An agent for the sale of personal property without possession thereof is not authorized to collect the purchase price, although Civ. Code, § 2325, authorizes a general agent intrusted with possession of the thing sold to do so.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 301, 374.]

3. Principal and Agent 🔑137(1)—Liability of Third Parties—Collecting Purchase Price.

Where defendant buyer notified plaintiff seller that he intended to pay the purchase price to plaintiff's alleged agent, and no objection was raised, plaintiff is estopped to claim that such agent was unauthorized to receive payment.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 492, 494.]

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by the Fred Medart Manufacturing Company against the Weary & Alford Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Bicksler, Smith & Parke, of Los Angeles, for appellant. Ralph F. Twombly, of Los Angeles, for respondent.

JAMES, J. Suit was brought to recover the sum of $411.64 alleged to be due and owing to the plaintiff from the defendant on account of the sale of certain merchandise. Judgment was in favor of defendant. The appeal is from the judgment and is presented upon the judgment roll and a bill of exceptions.

Plaintiff at times material to the controversy was engaged in the city of St. Louis, Mo., in manufacturing steel office furniture of certain particular varieties. J. M. Bloom was an agent of the plaintiff in the city of Los Angeles. In July, 1913, he quoted to the defendant prices on certain articles of metal furniture. In the letter containing the quotations he stated:

> "The lockers are made by the Fred Medart Mfg. Co. of St. Louis, for which I am California agent."

The offer made by Bloom was accepted by the defendant, and the articles of merchandise were thereafter delivered, being billed directly from the plaintiff manufacturing company to the defendant. On December 24, 1913, the plaintiff wrote to the defendant advising the latter that their draft drawn to cover a portion of the purchase price of the merchandise had been returned with the notification from the collecting bank that the drawee was "paying their local agent." The letter also contained the following:

> "Up to this writing, we have not received the remittance through our local agent and are today taking this matter up with him."

On January 6th the plaintiff wrote to defendant as follows:

> "We have not received this remittance, and we again take this matter up with you and ask that you kindly advise us immediately upon receipt of this letter if you have paid any money to Mr. J. M. Bloom. P. S. If you have not paid this account to Mr. Bloom, kindly mail us check."

On January 15th the defendant wrote to the plaintiff acknowledging receipt of the letter of January 6th, and stating to the plaintiff that settlement had been delayed, but that, as soon as the goods had been satisfactorily installed, "we will settle in full with Mr. Bloom." It appears to be agreed that full settlement was thereafter made with Bloom, the agent, subsequent to which time defendant received notification from the plaintiff that Bloom was not authorized to accept the payment on its behalf. This suit was prosecuted on the same theory.

[1] The trial judge by his findings determined that the merchandise in question was purchased from Bloom, and not from the plaintiff, and that Bloom had been fully paid therefor. In view of the fact, as shown by the evidence, that Bloom in his first letter to the defendant gave notice that he was acting as agent for the plaintiff, and also as the merchandise was billed directly from the plaintiff to the defendant and correspondence was had showing at all times that plaintiff was the principal of Bloom, it must properly be said that the finding referred to is not supported by the evidence. However that may be, the court did find that Bloom received payment in full for the merchandise.

[2] This brings us to the question as to whether, assuming that an agency only existed between plaintiff and Bloom, Bloom possessed authority to bind the plaintiff by receipt of the purchase price agreed upon. The rule is of long standing that an agent for the sale of personal property merely, not having possession thereof, is not thereby vested with authority to bind his principal by collection of the purchase price. Our Civil Code, § 2325, provides:

> "A general agent to sell, who is intrusted by the principal with the possession of the thing sold, has authority to receive the price."

[3] Herein the authority of a factor having possession of goods and a mere sales agent without possession differs. But, conceding that Bloom had no authority under his contract of agency to collect the proceeds on the sale of the merchandise furnished by the plaintiff, we think that under the facts here shown there was created for such purpose an agency by estoppel; that is, that the failure of the plaintiff to notify the defendant of the limitation on the agent's authority closed its mouth against any claim denying that such authority existed. The plaintiff was first advised by letter and by the return of their draft of defendant's intention to pay Bloom, and did not object thereto, but stated to the defendant that they were taking the matter up with Bloom in order to secure the remittance. The next letter written by the defendant to plaintiff again advised plaintiff of the intention of defendant to settle in full with Bloom, which the defendant so did. After all the money had been paid, for the first time the defendant is advised that no authority existed in Bloom to make collections on behalf of the plaintiff. We are well satisfied that the payment to Bloom under such circumstances discharged the debt to the plaintiff. See Mechem on Agency, vol. 1 (2d Ed.) § 932 et seq. As under the facts shown and by reason of the conclusion which we have drawn no recovery could be had by the plaintiff against the defendant, the question of the correctness of the finding of the court that there was no contractual relation between the plaintiff and defendant becomes immaterial.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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33 Cal. App. 354

WARDEN et al. v. CHOATE. (Civ. 1927.)

(District Court of Appeal, Second District, California. April 3, 1917.)

1. INJUNCTION ⚷252(6)—BOND—DAMAGES.

Where defendants in a suit for injunction made no motion to dissolve the temporary restraining order, but only resisted the order to show cause, as the temporary restraining order fell of its own weight at the time limited therein, being the time fixed for the hearing of the order to show cause, in an action on the undertaking given for damages sustained by reason of such restraining order, the court properly determined that no attorney's fees were incurred as damages by reason of the restraining order.

2. INJUNCTION ⚷252(4)—BOND—DAMAGES.

Where assessment certificates acquired on account of sale of property for delinquent street assessments were sequestered by a temporary restraining order, in an action on the undertaking given therein, in which it was alleged that by the restraint imposed plaintiffs had been prevented from securing a deed to a lot affected by one of the certificates, and had been prevented from accepting an offer made for such lot, it was not proper to allow damages therefor, where there was no allegation in the complaint or evidence that the lot was worth less after the restraining order had become of no effect than it was at any time during the pendency of the injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 589, 590, 592–595.]

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Julia P. Warden and another against J. B. Choate. From a judgment for defendant and from an order denying a motion for new trial, plaintiffs appeal. Affirmed.

J. Irving McKenna and Catherine A. McKenna, both of Los Angeles, for appellants. Carlyle Wynn, of Los Angeles, for respondent.

JAMES, J. Appeal by the plaintiffs from a judgment denying them any relief in this action, and also from an order denying a motion for a new trial. The defendant here, in March, 1914, brought an action against these plaintiffs and certain officials of the city of Los Angeles in which injunctive relief was asked for. A temporary restraining order was made pending the hearing of an order to show cause which was set for the 6th day of April, 1914. These plaintiffs appeared in response to the order to show cause and demurred to the complaint of the plaintiff (this defendant), and made a further showing by affidavit in opposition to the application for injunction pendente lite. At the time fixed as the return day on the order to show cause, the demurrer was considered by the court and sustained, and the action there ended. This action was prosecuted for the purpose of obtaining damages alleged to have been sustained by reason of the restraint imposed under the temporary restraining order. The action, however, is upon the alleged undertaking of the defendant here, who was plaintiff in the injunction suit, by which the plaintiff in that suit gave security against damages on account of the restraining order. The security was not in the form prescribed by the Code, to wit, by written undertaking, the order to show cause and restraining order as signed by the court reciting that "plaintiff having given cash bond in the sum of $300 to indemnify defendants against damage by reason of this restraining order," et cetera. The question as to whether the acceptance of money in lieu of such undertaking as is authorized by the Code to be given upon injunctions (Code Civ. Proc. § 529) was proper may be passed, and it may be considered that it was permissible for the court to require indemnity in that form.

[1] In the injunction action it was alleged that the plaintiffs here were the holders of certain property assessment certificates acquired on account of sale of such property for delinquent street assessments in the city of Los Angeles, which certificates and the redemption proceeds from the same it was sought by the injunction suits to have sequestered or impounded in order that the plaintiff in that suit, he being a judgment creditor of the defendant C. D. Warden, might cause them to be subjected to satisfaction of his debt. The Wardens in this action alleged that they had incurred damages in the sum of $300, being money paid as counsel fees for the purpose of securing the dissolution of the temporary restraining order, and further that by reason of the restraint imposed they had been prevented from securing a deed to a certain lot affected by one of the assessment certificates and had been prevented from accepting an offer of $500 made to them for said lot. The court in this case determined by its findings that no amount of attorney's fees had been incurred or paid out by these plaintiffs for the purpose of securing a dissolution of the temporary restraining order. It does not appear from the evidence taken, as set out in the reporter's transcript, that the plaintiffs made any motion to dissolve the temporary restraining order, but that the whole of their efforts were directed to resisting the order to show cause. At the time fixed as the return day in the order to show cause they appeared, and their demurrer at that time to the complaint of the plaintiff (this defendant) was sustained. The temporary restraining order fell of its own weight at the expiration of the time limited therein, to wit, at the time fixed for the hearing of the order to show cause. In such a case the court properly determined that no attorney's fees were incurred as damages by reason of the temporary restraining order. See San Diego Water Co. v. Pacific Coast Steamship Co., 101 Cal. 216, 35 Pac. 651; Curtiss v. Bachman, 110 Cal. 433, 42 Pac. 910, 52 Am. St. Rep. 111. It is contended that the answer of the defendant here admitted that some amount of attorney's fees had been incurred on the behalf alleged; but taking the answer altogether in its various allegations, we find that it contains an allegation denying that any damage at all was sustained on the part of the plaintiffs by reason of the temporary restraining order.

[2] Neither was it proper to allow damages on account of the second alleged cause therefor, to wit, by reason of loss alleged to have been incurred on account of the inability of the plaintiffs to accept an offer of $500 for the lot as before mentioned. There is no allegation contained in the complaint, and neither does the evidence support any such condition, that the lot was worth any less after the restraining order had become of no effect than it was at any time during the pendency of the restraint imposed by that order. We conclude that the judgment of the court was proper, and is supported by the record presented.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

33 Cal. App. 357

PEOPLE v. CLAYTON. (Cr. 388.)

(District Court of Appeal, Third District, California. April 3, 1917.)

1. Criminal Law 🔑1063(4)—Appeal from Judgment—Question Presented—Insufficiency of Evidence.

Upon appeal from judgment in a criminal case, without making motion for new trial, announcement having been made in open court as provided by Pen. Code, § 1239, and notice for transcript of record having been given pursuant to section 1247, assignment that evidence was insufficient to support conviction was reviewable, and evidence may be considered for any of the purposes of the appeal, in view of Const. art. 6, § 4½, providing that no judgment shall be set aside "unless, after an examination of the entire cause, including the evidence," the court shall be of opinion that a miscarriage of justice has occurred, and St. 1909, pp. 1083 to 1086, altering system of appeals, do not change the rule formerly existing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2673, 2680.]

2. Criminal Law 🔑1104(6)—Appeal—Application for Transcript—Sufficiency.

Notice prescribed by Pen. Code, § 1247, asking court to direct reporter to transcribe parts of record necessary for criminal appeal need be in no particular form, it being only necessary to set forth in general terms grounds of appeal and points relied on and designating particular portions of record necessary to be transcribed; hence fact that appellant states that he "thinks" that all the testimony is necessary does not invalidate notice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2776.]

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

George Clayton was convicted of grand larceny, and upon a suggestion of diminution of the record, on appeal from judgment, applies for further transcription and certification of testimony under Pen. Code, § 1247c. Application granted.

Ralph H. Lewis, and Grover W. Bedeau, of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. Upon a suggestion of diminution of the record, the defendant has applied to this court for a further transcription and certification of the testimony taken at the trial. Pen. Code, § 1247c. The application is supported by the affidavit of the defendant. The Attorney General opposes the application for reasons to be hereinafter stated.

[1] The defendant was, on the 21st day of November, 1916, found guilty by a jury, in the superior court of Sacramento county, of the crime of grand larceny. On the 24th day of said month the court pronounced its judgment of sentence upon the defendant, adjudging and decreeing that he be imprisoned in the state penitentiary at Folsom for the term of ten years. Thereupon G. W. Bedeau, counsel for the defendant, announced in open court:

> "That the defendant appealed * * * to the District Court of Appeal in and for the Third Appellate District from the final judgment of conviction, made, rendered, and entered herein this day and from the whole thereof."

On the 29th day of November, 1916, counsel for the defendant filed with the clerk of the court a written document purporting to be the notice prescribed by section 1247 of the Penal Code, upon which, when legally sufficient in all respects, a trial court is authorized and required to order the phonographic reporter who reported the case to transcribe such portions of the notes as in its opinion may be necessary fairly and fully to present the points relied upon by the appellant. Said notice set forth a number of the grounds, including that of the insufficiency of the evidence to support the verdict, which are enumerated in section 1181 of the Penal Code as the grounds upon which an application for a new trial may be made and granted. In addition to the grounds mentioned, the notice also contained the following statement of the points upon which the defendant intended to rely:

> "(1) Inadmissible and prejudicial statements made by witnesses for the prosecution, irrelevant to the issue, which served to poison the minds of the jury against defendant and prevent him from having a fair and impartial trial; (2) that the chief deputy district attorney, during the course of the trial, and during the course of his closing argument to the jury therein, was guilty of misconduct prejudicial to the defendant and which was intended to and did prevent this defendant from having a fair and impartial trial."

The notice then concludes with the prayer or request that the court direct the phonographic reporter who reported the case—

> "to transcribe all evidence and proceedings and all objections and exceptions made during the trial, and all rulings made thereon adverse to defendant, and exceptions made thereto, and all remarks of the judge or district attorney, made during the course of the trial and during argument in the presence of the jury, to which defendant objected and excepted."

The notice proceeds:

> "Defendant, in his opinion, thinks it necessary in order to fairly present all his points on appeal, that the phonographic notes of the testimony of all witnesses, all proceedings, rulings, and exceptions had and taken at said trial, and the closing argument of the chief deputy district attorney be transcribed."

As much of section 1247 of the Penal Code as is relevant to the inquiry presented here reads:

> "Upon an appeal being taken from any judgment or order of the superior court, to the supreme court or to a district court of appeal, in any criminal action or proceeding where such appeal is allowed by law, the defendant, or the district attorney when the people appeal, must, within five days, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed and the judgment or order may be enforced as if no appeal had been taken. The court shall, within two days after the filing of such application, make an order directing the phonographic reporter who reported the case to transcribe such portion of his notes as in the opinion of the court may be necessary to fairly and fully present the points relied upon by the appellant."

The position of the Attorney General in opposition to the allowance of the application herein asked for is: (1) That the paper or writing purporting to be the notice required by the above section for the transcription of all the testimony is legally insufficient, that is to say, that it does not comply with the requirements of said section; (2) that the point that the evidence is insufficient to support the verdict cannot be reviewed upon an appeal from the judgment, but only upon an appeal from an order denying a new trial, and that, as the defendant made no motion for a new trial, and so elected to rely for a review of his case solely on an appeal from the judgment, there is no necessity, so far as the question of the insufficiency of the evidence to uphold the verdict is concerned, for a transcription and certification to this court of all the testimony and proceedings of the trial.

We will first consider the point last above stated.

Prior to the adoption of the present method of taking appeals in criminal cases, it was requisite, in order to take such an appeal, to file with the clerk of the court in which the action was tried a notice stating the appeal from the judgment or order or from both, and serving a copy thereof on the adverse party. See Pen. Code (Ed. 1906) § 1240. Such appeal, if not from the judgment only, upon the judgment roll alone, was required to be supported by a bill of exceptions. See Pen. Code (Ed. 1906) § 1170. Section 1171 of said Code, as it then read, specified the points to the decision of which exceptions might be taken by the defendant. Under the then system of appellate procedure in criminal cases, as we shall presently see, the defendant could, upon an appeal from the judgment, rely on any of the exceptions specified in section 1170 of the Penal Code, it being necessary, of course, for him to have preserved and presented his exceptions in the manner prescribed by section 1171 of said Code, as it then read.

The Legislature of 1909, however, introduced radical changes in the system. Sections 1170, 1171, 1172, 1173, 1174, 1175, and 1177, all relating to certain exceptions which might be taken to rulings upon certain matters and to bills of exceptions and the manner of their preparation and settlement, were in the year mentioned repealed (Stats. 1909, pp. 1083 to 1086), and a number of new sections, prescribing a different method of taking appeals and preparing the record thereon, were substituted in lieu of the former system. By the change so effected the defendant may now take an appeal from the judgment by announcing personally or through his attorney in open court, at the time the judgment is rendered, that he appeals from the same; and from any appealable order after judgment by announcing in open court at the time the same is made that he appeals from the same. Pen. Code, § 1239. Thereupon the clerk must immediately enter in the minutes of the court the announcement of the appeal. The record on appeal must then be prepared, in pursuance of the notice required to be given, in accordance with the provisions of section 1247, supra, and the judge must then certify the same as required by section 1247a of said Code.

Under the former system there was no express provision of the Penal Code specifying the points which might be reviewed in criminal cases on an appeal from the judgment. Section 1181 then, as the same section does now, specified certain grounds upon which a new trial might be asked for and granted.

In the case of the People ex rel. Smith v. Keyser, 53 Cal. 183, the relator, having been convicted of a felony and duly noticed an appeal from the judgment and the order denying him a new trial, presented a bill of exceptions to the trial judge, who refused to settle the same for the reason that it was not presented within time. The defendant applied to the Supreme Court for a writ of mandate to compel the trial judge to settle the bill. The court said:

> "We are of the opinion that the bill of exceptions ought to have been settled by the judge. The defendant may appeal from the judgment, without having made a motion for a new trial; and on the appeal he may rely upon any of the grounds of exception mentioned in section 1170 of the Penal Code, and in such case he must have a bill of exceptions, settled as provided in section 1171."

The conclusion thus announced was reaffirmed by the Supreme Court in Walker v. Superior Court, 135 Cal. 369, 67 Pac. 336, and People v. Walker, 142 Cal. 90, 93, 75 Pac. 658.

We can discern no just ground for holding, from any change made by the Legislature of 1909, or by any subsequent Legislature in the procedure relative to appeals in criminal cases and the preparation of the records thereon, that there is now, under the existing system, any less reason for the application of the rule laid down in People v. Keyser, supra, than there was prior to the reform in the procedure referred to. It is true that the ground that the evidence is insufficient to sustain the verdict was not referred to by section 1170, as it then existed, but said section did specify, among others, including that of exceptions to rulings on questions involving the admissibility of evidence, a number of grounds or exceptions which were then and are now reviewable on an appeal from the order, and nowhere in the Penal Code was there a provision expressly authorizing such review of those exceptions. As before declared, there is not now, and, so far as we are otherwise advised, there never has been, any express provision in the Penal Code specifically enumerating and so restricting the number or nature of the points which may be reviewed on appeal from the judgment. Upon principle, it seems to us, there is every reason why the assignment that the verdict is not supported by the proofs should be reviewable on such an appeal. If, without express authority therefor, it may with reason be held proper, as the Keyser Case holds, that exceptions to rulings upon evidence may be reviewed on an appeal from the judgment, then a fortiori it is proper so to review the question whether the evidence is of sufficient strength to support the verdict; for the appeal from the judgment involves a direct attack thereon, while a motion for a new trial is a mere collateral assault upon the judgment. Quite consistently, therefore, and indeed most naturally, the question whether the verdict is sufficiently supported would arise on an appeal from the judgment, to nullify which or the verdict itself is always the very object of an attack thereon, even where such attack is collaterally made, as on a motion for a new trial.

The Attorney General declares, however, that:

> "Wherever an appeal from a judgment only has been taken, the only papers which go up

to the appellate court are prescribed by section 1246 of the Penal Code."

That section provides for the transmission by the clerk of the trial court to the appellate court, upon an appeal being taken thereto, of the papers and proceedings which, properly speaking, constitute the judgment roll in a criminal case, and they must be so transmitted whether the appeal is from the judgment or from the order denying a new trial or from both. They now constitute the clerk's record, and are so designated, and were formerly included in the bill of exceptions as a necessary part of the record on appeal. As a matter of course, it is indispensably necessary that the record, whatever its prescribed form, should show that a judgment against the appellant had been rendered, whether the appeal be from the judgment or the order or both; otherwise there would be nothing in the record to show that the court below had done anything which would occasion an appeal.

The cases of Turner v. Bauer, 28 Cal. App. 312, 152 Pac. 308, and Mankins v. Forward M. Syn., 28 Cal. App. 285, 152 Pac. 313, cited by the Attorney General, are wholly inapplicable to any question presented here. In those cases it is merely held, as obviously no other conclusion could be announced, that where the appeal is from the judgment on the judgment roll alone, the only recourse for the ascertainment of the facts is to the findings, and that in such case it will be presumed that the evidence justified the findings.

But there is still another consideration which, it seems to us, makes it not only proper, but quite necessary, in almost all cases, that the record on appeal should contain all the material and important testimony received at the trial, and this arises from the provisions of section 4½ of article 6 of the Constitution. That section, as is now pretty generally understood, provides that no judgment shall be set aside, or new trial granted in any case, on the ground of errors in instructing the jury or in the rulings of the court on the evidence or in the matters of pleading or procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Thus the appeal courts, as should be so, are expressly enjoined from reversing causes for error occurring in the trial of the case, however obvious and glaring, unless the evidence is of such a character as clearly to disclose that an affirmance would result in a miscarriage of justice. The importance, therefore, of presenting to the court to which the appeal has been taken all the testimony upon the vital points in the case is, if for no other reason than for that purpose, plainly apparent and readily to be apprehended. A reviewing court would hardly be in a position to determine whether a miscarriage of justice would follow the affirmance of a case in which the trial court had made egregious error in its rulings or instructions unless the evidence in full was before it, thus enabling it to determine, after a review thereof, whether the evidence appeared to be so conclusive of the defendant's guilt as to justify it in reaching the conclusion that an affirmance of the result arrived at by the jury would not produce a miscarriage of justice. But, as declared above, we think the testimony when brought up on an appeal from the judgment may be considered for any of the purposes of the appeal.

[2] 2. The notice filed by the defendant for the transcription of all the material testimony was in time and legally sufficient. No particular form of notice is required. All that is necessary is that the defendant shall, within the time prescribed, file a notice containing a statement setting forth in general terms the grounds of the appeal and the points upon which he relies, and designating therein the particular portions of the reporter's notes it will be necessary to have transcribed to fairly and fully present the points relied upon. This he has done, by designating all the testimony taken at the trial. The fact that he stated in the notice that he "thinks" or is of the "opinion" that all the testimony is necessary to the full and fair presentation of the points upon which he relies does not detract from the force or impair the efficacy of the notice for the purpose for which such a notice is required to be filed. In fact, it seems to us that the "designation" in any such case can be the result only of the opinion or belief or thought of the defendant that the testimony designated is necessary for the purposes of his appeal.

It follows from the foregoing views that the application for further transcription of the testimony in this case must be granted. It is accordingly ordered that the phonographic reporter who reported the case shall, within 15 days from the date of the filing of this opinion transcribe all such portions of the testimony taken and received at the trial of this case as have not already been transcribed and incorporated in the record now on file herein in this court, together with such portions of the address to the jury by the chief deputy district attorney as may be claimed to have been legally unwarranted and prejudicial to this defendant's substantial rights and as are not incorporated in the transcript now on file herein in this court, and to which remarks the said defendant duly excepted.

We concur: CHIPMAN, P. J.; BURNETT, J.

33 Cal. App. 394

PLATNAUER v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SACRAMENTO COUNTY et al. (Civ. 1600.)

(District Court of Appeal, Third District, California. April 6, 1917. Rehearing Denied by Supreme Court June 4, 1917.)

CONTEMPT 🔑68—COUNTIES 🔑197—APPEAL—COSTS.

Code Civ. Proc. § 1027, allowing costs to the prevailing party on appeal, and section 1032, allowing similar costs where an inferior court's decision is reviewed in a special proceeding, do not authorize taxing costs against a judge whose judgment of contempt is set aside, nor authorize collection of such costs from the county, especially where no claim therefor was presented to the county board of supervisors as required by Pol. Code, §§ 4075 and 4078.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 238–241; Counties, Cent. Dig. §§ 309–311.]

Petition by R. Platnauer against the Superior Court of County of Sacramento and Charles O. Busick, Judge thereof. On motion to disallow costs and to strike out. Motion to strike out granted.

A. M. Seymour, J. S. Daly, and R. Platnauer, all of Sacramento, for petitioner. Meredith, Landis & Chester, of Sacramento, for respondents.

BURNETT, J. A judgment was rendered by said superior court finding petitioner guilty of contempt, and, upon petition to this court, said judgment was set aside upon the ground that the conduct of petitioner was not such as to justify said finding. 163 Pac. 237. Petitioner thereupon filed in this court a memorandum of his costs incurred in the above-entitled proceeding, which respondent has moved the court to strike out "upon the ground that the decision and judgment of the court in said matter did not award costs to the petitioner, and upon the further ground that costs are not recoverable by petitioner in any event in said matter and are not authorized or allowed by law."

Petitioner claims that he is entitled to his costs by virtue of sections 1027 and 1032 of the Code of Civil Procedure. The former provides:

> "The prevailing party on appeal shall be entitled to his costs excepting when judgment is modified, and in that event the matter of costs is within the discretion of the appellate court," etc.

Section 1032 is:

> "When the decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review, in any other way than by appeal, the same costs must be allowed as in cases on appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case."

But this is not the ordinary action to which said sections of the code apply. It was directed against a court of record for the purpose of reviewing a judicial determination of that tribunal. In such cases the court is not liable for damages or for costs. The rule is stated in 23 Cyc. 567, as follows:

> "As a general rule no person is liable civilly for what he may do as a judge while acting within the limits of his jurisdiction, nor is he liable for neglect or refusal to act. The rule is especially true where the judge is one having general jurisdiction, and in such cases there is no liability even though he exceeds his authority. The overwhelming weight of authority is to the effect that, where a judge has full jurisdiction of the subject-matter and of the parties, whether his jurisdiction be a general or limited one, he is not liable civilly when he acts erroneously, illegally, or irregularly, and he is not chargeable with costs resulting from his erroneous rulings, or the cost of a proceeding to prohibit erroneous action on his part."

It has even been held that he is not liable when he acts from malicious or corrupt motives. 23 Cyc. 569. Here, it may be said, there is no contention nor evidence that the court acted from anything but proper motives. Nor is there any doubt that it had jurisdiction of petitioner and of the subject-matter. It, however, acted erroneously in finding from the facts that a contempt had been committed. It is true that its judgment was annulled on certiorari for excess of jurisdiction, but, after all, it presented a case, in the opinion of this court, of reaching a wrong conclusion from the premises involved therein. However, petitioner admits that no cost can be allowed against the judge or the court, but he contends:

> "That inasmuch as the statute is mandatory, and that he must be allowed his costs, and, seeing that they have been incurred in connection with the maintenance of the superior court of Sacramento county, the same should be paid by the county, and that respondent should be directed to draw an order on the treasurer of Sacramento county for the amount."

In support of this view he cites State v. Whitaker, 45 La. Ann. 1299, 14 South. 66; Haviland v. White, 7 How. Pr. (N. Y.) 154; and People v. Flake, 14 How. Pr. (N. Y.) 527.

The first of these involved the violation of an ordinance of the city of New Orleans. The judge of the recorder's court refused to allow "a suspension appeal," and it was held that his course was totally unwarranted. As to the costs it was said by the Supreme Court:

> "Although the action of the city judge in the matter was unjustifiable, reasons of public policy protect him from being made to pay the costs. They must be borne by the city of New Orleans."

The point involved in 7 How. Pr. (N. Y.) 154, was whether the provision of the statute as to costs applied to certiorari proceedings. After "a good deal of consideration and considerable hesitation," the court reached the conclusion that it was a case for costs, but it is to be observed that there were adversary parties in the litigation, and the costs were awarded against the losing party.

The Flake Case, supra, was similar to State v. Whitaker, supra. It was held that the referees or commissioners of highway acted as judges and constituted a court of inferior jurisdiction within the meaning of the Code of New York. In speaking of the action of said commissioners in the matter it was said:

> "Their error is an error of judgment, at least in the view of this court, and no obliquity of motive is to be imputed to them. They should not, therefore, be charged with the costs of the appeal."

It was further held that the appellants should not be charged with the costs, and the final conclusion of the court was announced in these words:

> "On the whole, I think the proper direction, under all the circumstances of the case, is that the costs of the relator in this court, as of an action at issue, or an issue of law, be awarded against and collected of the town of Westfield, and that the amount thereof be collected by a tax, as a part of the town charges of that town, in the next levy of taxes."

Thus it appears that two of these cases seem to afford some countenance to the contention of petitioner herein, but we can find no law in this state that authorizes us to make the order which petitioner seeks.

The county itself was not a party to the action. Besides, the superior court is an agency of the state rather than of the county. It is the superior court of the state of California in and for the county of Sacramento. Again, it is difficult to understand how said costs were incurred "in connection with the maintenance of the superior court." But if we assume that petitioner has a claim against the county for his outlay, he must in the first instance present it to the board of supervisors for allowance. If they reject it, he can then maintain the proper action for its recovery. Sections 4075 and 4078, Pol. Code.

As we are satisfied that no allowance of costs should be awarded in this proceeding, the motion to strike out is granted.

We concur: CHIPMAN, P. J.; HART, J.

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33 Cal. App. 331

SWEENEY v. BOARD OF TRUSTEES OF AUBURN SCHOOL DIST. OF CITY OF AUBURN, PLACER COUNTY. (Civ. 1652.)

(District Court of Appeal, Third District, California. March 27, 1917.)

1. MECHANICS' LIENS 🔑113(2) — BUILDING CONTRACTS—RIGHTS OF MATERIALMEN.

Under Code Civ. Proc. § 1184, providing that upon notice of materialmen, etc., the owner of property not subject to mechanics' liens shall withhold from the contractor sufficient money to cover such claims, a school district may withhold from a contractor's executrix sufficient money to cover claims filed by materialmen previous to the executrix's demand for payment.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 148.]

2. MECHANICS' LIENS 🔑228 — BUILDING CONTRACTS—RIGHTS OF MATERIALMEN.

The right of a contractor's materialmen under Code Civ. Proc. § 1183, to sue on a bond insuring construction of a school building, etc., does not exclude their right to share in money withheld from contractor by the school district pursuant to section 1184.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 411.]

Petition for writ of mandate by Mary Sweeney, executrix under last will of George S. Hayes, against the Board of Trustees of Auburn School District of the City of Auburn, Placer County. Writ denied.

P. H. Johnson and W. H. Ashby, both of Sacramento, for petitioner. Meredith, Landis & Chester and Chas. A. Swisler, all of Sacramento, for respondent.

CHIPMAN, P. J. Mandate. It appears from the petition that on March 29, 1915, defendant entered into a written contract with plaintiff's testate by which he agreed to furnish the materials and erect for defendant a school building for the agreed price of $35,725; that before entering upon the performance of said work the said Hayes filed with defendant a good and sufficient bond in a sum not less than one-half the total amount payable by the terms of said contract, which said bond was duly executed, filed, and approved according to the requirements of the act approved May 1, 1911 (St. 1911, p. 1422), entitled "An act to amend * * * 'An act to secure the payment of the claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal or other public work,'" approved March 27, 1897, "and was given for the purpose of securing the payment of such claims"; that the said Hayes duly performed all the conditions of said contract and completed said building on or about February 12, 1916, and said building was duly accepted by defendant and used thereafter as a public school building; that the whole sum of $35,725 is long past due, and there remains unpaid thereon the sum of $10,844.75; that at all times mentioned there was in the hands of and subject to the order of defendant, appropriated for the specific purpose of paying said indebtedness, more than sufficient to pay said balance of $10,844.75; that the final certificate of the completion of said building of the architect of defendant duly issued and is in the hands of defendant; that all payments on said contract were made by warrants drawn by defendant payable to said Hayes; that there is still due, owing, and unpaid to said Hayes on said contract the sum of $10,844.75 for the payment of which petitioner has duly demanded of defendant the warrant for said sum, but defendant has refused and still refuses to issue the same. The death of said Hayes and appointment of plaintiff as executrix of his last will are alleged.

A general demurrer was filed, and also an answer. Among other facts it is alleged in the answer that a large number of persons, naming them, "claim to have furnished materials in the construction of said school building or to have rendered and performed work, labor and services thereon." It is further alleged as follows:

> "(5) That each and all of said persons have heretofore and had prior to any demand being made on the respondent by the said petitioner herein, or the said George S. Hayes, for an order or warrant for the payment of any sum whatever payable under said contract, made demand upon and filed with respondent notices that they had respectively performed labor, or furnished materials, or both, to the said George S. Hayes, or to other persons claiming to have been acting by authority of said George S. Hayes, and stating in general terms the kind of labor and materials and the name of the person to, or for whom, the same was done or furnished, or both, and of the whole agreed to be done or furnished, or both; that such notices were respectively delivered by each and all of the said persons, firms, and corporations hereinbefore named and left with respondent and were in writing; that each and all of said notices demanded of respondent that it withhold from the said George S. Hayes sufficient money due, or that might become due, to said George S. Hayes to answer such claims and each and all of said respective claims. That said notices in all respects complied with section 1184 of the Code of Civil Procedure.
>
> "(6) Avers that the claims of said various persons and the amounts specified in the notices of the said various persons hereinbefore named filed and left with respondent exceed the sum of $21,000.
>
> "(7) Avers that neither the respondent, Auburn school district, nor the board of trustees of said Auburn school district, nor any member of said board of trustees has any knowledge, information, or belief as to, and is ignorant of the merits of, the respective claims of the hereinbefore named persons, firms, and corporations to the balance of said moneys payable under said contract, and does not know to whom said balance should be paid."

It was agreed by counsel at the argument that such alleged notices were duly given as alleged, and that the sole question to be determined is whether they justified the defendant in refusing to issue the warrant demanded by plaintiff.

Section 1184 of the Code of Civil Procedure reads as follows:

> "Any of the persons mentioned in the preceding section, except the contractor, may at any time give to the owner a notice that they have performed labor or furnished materials, or both, to the contractor or other person acting by the authority of the owner, or that they have agreed to do so, stating in general terms the kind of labor and materials and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both, and any of said persons who shall on the written demand of the owner refuse to give such notice shall thereby deprive himself of the right to claim a lien under this chapter. Such notice may be given by delivering the same to said owner personally, or by leaving it at his residence or place of business with some person in charge, or by delivering it to his architect, or by leaving it at the latter's office with some person in charge. No such notice shall be invalid by reason of any defect in form: Provided, it is sufficient to inform the owner of the substantial matters herein provided for. *Upon such notice being given it shall be lawful for the owner to withhold, and in the case of property which, for reasons of public policy or otherwise, is not subject to the liens in this chapter provided for, the owner or person who contracted with the contractor, shall withhold from his contractor sufficient money due or that may become due to such contractor to answer such claim and any lien that may be filed therefor including the reasonable cost of any litigation thereunder.*"

[1] The question now here arises out of that part of the section quoted in italics. This section has long existed substantially in its present form, with the exception that by the amendment of 1911 (Stats. 1911, p. 1315) there was introduced the following in the last paragraph:

> "And in the case of property which, for reasons of public policy or otherwise, is not subject to the liens in this chapter provided for," the owner shall withhold, etc.

The nature and effect of the notice referred to in the statute as it stood prior to the amendment of 1911 was stated in Diamond Match Co. v. Silberstein, 165 Cal. 282, 288, 131 Pac. 874. It was there said that it was intended to serve as an "equitable assignment"; that the notice "is a form of equitable subrogation regulated by statute" and entitled the persons serving the notice to receive so much of the money due the contractor as would satisfy the claims of the persons giving notice"; that the "right to a recovery of the money so garnished by the notice does not depend upon the establishment of a lien," but is "a cumulative" remedy. The decisions of the Supreme Court settling the foregoing principles are cited in the opinion.

The case of Miles v. Ryan, 172 Cal. 208, 157 Pac. 5, was a case similar to the one in hand. It was there pointed out that, under the decisions of which Mayrhofer v. Board, 89 Cal. 110, 26 Pac. 646, 23 Am. St. Rep. 451, is an example, neither the Constitution nor the statute gives laborers or materialmen any lien against public buildings, and in the opinion of the court it is shown why in the very nature of such cases no lien should be given, and that the rights of laborers and materialmen must be determined by the section 1184, Code of Civil Procedure. Quoting the provision above italicized, the court said:

> "The provision in the last quotation referring to property not subject to the liens was added by the amendment of 1911. It merely put in statutory form the previous decisions of this court. In other respects the section is substantially the same as it was prior to said amendment. It has been held that the proceeding authorized by this section is substantially an equitable garnishment by the claimant of the fund due to the contractor from the owner (Bates v. Santa Barbara, 90 Cal. 543 [27 Pac. 438]), and that it secures to the person giving the notice a claim on the funds due which is paramount to that of the contractor, or any person claiming under him by assignment or attachment made after the service of such notice (First National Bank v. Perris Irr. Dist., 107 Cal. 55 [40 Pac. 45]; Newport, etc., Co. v. Drew, 125 Cal. 585 [58 Pac. 187]; Long Beach School Dist. v. Lutge, 129 Cal. 409 [62 Pac. 36])."

To the foregoing cases may be added Clark v. Beryle, 160 Cal. 311, 116 Pac. 739; Dorris v. Alturas School Dist., 25 Cal. App. 30, 142 Pac. 795; Suisun L. Co. v. Fairfield

School Dist., 19 Cal. App. 587, 595, 127 Pac. 349.

Miles v. Ryan, supra, involved the priority of right between the labor claimant and an attaching judgment creditor who had served his notice of garnishment or attachment upon the owner before the laborer had served his notice upon the owner. The court held that the attachment took priority. But it very clearly appears that, had the laborer's notice been served before the attachment, his claim would have been held good against the fund in the hands of the owner belonging to the contractor by reason of the notice and section 1184.

[2] It is further contended that the remedy given laborers and materialmen to resort to the bond given under section 1183 is exclusive. In the Diamond Match Co. Case, supra, it was shown that the money garnished by means of the notice does not depend upon the establishment of a lien but is a cumulative remedy. The lien provided for is found in section 1183, as is also the bond required to be given. The one is no more exclusive than the other, nor is the remedy by notice less cumulative to the one than to the other. Goldtree v. City of San Diego, 8 Cal. App. 505, 97 Pac. 216. See a very careful and timely opinion as to the purpose and scope of the amendatory act of 1911 in Roystone Co. v. Darling, 171 Cal. 526, 154 Pac. 15.

The writ is denied.

We concur: BURNETT, J.; HART, J.

33 Cal. App. 365

PEOPLE v. SLAUGHTER. (Cr. 368.)

(District Court of Appeal, Third District, California. April 4, 1917. Rehearing Denied by Supreme Court June 2, 1917.)

1. Indictment and Information 🔑75(2) — Sufficiency—Clerical Error.

An indictment charging that accused wrongfully, etc., "accomplish" an act of sexual intercourse, etc., is not erroneous because not using the words "did accomplish."

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 204.]

2. Jury 🔑70(6)—Special Venire.

Under Code Civ. Proc. §§ 226, 227, authorizing additional jurors to be summoned when the regular venire is insufficient, the court in a criminal case may summon special venire before the regular jurors are exhausted, where all regular jurors were examined before names were drawn from the special venire.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 322, 330.]

3. Jury 🔑133—Competency of Jurors.

In a criminal case doubt as to a juror's competency should be resolved in defendant's favor.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 586–598.]

4. Jury 🔑110(14) — Objection to Juror — Failure to Peremptorily Challenge.

Defendant in a criminal case cannot complain because a juror was accepted over his objection where he might have eliminated him by a peremptory challenge.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 520.]

5. Jury 🔑103(3) — Competency of Juror — Formation of Opinion.

Accepting a juror in a criminal case who stated that he could lay aside an opinion derived from newspaper reports and short conversations and decide the case on the evidence *held* not reversible error.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 463.]

6. Witnesses 🔑396(1) — Explanation of Contradictory Statements.

In prosecution for unlawful sexual intercourse, prosecutrix may explain circumstances under which she wrote letters and signed an affidavit contradicting her direct testimony and elicited upon her cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1261, 1262.]

7. Criminal Law 🔑680(1)—Reception of Evidence—Order of Proof.

Receiving evidence of other similar acts out of order is not reversible error where the particular offense relied on for conviction was stated at the beginning of the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1609, 1613.]

8. Criminal Law 🔑822(1)—Instructions—Construction as a Whole.

An instruction authorizing conviction if the offense occurred at any time on a specified day is not erroneous because there was evidence of two offenses on such day, where another instruction specifically limited such general language to one of such offenses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1994, 3158.]

9. Criminal Law 🔑789(14)—Instructions —Reasonable Doubt.

An instruction that other similar acts may be considered to determine whether it was probable the act charged was committed is not erroneous because authorizing a conviction upon a probability of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849, 1919, 1960, 1967.]

10. Criminal Law 🔑789(4)—Instructions—Reasonable Doubt.

An instruction that one witness' testimony may establish any fact necessary to be proved if believed beyond a reasonable doubt is not erroneous, although awkwardly expressed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849, 1880, 1909, 1960, 1967.]

11. Criminal Law 🔑829(9)—Requested Instructions—Presumption of Innocence.

Refusing a requested instruction in a criminal case that the presumption of innocence is an "instrument of proof" *held* not erroneous, where another instruction clearly charged that such presumption is not a mere form, but attends defendant through all stages of the trial, etc.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

12. Criminal Law 🔑859 — Trial — Jury's Requests to Have Evidence Read.

Where jurors in a criminal case after retiring requested that certain evidence be read them, the reporter was instructed to locate it, and jury told how long it would probably take, and they expressed opinion that they might agree without such evidence, which they did, defendant's rights under Pen. Code, § 1138, providing that information desired by jury must be given in presence of defendant, etc., are not violated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1600, 2064.]

13. Rape 🔑54(1) — Sufficiency of Evidence—Uncorroborated Testimony.

A prosecutrix's uncorroborated testimony may sustain a conviction for unlawful sexual intercourse.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 83.]

14. Rape 🔑52(1) — Sufficiency of Evidence.

Evidence consisting chiefly of a 15 year old prosecutrix's testimony, which was impeached by contradictory letters and affidavit and others witnesses, *held* to sustain a conviction for unlawful sexual intercourse.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71, 72, 76.]

15. Criminal Law 🔑1158(1)—Appeal and Error—Reviewing Evidence.

Const. art. 6, § 4½, prohibiting reversals unless court concludes the error resulted in a miscarriage of justice after examining the entire case, including the evidence, does not authorize the appellate court to weigh the evidence and judge the credibility of witnesses in a criminal case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3070, 3071, 3074.]

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Madison Slaughter was convicted of unlawful sexual intercourse, and appeals. Affirmed.

Rehearing denied by Supreme Court. See People v. Davis, 147 Cal. 346, 81 Pac. 718; Burke v. Maze, 10 Cal. App. 206, 211, 101 Pac. 438, 440.

Wm. H. Schooler, of San Francisco, and Madison Slaughter, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. We are not unmindful of the grave importance of the questions involved in the determination of this appeal. We are appreciative of the significance of the various circumstances connected with the charge and the trial to which our attention has been earnestly invited. We have given serious attention especially to the reiterated and emphatic declaration that appellant did not receive that fair and impartial trial which is the unquestionable right of every American citizen, and we have considered as carefully as possible the various specified particular grounds for that contention. It is undoubtedly true that a charge of this kind is likely to make such an impression on the minds of many people in the vicinity as to unfit them for that calm, impartial, and deliberate action which the law demands of every juror. The mere accusation when given wings, as usually happens in such cases, excites the prejudice, arouses the resentment, and disturbs and impairs the judgment of a part of the community, and there is danger, of course, that the unfair and hostile attitude toward the defendant thereby engendered may reach the jury box and even the judge upon the bench. The fact that the one accused is a minister of the gospel intensifies the situation and increases the probability of unfavorable and malevolent impressions and sentiments. Even upright and righteous persons with a due conception of the importance and sanctity of this high calling are sometimes too easily moved to give credence to a story impugning the chastity of one filling the holy office of the ministry, and therefore also too ready to contribute to the creation of an unfavorable environment for the dispassionate determination of the guilt or innocence of the accused. It is more emphatically true that in every community there are some small souls who by reason of their sinister and malignant opposition to the cause of religion and through a depraved desire to cripple the efficiency of religious efforts and to destroy confidence in its advocates and promoters, with avid glee welcome every imputation, especially of the kind involved herein, against the character and standing of a minister of the gospel. These people generally also hasten to prejudge the case and with feverish anxiety seek to inoculate as many as possible of the community with the virus of their own prejudice and hatred. These and other unfavorable considerations were, no doubt, at work in the community wherein the defendant was tried and convicted, and probably quite a number of the citizens had irrevocably determined his guilt before a witness was heard in court.

However, we feel satisfied that the vast majority of the people of Butte county, moved by the spirit of fair play and a desire that there be no unwarranted interference with the orderly processes of the law, were in that mental and moral frame of mind essential to the impartial administration of justice as between the plaintiff and defendant.

But, what is more to the point, we are convinced from an examination of the record that there was no such prejudice or hostility on the part of the trial judge or of any of the jurors nor was there any misconduct on the part of either nor any such acts or omissions during the course of the trial as would legally justify this court in setting aside the verdict. We go further, and say that in none of the contentions of appellant do we find sufficient merit to warrant any interference with the judgment of the lower court, as will more fully appear while we proceed to notice the specific points which are urged upon our attention with great ability and impressiveness in the four different briefs filed in his behalf, three of which bearing his own signature were undoubtedly prepared by a former astute member of the bar now sojourning at San Quentin.

[1] The indictment is grammatically defec-

tive in using the word "accomplish" instead of "accomplished" or "did accomplish," but while the district attorney thus manifested a degree of carelessness it is perfectly apparent that the defendant suffered no prejudice by reason of the defective averment. The charging part of said instrument is as follows:

> "The said Madison Slaughter on or about the 7th day of November, A. D. 1915, at the county of Butte and state of California, and before the finding of this indictment wrongfully, unlawfully, willfully, and feloniously accomplish an act of sexual intercourse with one Gertrude Lamson, * * * a female under the age of 18 years, to wit, the age of 15 years," etc.

If any one at all familiar with the English language could not understand that the intention was to charge that the said Madison Slaughter "did accomplish" the act on said date, his sanity would be the proper subject for investigation. And yet, with great earnestness and apparent sincerity, it is argued that the cause should be reversed for this verbal inaccuracy. We are spared any further comment, however, for the reason that the identical point was decided in the case of People v. Haagen, 139 Cal. 115, 72 Pac. 836, wherein it was said:

> "We do not think there is any merit in this contention."

[2] The jurors drawn on the regular venire were insufficient to complete the jury, and a special venire was issued. This is made the subject of criticism and complaint by appellant, but the practice is authorized by the Code and sanctioned by the decisions of the courts. Sections 226 and 227, Code Civ. Proc.; People v. Sehorn, 116 Cal. 508, 48 Pac. 495; People v. Suesser, 142 Cal. 359, 75 Pac. 1093. In the Sehorn Case it was said:

> "There may, no doubt, be cases where, as was said in Levy v. Wilson, 69 Cal. 111 [10 Pac. 272], the drawing of the entire jury from the box would be 'more consistent with the correct administration of justice'; but it has frequently been held, with respect to both grand and trial jurors, that after the venire drawn from the regular jurors had been exhausted the court may order additional jurors to be summoned from the county at large, and that such proceeding is valid—at least, unless there has been a gross abuse of discretion."

There is nothing in the case here to show that the discretion thus vested in the trial court was not properly exercised. No doubt, the special venire was ordered to save time and expense, and we are not authorized to conclude that appellant suffered any prejudice thereby. The fact that the order was made before all the jurors on the preceding venire had been examined is of no moment, since such examination was completed before any name was drawn from the special venire. The procedure was, at most, an irregularity which worked no damage.

[3-5] Complaint is made that the court improperly overruled defendant's challenge to certain jurors for bias. Of the 12 selected it is not pretended that such objection could be made to more than two. These are John Finning and T. R. Boalt. As to the others there can be no possible controversy. The court might well have excused Mr. Finning, although he declared that he could and would disregard his opinion and be controlled entirely by the evidence and the instructions. However, his was a doubtful case, and there should be no hesitation in resolving such doubt in favor of the defendant. But, for the reason that he accepted the juror while still having five peremptory challenges, appellant is in no position to complain of the ruling. The point is covered and controlled by the cases of People v. Durrant, 116 Cal. 196, 48 Pac. 75; People v. Schafer, 161 Cal. 576, 119 Pac. 920; Scragg v. Sallee, 24 Cal. App. 139, 140 Pac. 706; and People v. Perry, 25 Cal. App. 338, 143 Pac. 798. Therein this and the Supreme Court approved the doctrine stated in Thompson on Trials, § 120, as follows:

> "It is a rule of paramount importance that errors committed in overruling challenges for cause are not grounds of reversal, unless it be shown an objectionable juror was forced upon the challenging party after he had exhausted his peremptory challenges; if his peremptory challenges remain unexhausted, so that he might have excluded the objectionable juror by that means, he has no grounds of complaint."

It is true that his peremptory challenges were finally exhausted, but not until he had accepted Mr. Finning, and he was sworn to try the case. In People v. Riggins, 159 Cal. 113, 112 Pac. 862, relied upon by appellant, it appears—

> "not only that the defendant exhausted all his peremptory challenges, but that by reason of the rulings of the court he was forced to accept McKeen, a juror objectionable to him and challenged by him for cause, and also that he asked the privilege of challenging McKeen peremptorily, and that his request was denied."

The rule is one not only of expediency, but of justice. The peremptory challenge affords an auxiliary or additional method for getting rid of an objectionable juror. If the defendant feels that a juror is disqualified, he may challenge him for cause, but the court may not concur in that view. If so, and the limit of peremptory challenges has not been reached, the defendant must avail himself of that remedy, or else be deemed to have waived his objection. When the peremptory challenges have been exhausted, the situation, of course, is quite different, as he then has only the one remedy, and in case of an adverse ruling he may have it reviewed by the appellate court. Such is the instance of juror Boalt. On his direct examination he testified that he had an opinion in regard to the case, and, asked as to how it was formed, he answered, "By newspaper talk and talking on the streets;" and, in reply to the question, "In what other manner if any was this opinion formed?" he said, "I have heard a few words that took place here; I heard of some parties who talked with parties that were here who quoted me about ten words." If it be argued that he meant by these answers that his opinion was influenced by the ten words that had been repeated in his presence, we cannot assume that they were prejudicial to appellant, since it does not appear what they were. Besides, in the further course of the examination he stated that his opinion was founded entirely upon newspaper reports and street gossip, and still further that his opinion was based only upon "what little I read in the paper." It was therefore for the trial court to determine what was the source of his opinion and the decision is binding upon this court. Indeed, the examination of the juror presents an instance for the application of the rule laid down in People v. Ryan, 152 Cal. 371, 92 Pac. 853, and People v. Edwards, 163 Cal. 752, 127 Pac. 58, and other decisions. In the former it is said:

> "The trial court must decide which of the answers most truly shows the juror's mind."

Indeed, so far as we can judge from the cold record, Mr. Boalt was unbiased and entirely disposed to be fair and just. He declared several times that he would lay aside any opinion that he might have and be guided entirely by the evidence and the instructions of the court, and that he would act fairly and impartially in the case. As we read the record, we are satisfied there is no just ground for complaint as to the selection and impanelment of the jury.

[6] Among the many questions presented as to the admissibilty of evidence, we notice first the ruling of the court in relation to the explanation by the prosecutrix of an affidavit and two letters made and written by her. These instruments were secured by the defendant and offered in evidence on her cross-examination.

The first letter was addressed to Mr. Kennedy, one of the counsel for appellant, was dated February 19, 1916, and was as follows:

> "I am writing this of my own free will, and under no one's influence. I have done a very great wrong which I am very sorry for and want to correct. I have told an outrageous lie. I don't know whether any one will speak to me or not; I hope they will. That what I have charged against Mr. Slaughter is an absolute lie, which I want seen to and done away with soon as possible. And I will say with the oath of God I will never tell another lie to any one of any kind again as long as I lives. I was very angry when I told this lie and the second one I told it to encouraged me so much I kept it up. Now I deny it, and deny it forever. Remember no one has influenced me in any way only to tell the truth, unless it was the partys that got me in this mess."

The other letter was directed to "Mr. and Mrs. Slaughter and Girls," and was of similar tenor. It concluded with the declaration:

> "I am sorry to the bottom of my heart and soul and experience has been a very dear teacher to me and I mean to begin over again and live a new good right life."

The affidavit is clearly in the language of an expert, and not such as would have been chosen by the prosecutrix. Therein, among others, were the statements that said letters contained the truth; that she was not influenced by Mr. Kennedy to write the same, but did so of her own free will; that said statement was made to right a great wrong; that she never had sexual intercourse with defendant at any time or place, and that he had always acted toward her "in a proper, gentlemanly, and straightforward way"; that the affidavit was made to rectify a great wrong, and, while made at the request of Guy R. Kennedy, it "has been read to me, and the entire contents of the same is the truth, the whole truth, and nothing but the truth." The witness also testified on said cross-examination as to declarations she had made to Mr. Schooler, one of the attorneys for appellant, denying any improper relations with Mr. Slaughter. Over strenuous objections the witness was permitted to explain these various statements and to detail the circumstances under which they were made. The purpose was, of course, to show the undue influence that was exerted in behalf of appellant and to minimize or nullify the effect upon her credibility of her different contradictions. It was the theory of the plaintiff that a conspiracy existed in which the mother, father, and defendant with his attorneys participated, designed to coerce the witness into a renunciation of her charges and an abandonment of the prosecution. On redirect examination the people therefore, in support of the contention, were permited to show that she was told her mother's health was bad, and that she would cause her death if she persisted in the prosecution; that defendant himself brought her father, Frederick Lamson, to his daughter, and the father said: "There, see what you have done; you will kill your mother"; that one of the defendant's attorneys came in the nighttime to her home to use his influence upon her; that her mother told her the defendant should not be prosecuted; that statements were made by defendant's attorneys calculated to induce the belief that she would get into trouble if she insisted upon the charge against Mr. Slaughter and some other circumstances of similar tenor were related by the witness. To illustrate this line of examination we may set out her statement of what her father said to her:

> "He had told me that he believed my story and that he had believed it all along, but for me not to say anything or not to tell mamma that he did, or to tell anybody, and during the time mamma was having these spells he said: 'Whatever she said to answer "Yes" and never to dispute her in anything,' and he said that I would probably be the cause of her death, anyway."

We think there was no violation therein of the familiar rule permitting a witness to explain contradictory statements. It would be strange if her mouth were closed as to the circumstances and inducements of the transaction called out on cross-examination for the purpose of impeaching her veracity and destroying her credibility. Some portions of said testimony may have been objectionable, but there was no motion to strike them out, and the questions themselves were entirely proper. Of course, the only purpose of such examination is as we have indicated, and her recital of certain statements made to her was not to be considered as evidence of the truth of said declarations. If this was not made entirely clear to the jury, it was the fault of appellant in not requesting a specific direction to that effect.

In People v. Smallman, 55 Cal. 185, on the cross-examination of the prosecuting witness, defendants, for the purpose of affecting her credibility, offered an affidavit made and signed by her, but written by one Carey, who presented and read it to the witness. On the direct examination the witness was asked as to the circumstances under which the affidavit was made, and what conversation she had with Carey about it. The defendants objected to any conversation of witness with Carey in relation to this affidavit which was had in the absence of the defendant. The court overruled the objection, and admitted the evidence. The Supreme Court said:

> "We see no error in this ruling. It was proper to ask the witness as to every matter which occurred in relation to and in connection with, the affidavit."

In People v. Wessel, 98 Cal. 352, 33 Pac. 216, the court said:

> "To contradict the testimony of the prosecutrix, who was a child of eleven years, the defense read her testimony before the committing magistrate, in which it was claimed she had made statements inconsistent with her evidence on the trial. Thereupon the prosecution recalled the prosecutrix and asked her to explain the discrepancies. This course was too plainly proper and of too common practice to justify the presentation of the question here."

In Bradford v. Woodworth, 108 Cal. 684, 41 Pac. 797, it was said:

> "It was proper to permit plaintiff to explain in rebuttal the telegram which had been introduced by the defendant to contradict his testimony."

See, also, People v. Glover, 141 Cal. 233, 74 Pac. 745; Risdon v. Yates, 145 Cal. 212, 78 Pac. 641; Hoggan v. Cahoon, 31 Utah, 172, 87 Pac. 164; Strebin v. Lavengood, 163 Ind. 478, 71 N. E. 494.

The prosecution adopted a circuitous method of obtaining the explanation and asked of the witness many unnecessary questions, but circumlocution or volubility is not necessarily error. The witness was not lacking in intelligence or assurance, and a simple question as to why she made such contradictory statements would probably have produced the explanation and avoided the necessity for such protracted and wearisome examination. However, the defendant opened the door for an investigation of the reasons that moved and influenced the witness to make such contradictory statements, and we find therein no prejudicial error. The cases cited as to this point by appellant do not sustain his contention.

In Wagner v. People, 30 Mich. 384, the evidence brought out on the cross-examination was incompetent, although admitted without objection, and it was correctly held that this hearsay evidence was not subject to modification or explanation on the redirect examination.

The later Michigan case, People v. Hanifan, 98 Mich. 32, 56 N. W. 1048, supports respondent's position here. Therein it was held that:

> "Where, on the trial of a respondent for larceny, his counsel show on the cross-examination of one of the people's witnesses that the witness had some trouble with the respondent subsequent to the alleged larceny, and that he would like to get even with respondent, it is proper to permit the witness, on his redirect examination, to explain the nature of the trouble."

In Atherton v. Defreeze, 129 Mich. 364, 88 N. W. 886, where the relevant part of a conversation was received, it was held that on cross-examination it was not proper to introduce another part of the conversation which had no connection with the issue involved, and had no bearing whatever upon the part that was relevant.

The case of Garey v. Nicholson, 24 Wend. (N. Y.) 350, is of similar import. Referring to the rule that, where a part of a conversation is introduced in evidence by one party the other has a right to call for the whole conversation, the Supreme Court of New York said:

> "That, however, must obviously mean that the additional conversation called for should be relevant to the matter in issue. All evidence is received under that qualification, and, if not so restrained, might operate as a waste of time. Other subjects might be introduced having no connection with the subject-matter of the suit."

Commonwealth v. Keyes, 11 Gray (Mass.) 323, is to the same effect. In reference to the complaint of the defendant that she was debarred from proving the residue of a conversation of which a part had been produced by the prosecution against her, it was declared by the Supreme Court of Massachusetts:

> "The proof in such case is to be confined to what was said upon or concerning those matters which are made subjects of inquiry or investigation. Every remark or observation made upon those topics is to be received as competent evidence, because they may essentially modify the character and purport of the whole conversation, and vitally affect what might otherwise appear to be explicitly asserted or denied. 1 Green. Ev. §§ 201–218."

A great many other rulings of the court as to the admissibility of evidence are severely criticized by appellant. We do not feel called upon to notice them specifically, although they have been carefully examined Some of them, it may be said, are of doubtful propriety, but it could hardly be otherwise, considering the mass of testimony and the multitude of objections. However, as before stated, we find in none of the rulings any warrant for a reversal of the judgment Each side was very swift to object to questions propounded by the other, and thereby the time of the trial was greatly extended, and the labor of the trial judge was largely increased. In the heat of the contest, also, counsel indulged in frequent interruptions and in occasional acrimonious suggestions which, no doubt, tried the patience of the court, but we believe the trial was conducted with due regard for the proprieties of juridical procedure.

[7] That other acts of a similar nature were permitted to be shown out of order was not error in view of the fact that at the beginning of the trial the district attorney made and stated the election of the prosecution as to the particular offense for which a conviction was asked. People v. Koller, 142 Cal. 624, 76 Pac. 500.

[8] Earnest objection is made to this instruction given by the court:

> "The indictment in this case charging defendant with the offense for which he is now on trial was filed January 31, 1916. In that indictment it is alleged that the offense was committed by defendant on or about the 7th day of November, 1915, and before the finding of the indictment. It is not necessary to prove the commission of the offense now on trial at the precise time or date alleged in the indictment, but it is sufficient to prove its commission at any time on November 14, 1915, if the evidence proves beyond a reasonable doubt that defendant on said last-mentioned date has been guilty of the offense of rape charged in the indictment."

It is not claimed that the people are confined to the precise date contained in the indictment, and it is admitted that ordinarily the instruction would be unobjectionable, but it is insisted that by reason of the fact that there was evidence of two separate offenses on said date of November 14th the instruction authorized a conviction if a part of the jury believed that one and the remaining jurors believed that the other was established, although there was no concurrence of the 12 as to to either of said declared offenses. There would be much force in this criticism were it not for the fact that this instruction was qualified by another reading as follows:

> "I will instruct you now that wherever in these instructions I have referred to the act as charged of November 14, 1915, I have referred to the act charged as having been committed on a chair in the dining room as charged in the evidence as the only act upon which he is now on trial."

This was not inconsistent with the former, but a definite limitation of the more general language, and it removed any probability of the result apprehended by appellant. People v. Besold, 154 Cal. 370, 97 Pac. 871.

[9] In instruction No. 42 the jury was directed that they might consider previous acts similar to the one charged in the indictment as tending to show the disposition of the defendant towards the prosecutrix and "for the purpose of ascertaining whether it is or is not more probable that the act of sexual intercourse charged to have been committed on November 14, 1915, was committed and for no other purpose." There is no merit in the contention that thereby the jurors were instructed that they might convict upon a probability of guilt. It signified no more than an instruction that they might consider such evidence as bearing upon the question of appellant's guilt or innocence of the charge made in the indictment. If they were to consider it at all, it is difficult to understand how it could be regarded except as relating to the probability of guilt. As to the rule requiring the jury to be convinced beyond a reasonable doubt of the defendant's guilt in order to convict they were fully and repeatedly instructed. It may be said that a similar instruction to the one before us was approved in People v. Mathews, 139 Cal. 530, 73 Pac. 416.

[10] Instruction No. 40 was to the effect that in such prosecution the testimony of one witness is sufficient to establish any fact necessary to be proved if believed by the jury beyond a reasonable doubt. There can be no fault found with the principle therein declared, although it is somewhat awkwardly expressed. The jury, though, could not have been misled by it.

[11] The defendant requested an instruction as to the presumption of innocence. Therein was an expression that "this presumption is an instrument of proof," and it is contended that this specific affirmation ought to have been brought to the attention of the jury. It is perfectly clear, however, that the consideration which should be accorded to this presumption was fully set forth in several instructions given by the court. That it was not designated as an "instrument of proof" or "evidence" is a mere verbal criticism without merit. People v. Linares, 142 Cal. 17, 75 Pac. 308; Agnew v. United States, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624. The fact is that the rejected instruction would have added nothing to the following which was given:

> "The jury is instructed that the defendant comes before you clothed with the presumption of innocence, and that such presumption is not a mere form to be disregarded by the jury at its pleasure, but it is a substantial part of the law of the land, and binding on the jury in this case, as in all criminal cases, and it is the duty of the jury to give the defendant in this case the full benefit of this presumption, and to acquit him, unless the evidence in this case convinces you of his guilt as charged beyond all reasonable doubt; and you are compelled under your oaths to carry this presumption in your minds during every stage of the trial, and give the defendant the benefit of it until such time as you may be convinced beyond all reasonable doubt of his guilt, as charged in the specific offense elected by the prosecution, that of November 14, 1915."

The foregoing was given at the request of appellant, and leaves nothing to be desired on the subject. Indeed, the jury were fully and correctly instructed on every material phase of the case, and no just criticism can be made of the court in reference to the instructions given or refused.

[12] After the submission of the cause and the jury had deliberated for several hours they returned, and, through their foreman, made a request to have a portion of the testimony read. The proceedings in relation to it are shown by the record as follows:

> "Foreman Darrell: If the court please, we wish to apologize to your honor and the attorneys and the court officials and others present

for causing you to convene court at this time, but there are certain points in the evidence upon which we do not agree, and we deem it necessary that the evidence be read. The clerk has the memoranda for the evidence we desire. The Court: Yes; I see. Mr. McCallum, you have seen that memoranda, have you? Show it to Mr. Schooler. (At this time Mr. Schooler examines note containing request for testimony.) The Court (to the reporter): How long would it take you, Mr. McCallum, to prepare yourself to read that to this jury? (The testimony requested by the jury to be read included the testimony of Gertrude Lamson, cross and direct, and that of Thomas Whidden and Mrs. Whidden.) (At this time the reporter stated that in order to go over the entire direct and cross examination of Gertrude Lamson, of Thomas Whidden and of Mrs. Whidden, which testimony extended continuously over a period of approximately four days, that he might be able to locate the particular testimony desired in an hour, but in order to look over all the testimony mentioned by the jury and to locate it in its entirety with the required certainty necessary, it would take perhaps several hours, and that to read the entire testimony mentioned, thus entirely avoiding the danger of omitting any portion of that mentioned by the jury, that it would require at least three days' time.) Foreman Darrell: If the court please, it is just a slight portion of the evidence of the witness referred to in the memoranda we desire. The Court: I see, but we have to give the reporter some time to look it up. I will have to give him some time to report to me that he has found it. You see that big stack of books before him there, gentlemen; they contain the evidence that he has to seek through and get the line and the sentences that you want in order to cover your request fully. Foreman Darrell: Providing we determine to get along without this testimony, if, after debating the matter further, we can proceed without this particular evidence, then what? The Court: It is for you, gentlemen of the jury, when you get ready to report a verdict, if you find a verdict, to notify the officers, and they will notify the rest of us. Foreman Darrell: My point was this, that I do not believe that those who desire the reading of this portion of the testimony—in fact, I am sure that they were not aware that it would take any considerable time to produce that. There was simply a question that arose upon which we could not agree. As stated in the memoranda, we were under the impression that it required only a few moments, as it was a very small part of the evidence that was given by those three parties that we wanted. The Court: I do not know of anything to do only to let you go to your jury room and let the reporter go to work and find the testimony that you want, and when he finds it we will report to you. You can now return to your jury room. (In accordance with the foregoing proceedings, after the jury retired again to their jury room to deliberate further, the reporter proceeded to locate through the testimony of the foregoing named three witnesses, covering some 1,000 or 1,200 pages of shorthand, the portions thereof covered by the memoranda submitted to the court by the jury and awaited a further call from the jury.) At this time, to wit, 9:10 o'clock a. m. on this 13th day of May, 1916, after having been out all night, the jury returned into the courtroom, and the following proceedings are had."

Then follows the announcement of the verdict in the usual manner without any further reference to said testimony.

Section 1138 of the Penal Code provides:

"After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the district attorney, and the defendant or his counsel, or after they have been called."

It is the claim of appellant that to his prejudice he was deprived of the substantial right to which he was entitled by this statute, and therefore his conviction should be reversed. His contention is not supported by the record. The statute must, of course, have a reasonable construction. No one but the reporter could furnish the information, and he could not do so without laborious investigation. He made the effort and located the testimony, but at what time he was prepared to read it the record does not show. It may have been after the verdict was reached by the jury. At any rate, there was no disposition apparently on the part of said reporter or of the trial judge to withhold from the jury what they requested and preparation was made to comply with the request. But it is manifest that the jury, after further consultation, concluded that they did not need the additional information and they could and did agree upon a verdict without waiting to have the said testimony read. As seen, it had been stated by the foreman that they might thus be able to agree and we must conclusively presume, in the absence of any showing to the contrary, that they were entirely satisfied to forego the reading, believing that it would not affect their conclusion as to the guilt of the defendant. There is nothing in the matter to indicate any improper conduct on the part of any officer of the court or of the jury, nor can it be said that any harm was thereby done to appellant.

[13-15] It is insisted with frequent repetition that there is no proof of the act upon which the district attorney elected to rely. In this appellant is entirely mistaken. The evidence is set out in the brief of the Attorney General. The salacious story need not be repeated. The testimony of the prosecutrix is direct and positive as to the consummation of the offense at the time and place alleged. Her credibility was, of course, matter of argument before the jury and the trial court. The considerations suggested affecting her veracity were, no doubt, forcibly presented at the proper time in that tribunal, but they failed of their purpose, and we are in no position to say that she did not tell the truth when she attempted to relate the occurrence in question.

Appellant is also in error when he asserts that the uncorroborated testimony of the prosecutrix is insufficient to warrant a conviction. There are some early decisions to that effect, but such is not the law as now recognized in this state.

In People v. Logan, 123 Cal. 414, 56 Pac. 56, it is said:

"Upon the trial of a defendant accused of rape, if the evidence of the prosecuting witness is sufficient to support the verdict, the truth or falsity of her evidence is a matter for the jury, and a verdict of conviction will not be disturbed, notwithstanding conflicting evidence for the defendant, and notwithstanding the circumstances and conditions forming part of the res gestæ of the offense are unusual, and not entirely convincing."

It is true that her testimony should be clear and convincing, but it is for the jury and the trial judge to determine whether it fulfills that requirement, and the record here shows that their conclusion was against the contention of appellant. We may say also that there was some circumstantial corroboration of the testimony of the prosecutrix to which, no doubt, some heed was given. Manifestly, the jury should exercise the greatest care and circumspection in considering the evidence in cases of this character, as was aptly said in People v. Price, 26 Cal. App. 550, 147 Pac. 591. They were so instructed in the present instance, and we cannot say they failed to observe the admonition.

Many circumstances tending to discredit her testimony are pressed upon our attention. It is urged that she was strongly impeached and discredited by her own voluntary and repeated repudiation of the charge, that it is so inherently as well as circumstantially improbable, and the great preponderance of the evidence is to the effect that the testimony given by her on the trial of the case is absolutely false. Hence it is argued that the verdict must be the result of passion and prejudice, and "a conviction upon such evidence would be a blot upon the jurisprudence of the country and a libel upon jury trials." People v. Hamilton, 46 Cal. 540.

That she had made contradictory statements was, as we have seen, the subject of explanation, and the value of it as a probative fact was for the jury. That on behalf of the defendant there was much evidence in irreconcilable conflict with the testimony of the prosecutrix cannot of itself justify us in setting aside the verdict. These considerations are amply discussed in People v. Kaiser, 119 Cal. 458, 51 Pac. 702, People v. Lewis, 18 Cal. App. 364, 123 Pac. 232, People v. Preston, 19 Cal. App. 679, 127 Pac. 660, People v. Crawford, 24 Cal. App. 403, 141 Pac. 824, and People v. Rongo, 169 Cal. 75, 145 Pac. 1017, and no further comment is deemed expedient. But if we could say that her story is inherently improbable, we should, of course, have no hesitation in branding it as false and malicious and awarding appellant the relief he seeks.

In support of his contention that her charge is incredible, appellant calls attention to the peculiar and unusual circumstances attending each occasion of immorality as related by the prosecutrix, and the improbability of the story is enhanced and emphasized, so it is claimed, by—

"the established good character of the defendant for decency and morality, prohibiting the belief that he did the monstrous and depraved things the prosecutrix in her destructively self-contradictory testimony says he perpetrated against her virtue. Surely the defendant's good character as a minister of Christianity established by 33 years of constant devotion to the maintenance and advocacy of religion and morality should be and is a powerful circumstance indicating the great improbability of the accusation that has been made against him at the sinister instigation of his enemies, by a woman who it must be conceded is not 'above suspicion and reproach.' Says a learned court: 'Character under all circumstances is the best earthly inheritance. It is a shield to the innocent when unjustly accused.' United States v. Emerson, 6 McLean, 406 [Fed. Cas. No. 15,051]."

The considerations thus forcibly set forth are of great significance and potency, but we need not dwell upon them at length. As to the peculiar circumstances of the various delinquencies, we may say they do not stamp the recital of the prosecutrix with inherent improbability, but they furnish the basis for a persuasive argument against the truth of her statements, and, no doubt, this feature of the case was conscientiously considered by the jury. It does, indeed, seem strange and almost incredible that any man in his senses would commit such an offense under such circumstances, but we cannot say that it is so unbelievable that the jury had no legal right to accept the story told by the prosecutrix. People v. Moore, 155 Cal. 241, 100 Pac. 688. The profession to which he belonged was a circumstance also vastly in favor of appellant's innocence. No higher calling ever enlisted the services of mankind, and it must be said that nearly all who are engaged in this great work are worthy of the respect and confidence of all upright people, but they are subjected to peculiar temptations along the line of this regnant impulse, and occasionally one falls, and some of them, of course, are "wolves in sheep's clothing." We need hardly say that there are many historical examples of similar and other crimes committed by persons of high standing in the community under circumstances more strange and startling than are revealed in the case before us. It is especially true of this character of offenses. It is the old story, as old as the history of the race, of man yielding to the almost irresistible coercion of the strongest instinct of animal life. Indeed, we have the authority of Paul, the greatest preacher that ever lived, that there is a constant strife between the carnal and the spiritual forces for supremacy in man's nature, and he himself found it necessary to be constantly on his guard lest he become a castaway. Cases equally as strange have come under the observation of all of us, and many of them could be readily recalled.

Of course, this might have been an unjust conviction. Mr. Slaughter may have been the victim of a foul conspiracy. If so, a monstrous wrong has been committed, but we are not in a position so to determine or so to declare. The responsibility of passing upon such considerations is not lodged with us. Finding, as we do, sufficient evidence to support the verdict and an absence of prejudicial error in the record, and having no means of determining that there was a miscarriage of justice, we can do nothing else than affirm the judgment; for it is not true, as contended by appellant, that under Amendment 4½ of article 6 of the state Constitution we are authorized to weigh the evidence and judge of the credibility of the witnesses, and thus virtually try the case anew. That amendment has been the subject of frequent exposition, and we need not add to the decisions. However, we may say that in view of the record it is impossible for us to be "satisfied" that an injustice was done to the defendant. We cannot say, as declared by appellant, that the verdict was the result of "the impassionate clamor of the mob, of the intemperate indignation of the multitude," or that it was influenced by "the mad assaults of a sensational and hysterical public press," but we are required to hold, rather, that it was the conscientious judgment of a jury anxious to do right and to vindicate the law, like "the true judicial opinion" of which appellant speaks, resembling "the magnificent nobility of the great ocean in its mighty grandeur, calm and dispassionate in rest, eternal in power." It is true that the law "condemns with intransigeant denunciation a verdict or decision that is induced by passion or prejudice and exacts from the courts a stringent supervision, as well as a liberal exertion of remedial power to redress a grave wrong destructive of justice and the supremacy of the law." But the mandate is equally insistent that the courts content themselves with the exercise of the power committed to their hands by the Constitution and the statutes, and that they refrain from an unwarranted interference with the prerogatives and duties assigned to other agencies by the deliberate action of the sovereign power of the state.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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33 Cal. App. 291

McGINN v. REES et al. (Civ. 1849.)

(District Court of Appeal, First District, California. Dec. 30, 1916. Rehearing Denied by Supreme Court May 21, 1917.)

1. APPEAL AND ERROR 🔑865—QUESTION PRESENTED—MOTION TO SET ASIDE JUDGMENT.

Appeal from order refusing motion to set aside default judgment not made under Code Civ. Proc. § 473, but on ground of lack of jurisdiction, presents only the question of jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3462–3466.]

2. JUDGMENT 🔑138(3)—DEFAULT—VACATION—FAILURE TO SERVE COMPLAINT WITH SUMMONS.

Failure to serve copy of complaint with summons, as required by Code Civ. Proc. § 410, will warrant vacation of default judgment for lack of jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 254.]

3. JUDGMENT 🔑138(3)—DEFAULT—VACATION—VARIANCE BETWEEN COMPLAINT AND COPY SERVED.

The fact that copy of complaint served with summons differed from complaint filed in omitting one of the names of the defendants, where this was stated in the summons, did not violate Code Civ. Proc. § 410, requiring service of copy of complaint with summons, so as to warrant vacation of default judgment for lack of jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 254.]

4. PROCESS 🔑156 — DEFECTIVE SERVICE — TIME FOR OBJECTION.

If defendant desired to test sufficiency of service of copy of complaint with summons, she should have appeared and made appropriate motion at the trial, instead of waiting until judgment was taken against her and then claiming it a nullity because of minor differences between complaint filed and copy served.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 211.]

5. PROCESS 🔑158—SERVICE—MOTION TO SET ASIDE.

A motion to set aside service of summons will be denied unless defendant's substantial rights were affected.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 218–220.]

6. PROCESS 🔑164(3)—AMENDMENT TO PROOF OF SERVICE—FICTITIOUS DEFENDANT.

Where complaint named a defendant as John Doe R. and default judgment was taken against Mark R., being defendant's true name, and he being served with process, motion to amend proof of service to correspond with the judgment should have been granted.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 245, 246.]

7. JUDGMENT 🔑18(3) — PLEADING TO SUPPORT—NAME OF DEFENDANT — FAILURE TO AMEND—FICTITIOUS DEFENDANT.

The fact that complaint was not amended so as to state defendant's true name, where defendant was sued under a fictitious name, was a mere irregularity, and did not invalidate the judgment, where the real defendant was served with process, and court had jurisdiction of subject-matter.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 36.]

8. JUDGMENT 🔑18(3) — COMPLAINT TO SUPPORT—PRAYER FOR JUDGMENT.

The fact that the body of the complaint seeks no personal judgment against defendant, in an action to foreclose a mechanic's lien, did not invalidate judgment, where the prayer of the complaint demanded personal judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 36.]

9. APPEAL AND ERROR 🔑188—NECESSITY OF OBJECTION—MOTION TO AMEND RETURN OF PROCESS.

Where defendant failed to object to plaintiff's motion to amend return of process because of failure to state grounds, appellate court will not entertain such objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1190–1204.]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by George W. McGinn against Mrs. Helen Rees and others. Judgment for plaintiff. Defendant named appeals from order refusing to set aside judgment and open default, and plaintiff appeals from order refusing to permit amendment of return of summons and from order vacating judgment as to defendant Mark Rees. Judgment for plaintiff against defendant named affirmed, and orders refusing permission to amend return of summons and opening default of defendant Mark Rees reversed.

John T. Williams and John D. Harloe, both of San Francisco, for plaintiff. Stafford & Stafford, of San Francisco, for defendant Helen Rees.

PER CURIAM. This is an action to foreclose a lien for street work. According to the caption of the complaint the action is against Helen Rees, John Doe Rees (her husband), and four fictitious defendants. Helen Rees, it is alleged in the complaint, is the owner of the property upon which the lien is claimed, and she alone entered into the contract with plaintiff for the performance of the street work. John Doe Rees is not alleged to be a fictitious defendant, but he and the four fictitious defendants, it is averred, claim some right or interest in the property, but which is subordinate to plaintiff's claim. In the prayer of the complaint judgment is demanded against the defendants for $377.75, with interest and costs, and for a foreclosure of plaintiff's lien. Summons was served on Helen Rees and Mark Rees, and a judgment by default for the amount demanded was entered against said defendants and the requested decree granted. Within about three months after the entry of the judgment each of the above-named defendants, specially appearing for that purpose, moved the court to set aside the judgment. Such motion was made, not under the provisions of section 473 of the Code of Cicil Procedure, but upon the ground that the court was wholly without jurisdiction to enter the same. The plaintiff also upon due notice requested permission to amend the proof of service of summons on Mark Rees. The court refused to grant the motion to set aside the judgment against Helen Rees, and refused to permit the plaintiff to amend the return of summons, but granted the motion to vacate the judgment as to Mark Rees. The plaintiff and defendants respectively prosecute appeals from these orders. These appeals are all embraced in one record, and will be considered together.

[1] Several of the points made in their briefs by Helen and Mark Rees could be considered only upon an appeal from the judgment or upon a motion made under the terms of section 473 of the Code of Civil Procedure, and not upon the motions giving rise to these appeals, which simply test the question of the jurisdiction of the court.

[2] The ground upon which Helen Rees relies for a reversal of the order denying her motion to vacate the judgment against her is that in effect she was not served with a copy of the complaint on file in the action as required by section 410 of the Code of Civil Procedure. A copy of the complaint must be served with the summons. S. P. R. Co. v. Superior Court, 59 Cal. 471. That case was approved in State v. Harrington, 31 Mont. 298, 78 Pac. 485, where the court held that when a summons was served without a copy of the complaint the court was without jurisdiction.

[3-5] In the present case there were a number of trivial differences between the complaint on file and the one served, the most important of which was the omission from the latter of one of the names of the defendants contained in the former, but as the summons served on Helen Rees with the copy of the complaint contained the omitted name, we take the view that there was not such a failure to comply with the terms of section 410 as would result in a lack of jurisdiction in the court of the person of said defendant. If she had desired to test the sufficiency of the service, she could have appeared and by an appropriate motion had that question settled at once. Arroyo D. D. Co. v. Superior Court, 92 Cal. 47, 52, 28 Pac. 54, 27 Am. St. Rep. 91. We think she could not wait until judgment was taken against her, and then claim that it was a nullity because of minor differences between the complaint filed and the copy served upon her. Brum v. Ivins, 154 Cal. 17, 96 Pac. 876, 129 Am. St. Rep. 137; Drake v. Duvenick, 45 Cal. 455. And even on a motion to set aside the service of summons, unless her substantial rights were affected—which does not appear to be the case here—such a motion would be denied. Fraser v. Oakdale L. & W. Co., 73 Cal. 187, 14 Pac. 829.

As to the appeal by Mark Rees, it appears from the return that the summons with a copy of the complaint was served on this defendant, but that the name of Mark Rees did not appear in the complaint or summons. In this state of the record, without any amendment thereof, plaintiff took by default a decree of foreclosure and a judgment for $377.75 with interest and costs, not only against Helen Rees, but also against Mark Rees. On the hearing of the motion made by Mark Rees to vacate the judgment against him he made no showing or claim that he was not served with summons, or that he was not the person intended to be sued by the name John Doe Rees. He depended—or in any event, according to the motion and the grounds thereof, was compelled to depend—on the point that from the face of the record it would not be presumed that John Doe Rees and Mark Rees were the same person, and therefore the action appearing to be against John Doe Rees, the court was without jurisdiction to render a judgment against Mark Rees.

If it appeared from the face of the record, as contended, that one person was served, and a judgment was obtained against a stranger to the action, although served with summons, it would, no doubt, be held that the court was without jurisdiction of the person so served, and that such judgment might be annulled at any time upon motion. But that is not this case, for here, although it is not so alleged, it would seem to appear from the name itself that John Doe Rees was a fictitious defendant, and this inference is strengthened by the fact that John Doe Rees in the complaint, and Mark Rees in the judgment, are referred to as the husband of the defendant Helen Rees.

[6] But however that may be, prior to the hearing of the motion to set aside the default of Mark Rees the plaintiff had moved the court for permission to amend the return of proof of service of summons so as to make it show that Mark Rees was the person sued as John Doe Rees, and that Mark Rees was in fact served with summons. This proposed amendment was in conformity with the facts; it was in support of the judgment, and in our opinion it ought to have been granted. Morrisey v. Gray, 160 Cal. 390, 117 Pac. 438; Herman v. Santee, 103 Cal. 519, 37 Pac. 509, 42 Am. St. Rep. 145. With the return amended as proposed the record would then have shown that Mark Rees was the person referred to and intended to be described in the complaint by the name of John Doe Rees, in which event the judgment could not be regarded as void on its face and consequently subject to be set aside at any time on motion.

[7] Perhaps, as suggested, if the plaintiff desired to obtain judgment against Mark Rees, the complaint should have been amended by substituting his true name for that by which he had been sued; but failure in this respect amounted to no more than an irregularity, for which the judgment might have been reversed on appeal. McKinlay v. Tuttle, 42 Cal. 570; Alameda Co. v. Crocker, 125 Cal. 101, 104, 57 Pac. 766. The court had jurisdiction of the subject-matter, and when Mark Rees was served as a defendant sued by the name of John Doe Rees, which appears to be the fact, the court aquired jurisdiction of his person. Campbell v. Adams, 50 Cal. 203; Baldwin v. Morgan, 50 Cal. 585.

[8] While it is true that in the body of the complaint no personal judgment was sought against Mark Rees, nevertheless the judgment, although of that nature, is not void, for the reason that the prayer of the complaint demanded a personal judgment against him for the amount of the contract price of the work performed together with the incidental costs. If there had been no such demand, the judgment here entered might be regarded as subject to the attack now made upon it, but there is a conflict of the authorities upon that question. Chase et al. v. Christianson, 41 Cal. 253; George v. Nowlan, 38 Or. 541, 64 Pac. 1; Sache v. Wallace, 101 Minn. 169, 112 N. W. 386, 11 L. R. A. (N. S.) 807, and notes, 118 Am. St. Rep. 612, 11 Ann. Cas. 348; Murdock v. De Vries, 37 Cal. 527; Brooks v. Forington, 117 Cal. 219, 48 Pac. 1073.

[9] Plaintiff's motion to amend his return fails to state the grounds upon which it was based. It does not appear that the defendant objected to the hearing of the motion on that ground, and apparently the objection is here made for the first time, for which reason we cannot entertain it.

For the foregoing reasons the judgment against defendant Helen Rees is affirmed, and the orders refusing plaintiff permission to amend his return of summons and opening the default of defendant Mark Rees are reversed.

LENNON, P. J. The judgment appealed from is affirmed, and the orders, refusing plaintiff permission to amend his return of summons, and upon the default of defendant Mark Rees, are reversed, for the reason stated in opinion filed December 30, 1916 (24 Cal. App. Dec. 52), which opinion is hereby adopted as the opinion of the court following the resubmission of the cause, and said opinion is hereby ordered refiled as of this date.

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33 Cal. App. 350

CONNELL CO. v. JENNER. (Civ. 1901.)

(District Court of Appeal, Second District, California. April 3, 1917.)

1. MASTER AND SERVANT 🔑80(15)—COMPENSATION—FINDINGS.

Findings that defendant employé was engaged at a specified salary but that for two months he procured credit for a larger monthly salary without plaintiff employer's consent, the excess being later charged back to him, negatives the conclusion that his salary was increased.

2. MASTER AND SERVANT 🔑80(15)—ACTION FOR COMPENSATION—PLEADING.

Allegations that defendant was employed at a specified monthly salary in 1912 *held* supported by findings that such a contract was made in 1909, and had not been changed with plaintiff employer's consent.

3. MASTER AND SERVANT 🔑80(5) — ACTION FOR COMPENSATION—PLEADING.

Under a common count for money had and received plaintiff employer may have amount of salary due defendant employé determined in order to ascertain the balance due it from collections made by defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 114.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the Connell Company against Arthur Jenner. From an adverse judgment, plaintiff appeals. Reversed.

Stephens & Stephens, of Los Angeles, for appellant. Kendrick & Ardis, J. C. Craig, and Edward Winterer, all of Los Angeles, for respondent.

JAMES, J. Appeal by the plaintiff taken from an adverse judgment and presented on the judgment roll.

The complaint of plaintiff contained statements of four alleged causes of action, the first two only of which need to be considered. In the first cause of action it is alleged that on the 1st day of February, 1912, and subsequent thereto, defendant was employed by the plaintiff under an arrangement by which defendant was to devote his time and services in the business of the plaintiff for a salary of $100 per month, with an additional sum of $20 per month to be paid to him for the use of an automobile. In this cause of action it was further alleged that defendant had received and collected from debtors of the plaintiff the sum of $443.86 in excess of the amounts which he had earned by reason of the agreement aforesaid, and which excess sum of money he had refused to pay to the plaintiff upon demand. The second cause of action was in the form of a common count for the same amount of money as money had and received by the defendant to and for the use of the plaintiff. By way of answer the defendant alleged that on or about the 1st day of March, 1909, he entered into an agreement with the plaintiff to render services for the compensation of $100 per month, and that in May, 1909, there was added to his compensation the sum of $20 per month for the use of his automobile. He alleged that that arrangement was to continue for a period of one year, but that he continued to render services until December 31, 1910, without any further agreement for a different compensation, and that he collected and received up to December 31, 1910, the sum of $120 per month according to the agreement, although he alleges that his services were worth the sum of $150 per month. He then alleged that about the 1st day of December, 1910, he notified the manager of the company that, if he continued to work for the plaintiff company, "he must have $150 per month," and that he would retain that amount out of moneys collected by him, and that plaintiff nor its manager made any objection thereto; that defendant continued to serve the plaintiff and to retain the sum of $150 per month; that his services continued up to the 15th day of March, 1913. The court made findings by which the facts were determined to be that on or about the 1st day of March, 1909, the defendant was employed by the plaintiff at the monthly compensation of $100, and that about the 1st day of May, 1909, an agreement was made allowing to defendant $20 per month additional for the use of an automobile, and that defendant continued in the employ of plaintiff until the 6th day of March, 1913. Further facts are found in the following terms:

> "That in the month of December, 1910, the defendant demanded of the plaintiff that his salary be thereafter raised to the sum of $150 per month for his services and for the use of his said automobile; that said demand was made of the plaintiff through the secretary and treasurer of the plaintiff, one Madge H. Connell; that thereupon the said Connell failed to refuse said demand, and failed to accede to said demand, and failed to discharge the defendant from the employ of the plaintiff; that thereafter, at the direction of the defendant, the bookkeeper for the plaintiff, entered upon the books of plaintiff in the account of said defendant for the months of January and February, 1911, a credit to the defendant of $150 for each of said months as salary. Thereafter the fact of said entries was brought to the attention of the said Connell, who voiced objections to the same to the defendant, and called the attention of the president of the plaintiff thereto; that said president thereupon instructed the defendant that he had no right to raise his own salary, and pursuant to the instructions of said president, on the 28th day of February, 1911, a charge was made upon said books against the defendant in the sum of $60 for excess in salary; that at all times thereafter said account upon said books of defendant was credited with the sum of $120 per month and no more; that said books were at all times open to the inspection of the defendant, and were inspected by him, and he had knowledge of the fact of all of said entries; that thereafter, up to the time of the termination of the employment of the defendant, the defendant and said Connell continued to quarrel and dispute with each other as to the amount of the salary of the defendant."

It was further found that it was not true that the defendant was employed for the period of one year, "or for any other definite period of time." It was also found that the defendant had collected the sum sued for by the plaintiff, and that such sum was in excess of the amount of money which would be due him under the compensation as agreed of $120 per month. It was further found that it was not true that defendant's services were worth $150 per month, but that it was true that about the 1st day of December, 1910, the defendant notified the manager of the company that, if he continued to work after the 31st of December, he must have $150 per month, and that plaintiff nor its said manager made any objection at that time, and that the defendant was credited with the sum of $150 per month for the months of January and February, 1911. This finding then follows:

> "That it is true that the services of the said defendant after January 1, 1911, continued during all the time from that date until on or about the 15th day of March, 1913, with full knowledge on the part of the manager of the plaintiff and of its directors. But it is not true that said services continued with full knowledge that the defendant has given notice that he would serve the company only on the condition that he was paid or allowed to draw from the company $150 per month during the time that he served the plaintiff."

[1-3] The findings, as will be noted, were somewhat contradictory. The substance, however, of the findings, to our minds, clearly negatives the conclusion that the defendant at any time was serving the plaintiff company under any different arrangement as to compensation than that originally entered into by him. Up to the time that he sought to secure an increase in compensation there

was no dispute as to the terms of his employment, and if he continued to work for the plaintiff without any agreement consented to by the plaintiff which would change that compensation, we think that it must be inferred as a legal conclusion that he consented to work for the compensation theretofore agreed upon. It appears from the findings that, while a credit of $150 per month was entered for two months, that credit was not authorized by the plaintiff company, and that the excess was charged back to the defendant, and that he continued to work many months thereafter with the accounts on the books of the company showing a credit of compensation as originally agreed upon only, and that he had knowledge of the fact that the books were so kept. Counsel for respondent argue that the plaintiff declared upon an express contract which the court found to be different from that alleged; but we do not think that such is the effect of the findings. At any rate, under the allegations of the second alleged cause of action, plaintiff was entitled to have ascertained the amount due to the defendant in order to have fixed the amount which it was alleged he had collected and not accounted for.

By a supplemental complaint the plaintiff sought to set up certain facts regarding a judgment of the justice's court wherein the assignor of the defendant had brought suit on behalf of the defendant to recover from the plaintiff certain money alleged to be due, and by reason of which judgment it was asserted defendant was estopped from claiming any offset against the demand of the plaintiff. We do not think that that judgment was properly pleaded in bar under the condition of the issues; but, in the view we have taken of the case, that matter becomes immaterial here.

The judgment is reversed in order that a new trial may be had.

We concur: CONREY, P. J.; SHAW, J.

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33 Cal. App. 317

LAPIQUE v. PLUMMER et al. (Civ. 2231.)

(District Court of Appeal, Second District, California. March 26, 1917. Rehearing Denied by Supreme Court May 24, 1917.)

APPEAL AND ERROR ⇨631 — TRANSCRIPT OF JUDGMENT ROLL—NECESSITY OF PRINTING.

Code Civ. Proc. §§ 953a, 953b, and 953c, as effective August, 1914, regulating the preparation, etc., of phonographic reports and transcripts on appeal, did not apply to an appeal from a judgment upon the judgment roll alone, and such a record must be printed under the direct provisions of Supreme Court rule 7 (119 Pac. xi).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2766–2770.]

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by John Lapique against Eugene R. Plummer, Catherine Agoure, and others. From a judgment dismissing the action as to Catherine Agoure, plaintiff appeals. Appeal dismissed.

John Lapique, of Orange, in pro. per. O'Melveny, Stevens & Millikin and Stuart O'Melveny, all of Los Angeles, for respondent.

PER CURIAM. This is an appeal upon the judgment roll from a judgment of dismissal of the action as to respondent, Catherine Agoure, as administratrix of the estate of Pierre Agoure, deceased, entered upon an order of court sustaining her demurrer to the second amended complaint, without leave to amend.

As stated, the appeal is upon the judgment roll alone, a transcript of which is presented by a certified typewritten copy. No authority is found, either in the rules of the court or in the statutory provisions of the Code, for this method of bringing up the record, where it consists solely and alone of the judgment roll. In the cases there specified sections 953a, 953b, and 953c, Code of Civil Procedure, provide for the preparation, certification, and filing of phonographic reports and transcripts of records to be used on appeal; but these sections do not apply to the transcript where the appeal is from the judgment upon the judgment roll alone.

> "The provision that the transcript need not be printed applies only where the appellant has availed himself of section 953a, and the latter section relates and applies only to cases where a reporter's transcript is prepared and settled." Harpold v. Slocum, 168 Cal. 364, 143 Pac. 609.

Hence, it follows that in cases where there is no substitute for the bill or reporter's transcript prepared under section 953a there is no statutory exemption from the necessity of printing the transcript, as required by rule 7 (119 Pac. xi) of the Supreme Court on the subject, which must prevail. For this reason, the appellant is not entitled to a hearing of the appeal, which should be and it is dismissed.

Our opinion is based upon the sections of the Code as they were in August, 1914, when the transcript herein was filed.

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33 Cal. App. 807

LAPIQUE v. WALSH. (Civ. No. 2230.)

(District Court of Appeal, Second District, California. March 26, 1917. Rehearing Denied by Supreme Court May 24, 1917.)

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by John Lapique against Frank E. Walsh, administrator of the estate of Laurent Etchepare, deceased. From a judgment dismissing the complaint, plaintiff appeals. Appeal dismissed.

John Lapique, of Orange, in pro. per. H. H. Appel and Horace Bell, both of Los Angeles, for respondent.

PER CURIAM. It appearing that the facts in this case are identical with those involved in civil No. 2231, entitled John Lapique, Appellant, v. Eugene R. Plummer et al., Respondents, 165 Pac. 56, wherein an opinion was this day filed dismissing the appeal, it is ordered, upon the authority of the opinion so filed in said last-mentioned case, that the appeal herein be, and the same is, dismissed.

33 Cal. App. 807

LAPIQUE et al. v. AGOURE. (Civ. No. 2229.)

(District Court of Appeal, Second District, California. March 26, 1917. Rehearing Denied by Supreme Court May 24, 1917.)

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by John Lapique and others, as surviving copartners, etc., against Catherine Agoure, administratrix of the estate of Pierre Agoure, deceased. From a judgment dismissing the complaint, John Lapique appeals. Appeal dismissed.

John Lapique, of Orange, in pro. per. O'Melveny, Stevens & Millikin and Stuart O'Melveny, all of Los Angeles, for respondent.

PER CURIAM. It appearing that the facts in this case are identical with those involved in civil No. 2231, entitled John Lapique, Appellant, v. Eugene R. Plummer, et al., Respondents, 165 Pac. 56, wherein an opinion was this day filed dismissing the appeal, it is ordered, upon the authority of the opinion so filed in said last-mentioned case, that the appeal herein be, and the same is, dismissed.

175 Cal. 813

BANK OF CALIFORNIA, NATIONAL ASS'N, v. RICHARDSON, State Treasurer. (S. F. 8381.)

(Supreme Court of California. June 18, 1917.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Bank of California, National Association, against Friend William Richardson, as State Treasurer. From the judgment rendered, plaintiff appeals. Affirmed.

Pillsbury, Madison & Sutro, of San Francisco, for appellant. U. S. Webb and Raymond Benjamin, both of San Francisco, for respondent.

PER CURIAM. It is stipulated in this case that all of the questions involved in the appeal are identical with those involved and passed upon by this court in the case of Bank of California v. Roberts, as Treasurer, reported in 173 Cal., commencing at page 398, 160 Pac. 225. On the authority of that case the judgment must be affirmed.

The judgment is affirmed.

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34 Cal. App. 65

JACKSON v. BROWN. (Civ. 1996.)

(District Court of Appeal, First District, California. June 7, 1917.)

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by B. M. Jackson against D. C. Brown. Judgment for defendant, and plaintiff appeals. Affirmed.

B. M. Jackson, of San Francisco, in pro. per. E. S. Bell, of Napa, J. J. Bullock, of Redwood City, and Michael Brown, of San Mateo, for respondent.

KERRIGAN, J. This is an action brought to recover a balance of an attorney's fee alleged to be due for services rendered by plaintiff to the defendant. The complaint contained several counts. At the trial it was contended by the defendant that, while he had paid part of the fee for which he was being sued, such payment was made as an accommodation to his attorney, who was not entitled to his fee, nor to any part of it, until the judgment in a certain action should be recovered and the amount thereof collected. After practically all the evidence was in, it was suggested that the further trial of the cause be postponed, in order to give the defendant an opportunity to introduce evidence to the effect that a written contract had been entered into by the parties, providing that the plaintiff's fee here sought to be recovered was to be contingent upon a certain event which had not yet happened, whereupon the plaintiff, in order to conclude the matter, proposed that the case be submitted on that portion of his complaint which alleged a cause of action upon an account stated, and that he waive the remaining counts of his complaint. This was agreed to and the cause submitted.

With the trial court we think that the evidence does not sustain the view that there was an account stated. Early in January, 1916, the plaintiff wrote to the defendant a letter, claiming that there was a certain balance due him on account of his fee in a suit conducted by him for the defendant, entitled Brown v. Lee et al. The defendant in a prompt reply neither expressly nor tacitly admitted the indebtedness and in fact turned the matter of the claim over to an attorney for attention and adjustment. This correspondence, and another letter written on behalf of the defendant, together with several conversations, telephonic and otherwise, between the parties, clearly show that the negotiation fell far short of constituting an account stated.

The judgment is affirmed.

We concur: RICHARDS, J.; BEASLY, Judge pro tem.

(175 Cal. 144)

WILSON v. CALKINS et al. (L. A. 3813.)

(Supreme Court of California. May 16, 1917.)

MORTGAGES 🔑74 — FORECLOSURE — SUFFICIENCY OF EVIDENCE.

In suit to foreclose a mortgage given to secure payment for shares of stock, evidence that stock was delivered to defendant, who signed a receipt and voted proxies for it but allowed the issuing bank to retain it as security for an indebtedness due it, sustains a finding that the shares were delivered.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 172.]

Department 2. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Mortgage foreclosure action by John W. Wilson, trustee, against C. C. Calkins and Kate A. Calkins. Judgment for plaintiff, and defendants appeal. Affirmed.

Waterman & Green, of Los Angeles, for appellants. Shankland & Chandler, of Los Angeles, for respondent.

HENSHAW, J. In 1908 the defendants delivered to the Columbia Trust Company (which afterward by change in corporate name became the Oil & Metals Bank & Trust Company) their promissory note for $3,750 for the purchase of 30 shares of the stock of the trust company. Thereafter, and while a renewal note for this indebtedness was held by the trust company, the defendants executed a new note to the company for the sum of $800, and at the same time executed a mortgage in form a deed absolute to certain real property which they owned. They covenanted that the mortgaged property should also be security "for any and all other debts or claims held against the promisors by said company which may be outstanding and unpaid at any time." The Oil & Metals Bank & Trust Company, successors to the Columbia Trust Company, became financially involved. John W. Wilson was made trustee for the purposes of liquidation. The defendants' obligations and the security were transferred to him. He brought this action to foreclose the mortgage under pleadings declaring the mortgage to be security for the debts evidenced by both promissory notes. The defendants answered, admitting that it was security for the $800 note, but denying that it was security for the note given by them in payment of the stock of the trust company, which, of course, had become of greatly depreciated or of no value.

The court found a delivery to and receipt by defendants of the 30 shares of the stock of the trust company for which their note was given. The one question argued upon this appeal goes to the insufficiency of the evidence to sustain this finding, the defendants testifying that they never received the stock. The testimony in support of the finding, however, shows that the 30 shares of stock were actually issued to the defendants, and the stub of the certificate in the stock book shows a receipt for it by defendant C. C. Calkins. The former president testifies that the stock was actually delivered to defendant, that he had possession of it, and that because of his indebtedness to the bank it was permitted to remain in the custody of the bank, apparently for purposes of security; but that Mr. Calkins recognized his ownership of the stock by giving proxies authorizing the voting of it at stockholders' meetings on more than one occasion.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

(175 Cal. 149)

HORTON v. WINBIGLER. (L. A. 3862.)

(Supreme Court of California. May 17, 1917.)

1. REFORMATION OF INSTRUMENTS 🔑36(2) — PLEADING—AGREEMENT BETWEEN PARTIES.

To invoke the authority of equity to reform a contract to incorporate therein provisions claimed to have been omitted in its execution, though intended by the parties to have been inserted, it must be pleaded as a fact that there was an agreement between the parties that the provision or term omitted should have been contained in the executed instrument.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 142.]

2. REFORMATION OF INSTRUMENTS 🔑36(2) — PLEADING—AGREEMENT BETWEEN PARTIES.

In suit to reform a contract to incorporate provisions which it is claimed the parties agreed to incorporate therein, it is not necessary that it shall be alleged in direct terms that such an agreement was made, but it is sufficient if it appears reasonably and fairly from matters stated in the complaint and the language used representing them that in effect such an agreement is alleged.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 142.]

3. REFORMATION OF INSTRUMENTS 🔑36(2) — PLEADING—"INTENTION."

Where, in suit for reformation of a contract and deed to limit the estate of defendant's intestate therein to a life interest, the remainder on her death to pass to plaintiff, the complaint alleged that the purchase was made pending the administration of an estate, with the funds of the estate, the use of one-half of which defendant's intestate was to have only for life, with absolute property therein to pass to plaintiff upon her death, and alleged also that "it was intended at the time between" defendant's intestate and the plaintiff "that the contract should contain," etc., it sufficiently alleged the agreement between plaintiff and defendant's intestate as to what such instruments should contain, for whether the word "intention" is equivalent to an "agreement" depends on the connection in which it is used.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 142.

For other definitions, see Words and Phrases, First and Second Series, Intention.]

4. PLEADING 🔑52(2) — JOINDER OF CAUSES OF ACTION.

A complaint to reform a contract and deed, which were only parts of one transaction consisting of purchase of land, the mutual mistake alleged applying to the entire transaction, was not demurrable as stating two separate causes of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 113.]

5. REFORMATION OF INSTRUMENTS 🔑44—EVIDENCE—ADMISSIBILITY.

In suit for reformation of a contract and deed to make the estate therein of defendant's intestate only a life interest in an undivided half and at her death the same to pass to plaintiff, it appearing that defendant's intestate had only a life interest in the use of the money which went into the purchase of the property, plaintiff having the remainder, testimony of plaintiff as to his intention relative to the interest which the respective parties should have in the property was admissible, since defendant's intestate, by consenting to the investing in the property of the money in which she had only a life interest, could not acquire a greater interest therein than her interest in the funds entitled her to, unless it was the intention of the plaintiff that she should take it.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 155, 156.]

6. EVIDENCE 🔑158(11)—PAROL EVIDENCE.

In action for reformation of contract of purchase and deed, where the respective interests of the parties under a prior will was material to the issues, the court's action in allowing the attorney for plaintiff in the settlement of such testator's estate, who prepared a contract between plaintiff and defendant's intestate as to the interest they should take upon the distribution and also prepared the decree of distribution, to testify as to what was intended by the terms of these various instruments was error, since the will and the contract and the decree of distribution all spoke for themselves, if the two former were entitled to be considered at all in construing the decree of distribution.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 488.]

7. APPEAL AND ERROR 🔑1052(2)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in admitting evidence as to what was intended by a will and a contract between the beneficiaries thereof as to the interest they should take upon distribution was harmless, if the will and contract were properly admitted by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4172.]

8. EVIDENCE 🔑236(3)—DECLARATIONS BY DECEASED.

In action for reformation of contract and deed to limit the estate of defendant's intestate therein to a life estate and give plaintiff the remainder after defendant's intestate's death, evidence was properly admitted of declarations of defendant's intestate after the execution of the deed in question and while she and plaintiff were both in possession of the property that the property would belong to plaintiff after her death, that she often spoke of her interest in it being simply a life interest, and similar declarations; such declarations being admissible under Code Civ. Proc. § 1870, subds. 2, 4, as declarations of a deceased person against her interest in respect to her real property.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 878.]

9. EXECUTORS AND ADMINISTRATORS 🔑315(1)—DECREE OF DISTRIBUTION—INCORPORATION OF PROVISIONS OF WILL.

In making a decree of distribution, a court may incorporate therein the provisions of the will, or an agreement entered into between the heirs, which is called to the attention of the court with a view of having it incorporated in the decree, and the court may, by express terms or by apt reference thereto, incorporate said will or agreement in the decree so as to constitute it a portion of its distributive terms.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1302.]

10. EVIDENCE 🔑386(2) — EXTRANEOUS EVIDENCE.

Where the will and a contract between the heirs were by express reference incorporated in a decree of distribution, they were admissible as part of the decree in an action involving a consideration of the decree, and were not inadmissible as matters extraneous to the terms of the decree and modifying or changing it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1699.]

11. DEEDS 🔑211(2)—EVIDENCE.

In an action to reform a contract of purchase and a deed and to quiet plaintiff's title to the land, evidence *held* to support the court's finding that the parties intended to have the instruments show that defendant's intestate had only a life interest in an undivided half, the same at her death to pass to plaintiff.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 648.]

Department 2. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Charlie L. Horton against Theodore A. Winbigler, administrator. From judgment for plaintiff and order denying a new trial, defendant appeals. Affirmed.

F. C. Spencer, of Anaheim, and A. J. Mitchell, of Los Angeles, for appellant. Tipton & Cailor, of Los Angeles, for respondent.

LORIGAN, J. This action was for a decree reforming a contract of purchase and a deed to 30 acres of land in Orange county made and executed to plaintiff and the intestate in her lifetime, and further quieting the title of plaintiff to said land against the estate of said decedent.

There was no conflict in the evidence in the case. It was all produced by plaintiff. Certain facts are as follows: Plaintiff is the only son, and decedent was the mother of Minnie W. Horton. Mrs. Horton died testate September 23, 1909, several years before her mother, and by her will bequeathed to the latter certain personal effects, a monthly allowance to be charged against certain described real estate, and also "one-half of all the money * * * of which I may die possessed to have and enjoy for and during her life." The plaintiff was bequeathed the other half of the estate absolutely, and was also the residuary devisee on the death of his grandmother of the half of the estate in which she was left a life interest. The will of Mrs. Horton was admitted to probate and administered upon by the plaintiff. Pending the administration, and on December 19, 1909, the plaintiff and said Lucy J. Brown, his grandmother, entered into a written contract with one William Wagner to purchase from him the 30 acres of land here in question for $8,500, payable in certain installments, the last of which was to be paid on January 1, 1911, when they were to receive a deed to the property. While the administration of the estate of Mrs. Horton was still pending, and on September 12, 1910, said Lucy J. Brown and plaintiff, as beneficiaries under the will of said Mrs. Horton, made an agreement which was filed in the estate, whereby it was mutually agreed between them that said Lucy J. Brown should take under the said will one half of the moneys of the estate "to use and enjoy during her life," all the furniture and personal effects absolutely, and that her claim to $50 a month should be waived; that plaintiff should take the other half of the moneys his mother died possessed of and certain real property in the city of Los Angeles and in the state of Washington. Within the same month that this agreement between plaintiff and Mrs. Brown was made, a decree of distribution in the estate of Mrs. Horton was entered, whereby there was distributed to Mrs. Brown one-half of $10,395.71 cash in the hands of plaintiff, as executor, and certain personal effects, and the rest of the estate was distributed to the plaintiff. The particular terms of this decree of distribution will be subsequently referred to when we are discussing a question respecting its effect which is involved on this appeal. After the entry of the decree of distribution, and on February 24, 1911, in consummation of the contract with him, Wagner made a deed to plaintiff and Mrs. Brown, of the 30 acres involved in this action (the installment payments having been completed under the contract). It was an ordinary grant, bargain, and sale deed running to both said grantees, their heirs and assigns, and expressing a nominal consideration of $10. It further appears that Mrs. Horton, Mrs. Brown, and plaintiff came from Texas, and lived together at the home of Mrs. Horton until her death. Thereafter Mrs. Brown lived with plaintiff and his family. Mrs. Brown had no property when she came to California, and all she acquired subsequently (eliminating for the present the interest from Wagner to herself and plaintiff) was what she received by virtue of the will of Mrs. Horton—principally the life interest in this money. The purchase of this 30 acres was negotiated for by plaintiff while he was executor of the estate of his mother, pending the administration and after a conference with Mrs. Brown about its purchase, at which time Mrs. Brown told him to do as he saw fit and use his own judgment. He thought it advisable to purchase, and both himself and Mrs. Brown made the contract with Wagner to do so, and the payments aggregating $8,500 were made solely from the funds of the estate of Mrs. Horton in the hands of plaintiff as administrator of her estate.

Mrs. Brown died October 27, 1911, intestate. Letters of administration were issued to the defendant, who is asserting in behalf of her estate a claim to an undivided half interest in the 30 acres of land. Plaintiff brings this action, his complaint being based on two counts; upon one he seeks a reformation of the contract of purchase and deed; on the other to quiet title to the property. In that relating to the reformation of the instruments, after alleging the facts above recited as far as pertinent to the cause of action, plaintiff further alleged that the contract of purchase of this land made between Wagner and himself and Mrs. Brown did not, in truth or in fact, state the real intention of the parties, in that no mention is made therein that said Lucy J. Brown was to have but a life estate only in said property, and that it was intended at the time between plaintiff and Mrs. Brown that said contract should contain a stipulation, in substance, "that as to Lucy J. Brown a life interest only in the undivided one-half of the property herein described and on her death the same to pass to Charlie L. Horton"; that said stipulation was omitted by the mutual mistake of said plaintiff and said Lucy J. Brown, deceased. It is then further alleged as to the deed from Wagner to himself and Mrs. Brown that the same mistake was made by the mutual mistake of said parties; that in the said deed to plaintiff and Mrs. Brown there was omitted the same stipulation as aforesaid.

The other count, as stated, contained allegations under which plaintiff seeks to have his title to said premises quieted. The prayer is for a reformation of the contract and deed to conform to the alleged intention of the parties and for a decree quieting title. Defendant demurred generally and specially to the complaint, and, his demurrer being overruled, answered, denying the principal allegations of the complaint. The court made findings and a decree in favor of plaintiff, reforming the contract and deed and quieting the title of plaintiff, and this appeal is from the judgment and an order denying the motion of defendant for a new trial.

As grounds for a reversal appellant claims that the court erred in overruling his demurrer to the complaint; erred also in the admission of evidence; and it is further asserted that the evidence does not sustain certain of the findings.

[1-3] As to the demurrer the only points urged by appellant in presenting his demurrer in the trial court which we think call for any consideration are that there is no allegation in the complaint of an agreement entered into between plaintiff and Mrs. Brown in her lifetime when the contract and deed were made that there should be inserted therein a clause limiting the interest of said Mrs. Brown to a life interest with remainder over to plaintiff. The argument is that if there was no such agreement, then there could be no mutual mistake upon which a reformation of the instruments could be

based. It is further contended that the reformation of the contract and deed were separate causes of action which should have been separately stated, but were not, and hence the demurrer which made this particular point should have been sustained on that ground. As to the first claim that there is no allegation that plaintiff and Mrs. Brown did agree to any terms or stipulations to be inserted in the deed as to their interest in the land, it is quite apparent that there is no specific allegation to that effect. The most direct allegation is that, when the property was purchased—

> "it was intended at the time between the said Lucy J. Brown and the plaintiff that the said contract should contain the following stipulation 'that as to Lucy J. Brown a life interest only in and to the undivided one-half of the property herein described and at her death the same to pass to Charlie L. Horton.'"

When a court of equity is authorized to reform a contract at all, so as to incorporate therein provisions claimed to have been omitted in its execution though intended by the parties to have been inserted, in order to invoke such jurisdiction it must be pleaded as a fact that there was an agreement between the parties that the provision or term omitted should have been contained in the executed instrument. But it is not necessary that it shall be alleged in direct terms that such an agreement was made. The requirement of pleading will be met if it appears reasonably and fairly from matters stated in the complaint and the language used representing them that in effect such an agreement is alleged. The complaint here alleged that the purchase of the property was made pending the administration of the estate of Mrs. Horton with the funds of her estate, the use only of one-half of which Mrs. Brown was to have for life, with absolute property therein to pass to plaintiff upon her death. This limitation in the interest of Mrs. Brown in such funds of the estate was not one of agreement between plaintiff and herself, but was imposed by the will of her testator. Her interest in it could not extend further, and when she with plaintiff invested the funds of the estate in the property in question, it would only be natural that as part of the agreement in purchasing the property it should be agreed and understood that the interest of Mrs. Brown therein would be limited by the interest which she had in the funds which she was investing therein, a life interest in one-half. We refer to these allegations, not as assuming that they amount to an allegation of an explicit agreement between plaintiff and Mrs. Brown when the property was purchased as to the interest each should take therein and the stipulations respecting it to be inserted in the instrument, but as bearing on the language of the allegation quoted above "that it was intended at the time between the said Lucy J. Brown and the plaintiff that the contract should contain," etc. It is contended that "intention" is not equivalent to an "agreement." But whether it is or not depends on the connection in which it is used. Such use will often make the one word equivalent in meaning to the other. So it is here. The allegation is not that there was an intention simply on the part of plaintiff or Mrs. Brown that the contract should contain a certain stipulation, but that an intention had been reached between them at the time of the contract that the contract should contain such stipulation. An alleged intention between them that a specified provision should be placed in the contract could only mean, giving the language its ordinary meaning, that as a result of a consideration of the matter between the parties it was agreed or understood that the contract should contain the specified provision, and that construction sufficiently meets the objection of appellant.

[4] On the other point that there were two separate causes of action for reformation of instruments—one for reformation of a contract; one of a deed—which were not separately stated. There was but one cause of action, based upon mutual mistake. The contract for the purchase of the property supplemented by a deed thereto were only parts of the one transaction, namely, the purchase of the land. There was but one set of facts, and these as to this mutual mistake alleged in the complaint applied to this entire transaction. It constituted one mutual mistake, consisting of an omission from the written instruments of a provision agreed on to be inserted as to the extent of the interest the parties should take under the instruments.

[5] As to the alleged errors in the admission of evidence. It was proper for the court to admit in evidence the answer of the plaintiff as to his intention relative to the interests which the respective parties should have in the property and which should be inserted in the contract and deed. Mrs. Brown had only a life interest in the use of the money which went into its purchase price. The ownership of the fund subject to such life use was in the plaintiff. Mrs. Brown, by consenting to the investing of the money in which she had only a life interest in this land, could not acquire a greater interest therein than her interest in the funds entitled her to, unless it was the intention of the plaintiff that she should take it. While it is true that the intention of the plaintiff alone is not a controlling factor in the case, but that it must appear that some agreement or understanding existed between himself and his grandmother disclosing a mutual intention on their part to have the written instrument contain the alleged conditions which it is claimed were omitted, still, when one of the questions in the controversy was whether Mrs. Brown was to have a greater interest in the land to be purchased than she had in the purchase money to be invested in it, we think it was proper to allow the evidence of the intention of plaintiff on that point, as his intention was necessary to effect a gift, and to be con-

sidered in connection with all the other evidence tendered to show mutual intention and a mutual mistake. Appellant contends that this intention of the plaintiff was the only evidence relied on by him as showing mutual mistake, but whether it was or not is not the question here to be considered, but only the admissibility of the evidence. Whether there was any further evidence or not to sustain the finding will be considered further along in its place.

[6, 7] It is further claimed that the court erred in allowing the attorney for plaintiff in the settlement of the estate of Minnie W. Horton, deceased, and who prepared the contract between plaintiff and Mrs. Brown as to the interests they should take upon the distribution, and who further prepared the decree of distribution, to testify as to what was intended by the terms of these various instruments. He testified, over the objection of defendant, that the contract was not intended to change the disposition under the will, nor did the decree of distribution intend to distribute to Mrs. Brown a greater estate or to plaintiff a lesser estate than was given by the terms of the will. This evidence was not admissible. The will and the contract and the decree of distribution all spoke for themselves, if the two former were entitled to be considered at all in construing the decree of distribution. There was nothing ambiguous or uncertain in any of the terms of these instruments which required extraneous evidence to explain them. But while it was error to admit this testimony, it was harmless error if the will and contract were properly admitted by the court in connection with the decree of distribution. This is a question for later consideration.

[8] Evidence was admitted, over the objection of defendant, of declarations made by Mrs. Brown after the execution of the deed to plaintiff and herself, and while they were both in possession of the property, that the property would belong to plaintiff after her death; that she often spoke of her interest in it being simply a life interest, and similar declarations. Such declarations were clearly admissible under subdivisions 2 and 4 of section 1870 of the Code of Civil Procedure as declarations of a deceased person against her interest in respect to her real property.

The last point made by appellant is that the evidence is insufficient to sustain certain of the findings which relate to the decree quieting title of plaintiff to the land. The court found that:

> Plaintiff "now and ever since the death of Lucy J. Brown has been the owner in fee of the real property described in plaintiff's complaint, and that the estate of Lucy J. Brown is not the owner of an undivided one-half interest therein."

Further:

> "That said estate of Minnie W. Horton was distributed in accordance with said will and the contract entered into by the plaintiff and said Lucy J. Brown, and provided by its terms that said Lucy J. Brown should take a life interest only in and to one-half of said real estate distributed to her * * * and that by the terms of said will and contract and decree of distribution the said Lucy J. Brown, now deceased, acquired a life estate only in and to said real property described herein."

This claim of appellant is based solely on the construction which he claims must be given to the decree of distribution in the estate of Minnie W. Horton. His claim is that the only distributive language in the decree provides for a plain, distinct and unequivocable distribution "of one-half of all the moneys on hand to the said Lucy J. Brown, * * *" that no limitation to the use of such moneys for life is prescribed in the decree as to the interest or share given to said Lucy J. Brown in said money, but that it is given to her absolutely; and with much insistence appellant asserts that the clause above quoted must be taken segregated from other parts of the decree and considered by itself, and that, so considered, it must be construed as declaring an absolute ownership in Mrs. Brown of one-half of said money. But the error in the contention of appellant lies in placing undue stress on this particular distributive clause and ignoring other provisions of the decree intimately connected with and constituting an important part of its distributive terms. As we have shown, the will of Mrs. Horton gave Mrs. Brown the use of one-half of the moneys she died possessed of and the subsequent contract between plaintiff and Mrs. Brown, after extinguishing some right under the will to which she would otherwise be entitled, declares that she, Mrs. Brown, "selects and elects to take under said will one-half of the money for life" and certain other personal effects of the deceased absolutely.

Now, in the petition for a decree of distribution the terms of the will are set forth, and the agreement between plaintiff and Mrs. Brown aforesaid as to the method in which the estate should be distributed to them is also set forth, and distribution is then asked to be given under said will and agreement, and in the decree of distribution it is recited "that in pursuance of, and according to the last will of said deceased, the agreements of the heirs and legatees, and deeds and conveyances on file herein, the said property is distributed as follows, to wit," followed by the distributive clause in favor of Lucy J. Brown of one half of the money of the estate in the terms relied on by appellant and the other half of the money to plaintiff, together with certain real estate.

[9, 10] In making a decree of distribution a court may incorporate the provisions of the will therein or a contract or agreement entered into between the heirs and which is called to the attention of the court with a view of having it incorporated in the decree; and the court may, by express terms or by apt reference thereto, incorporate said will or contract in the decree so as to constitute it

a portion of its distributive terms. This is what was done in the decree of distribution under consideration. The court incorporated the will and the contract between plaintiff and Mrs. Brown as to the respective interests which each should take on distribution, and pursuant thereto made distribution accordingly. When a necessity arose thereafter to construe said decree, the court was not limited to a consideration of the particular provision of it, as claimed by appellant, but it was the duty of the court to look to the will and the contract which were made a part of the decree, together with the other terms, in order to ascertain just what the terms of the distribution were, because the distribution as declared by the court was in accordance with the provisions of the will and the agreement of the heirs. This declaration and reference to the will and agreement made them a part of the decree as effectually as though set forth in it. The court was not, as appellant asserts, allowing the admission of the will and contract as matters extraneous to the terms of the decree for the purpose of modifying or changing the decree of distribution. The court was admitting these instruments, which were in effect part of the decree of distribution because referred to therein and declared to be the basis of the decree itself, not to modify it or change it in any particular, but for the purpose of construing it in its entirety and determining just what was meant by all its distributive provisions. The right of the court to incorporate provisions of a will or agreement by express reference in a decree of distribution and thereafter in an action involving a consideration of the decree to resort to said will and agreement as part of the decree in construing its terms, as was done in this case, is well settled in this state. Goldtree v. Thompson, 79 Cal. 613, 22 Pac. 50; Goad v. Montgomery, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145; McCloud v. Hewlett, 135 Cal. 361, 67 Pac. 333.

[11] An attack is made also on a finding respecting the second cause of action. It is alleged in the complaint and found by the court that when the contract of purchase was entered into and the deed to the property subsequently made it was the intention of the parties to have the said instruments show that as to Lucy J. Brown she was to have only a life estate in an undivided half interest thereof, the same at her death to pass to plaintiff. Appellant claims that this finding is not sustained by the evidence. The only evidence on the subject was that produced by the plaintiff. It was not voluminous, and, the matter being of a private nature in which the plaintiff and Mrs. Brown were alone interested and she dead, it would hardly be expected to be otherwise. But even under these conditions we are satisfied there was sufficient warrant for the finding. When this transaction took place Mrs. Brown had no means of her own. All she had was a life interest in the money which on her part went into the purchase of her half interest in the property. Upon the investment of such funds she could not, without the consent of plaintiff, have acquired any greater interest in the land than a life interest, with a right in the plaintiff to take the property on her death. This was true because her interest or the money invested by her or its proceeds, together with the ultimate right of the plaintiff thereto on her death, was fixed by the terms of the decree of distribution under which she received the money for her use during her natural life. No action on her part could enlarge her interest in those funds or in the property purchased thereby. So that, in the absence of any evidence that the plaintiff and Mrs. Brown intended to hold the real property purchased under any other or different terms than they held the money derived from the estate of Mrs. Horton which went into its purchase, the inference would naturally be that they did not. Add to this the testimony of the plaintiff that it was the intention of himself and his grandmother when they bought the property to act in accordance with his mother's will; that the grandmother have a life estate or a life legacy in it, and at her death it was to revert to plaintiff; that plaintiff did not intend to make a gift to his grandmother of any interest in it; that his grandmother's intention and his intention, as he declared, were that she should have only a life interest in the same. After the purchase of the property, and while both parties were in possession on several occasions, the grandmother declared that on her death the property would belong to plaintiff; that she often spoke of her having but a life interest in it; that it did not make any difference as to expenditures made by him on the ranch, as the property would all go to him on her death. Taking into consideration that the grandmother only had a life interest in the fund invested in the real property, that she never claimed any other or different interest in it than a life estate, together with the testimony of plaintiff as to what was intended by himself and his grandmother as to the interest she should take in the property, the court was warranted in finding that it was the intention under the contract and deed to convey to her a life interest only, and that the omission to have said conveyances so declare was a mutual mistake.

We have examined all the points made for a reversal which we think merit attention, and, finding no reason for disturbing the order and judgment, they are affirmed.

We concur: MELVIN, J.; HENSHAW, J.

175 Cal. 141

BROWN v. SUPERIOR COURT, LOS ANGELES COUNTY, et al. (L. A. 5149.)

(Supreme Court of California. May 16, 1917.)

1. APPEAL AND ERROR 🔑607(1)—TRANSCRIPT —TIME.

Filing of a notice within the time prescribed by Code Civ. Proc. § 953a, is essential to one's right to have prepared a stenographic transcript for use in support of an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2665.]

2. APPEAL AND ERROR 🔑607(1)—TRANSCRIPT.

Under Code Civ. Proc. § 953a, providing that when appellant desires to have the record presented other than by printed record he shall file with the clerk a certain notice within ten days after entry of the judgment, order, or decree, or if a proceeding on motion for new trial be pending within ten days after notice of decision denying said motion or of other termination thereof, although no written notice was given petitioner of the decision denying a motion for a new trial, if he had actual knowledge of the decision at the time it was made, he would have only ten days from decision to file his motion for preparation of stenographic transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2665.]

3. APPEAL AND ERROR 🔑607(1)—TRANSCRIPT —TIME.

Minutes of the court, reciting that motion for new trial came on regularly to be heard, Y. appearing as attorney for plaintiff and V. for defendant, followed by order denying motion, was insufficient to show that defendant's attorney had actual notice of decision, and defendant's time for filing notice for preparation of transcript did not begin to run until notice of the decision was served.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2665.]

4. APPEAL AND ERROR 🔑165 — ESTOPPEL — ELECTION OF REMEDIES.

That petitioner contemplated an appeal upon a bill of exceptions under Code Civ. Proc. § 650, and took steps to obtain an extension for the preparation thereof could not deprive her of the right given by section 953a to bring up the record in a different manner.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 995-1001.]

In Bank. Original application by Edna A. Brown for a writ of mandate against the Superior Court, Los Angeles County, and John M. York, Judge thereof. Granted.

Arthur C. Vaughan, of Los Angeles, for petitioner. Milton K. Young, of Los Angeles, for respondents.

ANGELLOTTI, C. J. This is a proceeding in mandate to compel the certification by a trial judge of the stenographic reporter's transcript, as provided in section 953a, Code of Civil Procedure, for use in support of an appeal prosecuted by petitioner from a judgment rendered against her in a case entitled Tropical Investment Company v. Edna A. Brown.

The principal ground for the refusal of the trial judge to certify the transcript was that the notice for the preparation of the same was not filed with the clerk of the superior court within the time prescribed by law. The law requires such notice to be filed "within ten days after notice of entry of the judgment, order or decree, or if a proceeding on motion for new trial be pending, within ten days after notice of decision denying said motion, or of other termination thereof." Section 953a, Code Civ. Proc.

[1] It is settled that the filing of this notice within the time prescribed is essential to one's right to have such a transcript prepared and settled. Estate of Keating, 158 Cal. 113, 110 Pac. 109. The notice was not filed within ten days after notice of entry of the judgment. There was a motion for a new trial, which was heard and denied on July 17, 1916. Written notice of this decision was served on petitioner on July 29, 1916, and within ten days after such service, viz. on August 8, 1916, petitioner filed the requisite notice with the clerk. As will be observed, this was more than ten days after the decision denying the motion was actually made. It is claimed that petitioner had actual notice of the decision on the motion for a new trial at the time it was made, and that where such is the case written notice is not made essential by the language of this particular statute, with the result that her time for filing the notice for preparation of the transcript commenced at once and expired July 27, 1916.

[2] It was held by the court in bank in Estate of Keating, 158 Cal. 109, 110 Pac. 109, after a most exhaustive discussion, that, in view of the language of this statute, "actual notice established by *satisfactory evidence of record* will start the statute in motion without the service of a formal written notice." (The italics are ours.) In that case the filing of a notice of appeal from the order sought to be reviewed was held to be conclusive evidence that the party knew of the entry of the order, and this notice was taken as satisfactory "evidence of record." The same conclusion upon similar facts was reached by the court in bank in Fiske v. Gosbey, 168 Cal. 334, 143 Pac. 611. While written notice is not required where actual notice exists, as is established by these decisions, it appears to be equally well settled that the actual notice must be clearly shown by facts appearing in the records, files, or minutes of the court, such for instance as the filing by the party of a notice of appeal or a notice of intention to move for a new trial, or an application for a stay of execution, etc. In such cases it has sometimes been said by the court that by such acts the party must be held to have waived written notice of the decision. Such acts clearly show the *actual* notice of the decision which, it is established, renders the service of written notice unnecessary under the particular statute here involved.

[3] In the case at bar, the only material record evidence is furnished by the minutes

of the court, which show the following entry, viz.:

> "Tropical Investment Co., Plaintiff, v. Edna A. Brown, Defendant. The defendant's motion for a new trial coming on regularly to be heard, M. K. Young, Esq., appearing as attorney for plaintiff and A. C. Vaughn, Esq., for defendant. It is ordered that the motion be and the same is hereby denied."

There is nothing in the entry or on the records or files to indicate that petitioner or her attorney did any act showing actual notice of this decision until, in pursuance of the written notice subsequently served, the notice for preparation of the transcript was filed. We do not think that it may fairly be held that the minute entry clearly shows actual notice of the decision to her attorney. It is entirely consistent therewith that he did not have such notice. While it shows that he appeared on the *hearing* of the motion, it does not show whether or not he was actually present when the decision was rendered. So far as the record shows, he may or may not have been present at that time. The records failing to show clearly that he did have such actual notice, we are of the opinion that it must be held that time for filing notice for preparation of transcript did not commence to run until the notice of decision was served, viz.: on July 29, 1916, and that the notice filed on August 8, 1916, was in time.

[4] As to another objection made, we are entirely satisfied with what was said by the District Court of Appeal of the Second Appellate District, in the decision in this proceeding, as follows:

> "It appears that on August 2d the court, upon petitioner's application, made an order extending the time within which to prepare a bill of exceptions to be used on appeal; and this fact is urged as a further ground for the refusal of the court to certify the reporter's transcript prepared in lieu thereof. The fact that on August 2d petitioner contemplated an appeal upon a bill of exceptions, as prescribed in section 650, Code of Civil Procedure, and took steps to obtain an extension of time for the preparation thereof, could not deprive her of the right given by section 953a in bringing up the record in the manner there prescribed."

There is no other point requiring notice.

Let the peremptory writ of mandate issue as prayed.

We concur: VICTOR E. SHAW, Judge pro tem.; SLOSS, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

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175 Cal. 136

SMITH-BOOTH-USHER CO. v. LOS ANGELES ICE & COLD STORAGE CO.

(L. A. 3867.)

(Supreme Court of California. May 16, 1917.)

1. EVIDENCE 🔑400(3)—REDUCTION TO WRITING—MERGER.

Where a contract for the sale of a pump was reduced to writing, nothing not found in the writing, except that which is presumed by law from that which is written, can be considered as a part of the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1787, 1791, 1793.]

2. SALES 🔑273(1)—SALE FOR PARTICULAR PURPOSE—WARRANTY OF FITNESS—STATUTE.

The warranty created by Civ. Code, § 1770, providing that one who manufactures an article, under an order, for a particular purpose, warrants by the sale that it is reasonably fit for that purpose became part of the contract for sale of a pump by plaintiff acting as agent for the manufacturer; the article being supplied for a particular specified purpose.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 772.]

3. SALES 🔑273(1)—WARRANTY OF FITNESS FOR PARTICULAR PURPOSE—BREACH.

Where plaintiff furnished a pump, under Civ. Code, § 1770, warranting that it was fit to work in a normal well of designated size and depth, and to lift and discharge 500 gallons of water per minute, and the pump would not do the work satisfactorily simply because the conditions were abnormal, and the well was filled with loose sand, which the operation of the pump disturbed, there was no breach of warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 772.]

Department 2. Appeal from Superior Court, Los Angeles County; N. D. Arnot, Judge.

Action by the Smith-Booth-Usher Company, a corporation, against the Los Angeles Ice & Cold Storage Company, a corporation. From a judgment for defendant and an order denying plaintiff's motion for new trial, plaintiff appeals. Judgment and order reversed.

William M. Hiatt and Edward M. Selby, both of Los Angeles, for appellant. Sidney J. Parsons and C. W. Pendleton, Jr., both of Los Angeles, for respondent.

HENSHAW, J. Plaintiff sold a pump and pumping apparatus to defendant under circumstances hereinafter related. It was paid a part of the purchase price, the pump was installed, and failed to give good service. Defendant so notified plaintiff, demanded a return of its money, and requested a removal of the pump, in order that it might install one which would perform the desired service. Thereupon plaintiff brought this action to recover the unpaid part of the purchase price, and defendant answered, averring that it purchased the pump under a warranty that it would deliver 500 gallons of water per minute, and that the pump in fact would not deliver to exceed 100 gallons per minute. It counterclaimed, seeking a return of the amount of the partial payment which it had made on the purchase price of the pump and compensation for expenditures to which it had been put in its efforts to overcome the imperfections of the pump. The court found that the agreement between the parties was that the plaintiff would deliver a pump "which would furnish to said defendant not less than 500 gallons of water per minute"; that the pump was unable to furnish more than 100 gallons per minute; that by its written contract plaintiff warranted to the defendant that the pump would be reasonably fit for the particular purpose for which it was ordered, "but that the pump manufactured or caused to be manufactured by plaintiff and by plaintiff delivered to defendant was not reasonably fit for said purpose"; that in executing the contract defendant relied upon the warranty of fitness; that plaintiff warranted that the pump which it would manufacture and deliver "would have a capacity of delivering to defendant at least 500 gallons of water per minute from a well of defendant located in accordance with the specifications in said written contract contained." Following these findings, judgment was given against plaintiff and in favor of defendant on its counterclaim.

The question advanced by appellant for determination is twofold: First, did it give such a warranty as the court found, and, second, if it did, did the pump which it furnished fail to conform to the requirements of the warranty. The facts are that defendant in its business used water from several wells upon its premises. In the pumping of these wells it had been using air-lift pumps. It was represented to it that a pump known as the Weber subterranean pump would furnish a larger supply of water at less expense. The Weber subterranean pump was manufactured by the Weber Subterranean Pump Company of New York, but plaintiff represented that company as a selling agent. The Weber subterranean pump operated by compressed air. The result of conversations was a contract in writing, which, of course, measures the rights, duties, and obligations of the parties. The well in which the Weber pump was to be used had not at the time been dug by defendant, so that the specifications referred to in the findings could only go, as will appear from the contract itself, to such matters as its location and depth. The plaintiff submitted to defendant in writing the following:

> "As per your request, we have submitted to the Weber Subterranean Pump Company of New York, three propositions as follows: Well to be 18 inches inside diameter; 250 feet deep; location of well 50 feet from (air) compressor; capacity 500 gallons per minute."

Then followed proposal A, based on the water level lowering during the pumping to a depth not exceeding 120 feet below the surface of the ground. Upon this the offer continued with a list of materials, being manifestly the necessary and component parts of the pump itself, concluding with:

> "All cut to proper lengths and fitted complete, ready to erect, delivered to your plant, and one competent man furnished to superintend and assist in the erection of same; all for the sum of $2,085.90."

Then followed proposal B:

> "Based on water level receding when pumping 500 gallons per minute not to exceed 150 feet below surface of ground, the equipment would remain the same (as under proposal A) with the exception of necessarily added casing to place the valves at the greater depth, the total addition of cost of material for this purpose being $118.60. There would be required for this service approximately 615 cubic feet of free air per minute delivered from the compressor at about 65 pounds gauge pressure."

This proposal B was formally accepted in writing by defendant. In due time the well was dug and the pump installed. From the outset of the operations of the pump there was trouble, and this trouble clearly arose, not from any defect in the pump itself, but from the fact that the well ended in water-bearing sand, and that the action of the compressed air disturbed this sand and forced it into the pipes and clogged the valves. Upon the first occasion when the pump, after installation, was removed, there were 30 feet of loose sand in the bottom of the well and 4 feet of sand in the pump casing and valves. The pump itself worked perfectly saving for this impediment to its successful operation. The Weber pump, which in the principle of its operation forced the water upward by compressed air at the bottom of the well, created a much greater disturbance of this sand than did the straight air lift pumps which defendant theretofore had used and which, while they would furnish a less supply of water, created much less disturbance of the sand itself. This fairly presents the conditions as shown by the evidence.

[1] Since this contract was reduced to writing, nothing which is not found in the writing (except that which is presumed by law from that which is written) can be considered as a part of the contract. Johnson v. Powers, 65 Cal. 179, 3 Pac. 625. The writing did contain an express warranty of capacity of the pump, that is to say, it declared that the pump, working in a well of designated diameter and depth, and within a fixed distance from the air compressors, would deliver 500 gallons of water per minute. Respondent, in addition to this, invokes the application of section 1770 of the Civil Code, which declares that:

> "One who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose."

[2] It may be said that this warranty, erected by law, also becomes a part of the contract under the circumstances here shown; the plaintiff being considered as an agent for the manufacturer, and the manufacturer having supplied an article for a particular purpose, thereby warranting that it is reasonably fit for that purpose.

[3] What then precisely was the purpose which measures the warranty? It could be no more than that, working in a normal well of the designated size and depth, the pump would lift and discharge 500 gallons of water per minute, and the evidence leaves no doubt that this pump would do this thing. It was called upon to work, however, under abnormal conditions—in a well filled and filling with loose sand. Plaintiff's warranty

certainly cannot be extended to include this condition, nor could plaintiff know that such condition would exist, since in fact the well had not been dug. It was as much without the contemplation of the warranty, whether it be regarded as express or implied, as it would have been if the well, dug to the size and capacity, had not contained a sufficient quantity of water to furnish 500 gallons a minute. Moreover, while the rights of the parties are to be found in the terms of their written contract, to which are to be added such warranties as the law itself creates under proven circumstances, the parol evidence itself does not show that the plaintiff intended to warrant, or was ever called upon to warrant, the operation of its pump in a heavily sanded well. Defendant's manager testifies that he explained to plaintiff "our whole situation as to the wells we had and the trouble we had with the pumps we had in them." He testifies further as to one well that the defendant was afraid to longer pump it lest the sand removed might cause a cave in the surface soil, but nowhere does it appear that it was in contemplation that the well to be dug would be overloaded with sand and that the pump which plaintiff was to furnish was to have a 500-gallon per minute capacity working in such sand. The article furnished was reasonably fit for pumping an ordinary well of the size and capacity specified. If defendant desired a warranty that it would so pump under any condition which might be developed after the digging of the well, it should have seen to it that this warranty was expressed in the contract, as clearly it is not. Whatever may have been the conversations touching this matter, the terms of the written agreement may not be extended because of them. Bancroft v. San Francisco Tool Co., 120 Cal. 228, 52 Pac. 496; Germain Fruit Co. v. Armsby Co., 153 Cal. 585, 96 Pac. 319; United Iron Works v. Outer Harbor Dock and Wharf Co., 168 Cal. 81, 141 Pac. 917.

The judgment and order appealed from are therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

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175 Cal. 81

STEINBERGER v. YOUNG et al.

(L. A. 3852.)

(Supreme Court of California. May 9, 1917. Rehearing Denied June 7, 1917.)

1. SPECIFIC PERFORMANCE 🔑86—ORAL CONTRACT TO DEVISE.

An oral contract to devise may, under proper conditions, be specifically enforced.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 223, 224.]

2. WILLS 🔑58(1) — ORAL CONTRACT TO DEVISE—VALIDITY.

Prior to amendments of 1905 and 1907 to Civ. Code, § 1624, and Code Civ. Proc. § 1973, an agreement to devise was not required to be in writing.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 164.]

3. SPECIFIC PERFORMANCE 🔑121(7) — CONTRACT TO DEVISE—PROOF.

To warrant specific performance of a contract to devise, the proof must be clear, definite, and certain.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 391–393.]

4. APPEAL AND ERROR 🔑1011(1)—REVIEW—FINDING—CONFLICTING EVIDENCE.

A finding made upon conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988.]

5. TRIAL 🔑382—QUESTION OF LAW—SUFFICIENCY OF EVIDENCE.

The sufficiency of evidence to establish a given fact, even when the law requires clear and convincing proof, is primarily a question for the court in trial without jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 898.]

6. APPEAL AND ERROR 🔑1010(1)—REVIEW—FINDING—EVIDENCE TO SUPPORT.

If there is substantial evidence supporting the trial court's finding, it will not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3981, 4024.]

7. SPECIFIC PERFORMANCE 🔑121(7) — ORAL CONTRACT TO DEVISE—SUFFICIENCY OF EVIDENCE.

Evidence of oral declarations of decedent supported by other evidence and legitimate inferences therefrom *held* sufficient to warrant specific performance of an oral contract to devise.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 391–393.]

8. HUSBAND AND WIFE 🔑182—WIFE'S SEPARATE PROPERTY — CONTRACT TO DEVISE — "CONCERNING OR RELATING."

A married woman's agreement to devise is one "concerning or relating" to her separate property within meaning of St. 1850, p. 254, § 6, as amended by St. 1858, p. 22, and St. 1862, p. 518, requiring such contracts to be executed in a particular manner.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 714, 715, 719.]

9. HUSBAND AND WIFE 🔑199—WIFE'S SEPARATE ESTATE — RATIFICATION OF CONTRACT TO DEVISE—SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to support finding that after removal of restrictions relating to wife's separate estate by Civ. Code, § 167, as amended by St. 1873–74, p. 193, deceased ratified previous oral contract to devise.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 734.]

10. HUSBAND AND WIFE 🔑199 — WIFE'S SEPARATE PROPERTY—RATIFICATION OF CONTRACT TO DEVISE—VALIDITY.

A married woman's oral contract to devise was not absolutely void under St. 1850, p. 254, § 6, as amended by St. 1858, p. 22, and St. 1862, p. 518, requiring such contracts to be signed by husband and separately acknowledged, so as to make it incapable of ratification after removal of disability by Civ. Code, § 167, as amended by St. 1873–74, p. 193, although such contract was not enforceable when made.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 734.]

11. HUSBAND AND WIFE 🔑181 — MARRIED WOMAN'S PROPERTY ACTS—OPERATION.

The statutory limitations upon wife's disposition of her property were designed mainly for her own protection, and not to deprive her of power over her estate, in view of Const. 1849, art. 11, § 14, defining the wife's separate property and providing that "laws shall be passed more clearly defining" such rights; and such statutes merely prescribe the mode in which the wife shall exercise her rights.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 713, 730.]

12. SPECIFIC PERFORMANCE 🔑105(3) — ORAL CONTRACT TO DEVISE—LACHES.

Plaintiff was not guilty of laches, where her action for specific performance of oral contract to devise was brought within a reasonable time after she became aware that decedent left no will in her favor, although more than two years had elapsed since decedent's death.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 327–341.]

13. LIMITATION OF ACTIONS 🔑127(4) — AMENDMENT OF COMPLAINT—NEW CAUSE OF ACTION.

Amendment to complaint asking specific performance of married woman's oral contract to devise, to show her ratification after statutory removal of disability to make such contract, did not set up a new cause of action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 544.]

14. WILLS 🔑58(1)—CONTRACTS TO DEVISE—VALIDITY—PARTIES.

Contract to devise property to a child upon stepfather transferring custody to promisor was not void because the stepfather had no legal control over child, since the child was the real party in interest and the stepfather stood in a relation authorizing him to act in her behalf.

[Ed. Note.—For other cases, see Wills, Cent Dig. § 164.]

15. EVIDENCE 🔑276—BY DECEDENT AGAINST INTEREST—STATUTE.

In action for specific performance of oral contract to devise, evidence of decedent's declarations in plaintiff's favor were admissible under Code Civ. Proc. § 1853, relating to decedent's declarations against pecuniary interests, although such declarations in favor of defendant were inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1135.]

Department 1. Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Maggie G. Steinberger against Milton K. Young, administrator of the estate of Elizabeth B. Ross, deceased, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

H. M. Barstow, Milton K. Young, Davis, Kemp & Post, Joseph Scott, A. G. Ritter, and Taylor & Forgy, all of Los Angeles, for appellants. J. H. Merriam, of Pasadena, and Joseph L. Lewinsohn, John A. Powell, and Hunsaker & Britt, all of Los Angeles, for respondent.

SLOSS, J. Elizabeth B. Ross died intestate on January 5, 1910, leaving an estate of considerable value. This action was brought against her heirs and the administrator of her estate to obtain specific performance of an agreement alleged to have been made in September, 1865, between one Halbert, plaintiff's stepfather, and plaintiff herself, on the one hand, and Elizabeth Ross, on the other, whereby Elizabeth Ross agreed that she would adopt the plaintiff, take her into her home, and treat her as her own daughter, and that said plaintiff should be the heir of said Elizabeth, and on her death should be entitled to receive her property. The stipulated consideration for these promises consisted of the surrender by Halbert to Mrs. Ross of the control and custody of the plaintiff, and the rendition by plaintiff to Mrs. Ross of the obedience, affection, and services of a daughter. The complaint contained the necessary allegations of performance on the part of Halbert and the plaintiff, and of adequacy of consideration. At the close of the trial, the plaintiff, by leave of court, filed an amended complaint alleging, in effect, the recognition and ratification of the agreement by Elizabeth Ross at various times. This amendment, made "to conform to the proof," was designed to meet the claim of the defendants that Elizabeth Ross, the alleged promisor, was a married woman at the time of the making of the alleged agreement, and that she was, under the provisions of our statutes then in force (Stats. 1850, c. 103; Stats. 1858, p. 22; Stats. 1862, p. 518), precluded from making a valid contract concerning her real property, except by an instrument in writing, executed by the husband and wife, and acknowledged by the wife. The ratification relied upon was claimed to have been made after the disability had been removed by a change in the statute. A renewed promise, made after the death of her husband, was also set up. The court found in accordance with the plaintiff's allegations, and entered judgment declaring her to be the equitable owner of all of the property owned by Elizabeth B. Ross at the time of her death, and requiring the heirs to make conveyance to her. The defendants appeal from the judgment.

[1-6] One of the contentions strongly urged by the appellants is that the evidence is insufficient to sustain the finding that the contract set up in the complaint was made. It is well settled in this court that an oral contract to dispose of property upon death in a particular way may, under proper conditions, be specifically enforced, and that, prior to the amendment, in 1905 and 1907, of our Codes (Civ. Code, § 1624; Code Civ. Proc. § 1973), it was not required that an agreement to this effect should be in writing. The subject was very recently under consideration in this court in Monsen v. Monsen, 162 Pac. 90, and we need only refer to the opinion in that case, and the earlier decisions there cited, for a statement of the rules of law governing the enforcement of contracts like the one here set up. The opinion in the Monsen Case emphasizes the rule, often laid down in earlier decisions, that, to warrant specific enforcement of a contract to make a certain will, or to make a person one's heir, the proof of such contract must be clear, definite, and certain. Applying this rule, it was held that the contract there sought to be enforced had not been established by proof filling the measure of these requirements. We think however, that the evidence in the case at bar is materially stronger than that presented in the Monsen Case, and that, under the settled rule regarding the binding effect of findings made upon conflicting evidence, the determination of the trial court that a contract, as alleged, had been made, cannot be assailed here. The sufficiency of the evidence to establish a given fact, even where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court (Couts v. Winston, 153 Cal. 686, 96 Pac. 357; Estate of Pepper, 158 Cal. 619, 112 Pac. 62, 31 L. R. A. [N. S.] 1092), and, if there be substantial evidence to support the conclusion reached below, the finding is not open to review on appeal.

[7] In September, 1865, Elizabeth B. Ross was living with her husband, Robert Ross, in Sierra county, in this state. Plaintiff was then a child of the age of five years. Her mother had died two months before, leaving surviving a husband, J. C. Halbert, plaintiff's stepfather. The evidence is abundant and undisputed to the effect that, at this time, the plaintiff, with the consent of her stepfather, was taken into the family of Mr. and Mrs. Ross, and that, until her marriage, which took place in 1883, she lived in that family as a member thereof. She took the name of Ross, and was treated by Robert and Elizabeth Ross as a daughter. She gave them the service and the affectionate devotion due from a child to its parents, and received from them care and nurture, as well as the best educational advantages available. On each of two occasions, when plaintiff was receiving attentions from young men, Mrs. Ross exercised a parent's right of opposing the proposed marriage, and each time her objections were heeded. When plaintiff married Mr. Steinberger, Mr. and Mrs. Ross were present, the former "giving her away." In 1884, Robert Ross died, and thereafter, until the death of Mrs. Ross, the most affectionate relations continued between the latter and the plaintiff. Gifts of real and personal property of considerable value were made by Mrs. Ross to the plaintiff. It is not contended that any formal adoption was ever made. In fact, at the time of plaintiff's entry into the Ross family, there was in this state no statutory provision for adoption. But Mrs. Ross made many statements showing that she and her husband had intended to adopt the plaintiff. There were but two witnesses who could testify directly to the occurrences of September, 1865, when Halbert gave the child to the Rosses. One of these was the plaintiff herself. She could not, of course, recall in detail what took place at this early period of her life and did not testify to the making of any agreement. Will T. Ross, who was present on the occasion in question, testified that Mrs. Ross had asked Halbert to give her the little girl. Halbert assenting, Mrs. Ross asked her husband whether he was willing, stating that she would assume the responsibility, to which the husband replied, "All right." Halbert handed the child over to Mrs. Ross, saying, "Maggie, here is your new mama and papa." On the same day Mrs. Ross said to other persons, "We have taken Maggie for our own." It is true that in this there is no statement in words of an agreement to make any particular provision for the child. But this witness did not claim to have heard the entire conversation, and, under the circumstances, some arrangement to this end would naturally form a part of the transaction. Mrs. Arrowsmith, who had been acquainted with Mrs. Ross from 1869, said that in that year, and in 1870, Mrs. Ross had frequently told her:

> "That she and Mr. Ross had adopted the plaintiff and made her their sole heir. She told me on one occasion that they had taken the plaintiff and had agreed with her stepfather, Mr. Halbert, I think his name was, that they would adopt her and make her their sole heir."

Again in 1884, after Mr. Ross's death, Mrs. Ross had said to this witness in plaintiff's presence, referring to the failure of Ross to leave a will giving his estate to plaintiff:

> "There will be no such mistake as that in regard to my property. We agreed with Maggie that she should have our property, and she shall have it."

In addition to this, many witnesses testified to declarations of Mrs. Ross to the effect that Maggie (the plaintiff) would be her sole heir, "that she should receive their property whenever they died the same as if she was their own child," and the like. The testimony of Mrs. Arrowsmith was evidence tending to show that Mrs. Ross and her husband had agreed with Halbert and the plaintiff to make the plaintiff their sole heir, and to leave her all of their property. Whatever may be said of the weight to be given to testimony of oral declarations of decedents, it cannot be said that such testimony, supported, as it is in this case, by other evidence and by the inferences which may fairly be drawn from the entire conduct of the plaintiff and her foster parents, is not sufficient to warrant the finding of the court below.

[8] But, as we have suggested above, it is argued by the appellant that in September, 1865, the date of the alleged contract, a married woman could not bind her separate estate, except in a particular manner prescribed by statute. The statute in question was entitled, "An act defining the rights of husband and wife," and was enacted in 1850. Section 6 of the act was amended in 1858 (Stats. 1858, p. 22), and again in 1862 (Stats. 1862, p. 518). Under the last amendment, the section provided that the husband should have the management and control of the separate property of the wife during the continuance of the marriage; "but no alienation, sale, or conveyance, of the real property of the wife, or any part thereof, or any

right title or interest, therein, and no contract, or power of attorney, concerning or relating to the same, and no lien or incumbrance created thereon, shall be valid for any purpose, unless the same be made by an instrument in writing, executed by the husband and wife, and acknowledged by her, as provided for in the Acts concerning conveyances," etc. It further provided that personal property should not be sold, assigned, or transferred, unless both husband and wife joined in the sale, assignment, or transfer. The acknowledgment referred to in section 6 was one made upon an examination apart from, and without the hearing of, the husband. Stats. 1850, c. 101, § 22. The decree appealed from covers real estate of large value. Clearly, an agreement by which a married woman agrees to devise all of her estate, real and personal, or to have it pass upon her death to a given person, is, so far as it affects her real property, a contract "concerning or relating to the same." In September, 1865, Mrs. Ross could not, therefore, make a contract which should form the basis for an assertion of rights against her separate real estate, unless such contract were executed and acknowledged in conformity with the requirements of the statute to which we have referred. The contract here set up was oral merely.

[9] But, in 1874 (St. 1873-74, p. 193), the amendment of section 167 of the Civil Code removed the last restriction upon the power of the wife to contract with respect to her separate property, with the single exception that an acknowledgment of her conveyance of real estate was still required to be made as provided in sections 1093 and 1181 of the Civil Code. Marlow v. Barlew, 53 Cal. 456. The appellants do not dispute the proposition that, from and after this time, a married woman had the power, without any writing or acknowledgment, to make the kind of contract here involved. By the amendment to her complaint, the plaintiff alleged that, after the change of the law in 1874, Mrs. Ross recognized the validity of the agreement, and "for the continuing consideration to her rendered by the plaintiff, as in this complaint alleged and shown, she approved, ratified, and adopted said agreement," and continued to receive from plaintiff the benefit of the performance by plaintiff of the obligations on her part to be performed. The court found these allegations to be true, and the finding has sufficient support in the evidence. The testimony of Mrs. Arrowsmith shows a recognition by Mrs. Ross of the binding force of the agreement of 1865, and there is abundant other evidence to show that plaintiff continued to give Mrs. Ross the obedient service and devotion of a daughter, and that Mrs. Ross accepted such performance.

[10, 11] But, say the appellants, the contract of 1865 was void in its inception, and was therefore not capable of ratification. This contention, we think, cannot be sustained. While the statute of 1850, as amended in 1862, prohibited a married woman from making such a contract, except in the prescribed mode, the restrictions went rather to the mode of exercising her power of dealing with her separate estate than to the existence of such power. The Constitution of 1849 itself (article 11, § 14) defined the separate property of the wife, and provided that:

> "Laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as to that held in common with her husband."

Under this provision, as was said in an early case:

> "The capacity of the wife to hold her separate property being equal to that of the husband, or of any other individual, the same incidents necessarily attach to her capacity, as to that of the husband." Selover v. American Russian Commercial Co., 7 Cal. 266.

The statutory limitations upon the wife's disposition of her property were designed mainly for her own protection.

> The statute "does not prohibit her from disposing of, or incumbering, all or any part of her separate estate upon such terms as to her may seem proper. It does not in the slightest degree interfere with her free will. It only prescribes the mode in which she shall manifest that will. It was undoubtedly the object of the statute to provide a mode of alienation and of incumbering her estate, uniform, simple, and conclusive, which should protect both the wife and the purchaser; one that should secure entire freedom of will and action to the wife, and afford the least possible opportunity for subverting her interest through the medium of undue influence, threats or fraud. It is a beneficent provision intended for her benefit, and not as an encroachment upon her rights. And we think its obvious tendency is to throw a safeguard around without in any degree impairing, the jus disponendi." Maclay v. Love, 25 Cal. 367, 382, 85 Am. Dec. 133.

So, in Love v. Watkins, 40 Cal. 547, 560, 6 Am. Rep. 624, the court says that:

> "The object of requiring the contracts of married women to be executed with certain formalities has been often held to be for her protection, and not to deprive her of any power over her estate."

The contract was therefore one which Mrs. Ross had the power to make, although it was not, in the then state of the law, valid and enforceable unless executed in the prescribed manner. But, when the restrictions upon her mode of contracting were removed, we see no reason why she could not, by a ratification of her contract, coupled with the receipt and enjoyment of the continuing consideration, bind herself and her property. Brown v. Bennett, 75 Pa. 420. See, also, Jourdan v. Dean, 175 Pa. 599, 34 Atl. 958, 964; Pettus v. Gault, 81 Conn. 415, 71 Atl. 509. The contrary is held in two cases strongly relied on by the appellants. Austin v. Davis, 128 Ind. 472, 26 N. E. 890, 12 L. R. A. 120, 25 Am. St. Rep. 456; Thompson v. Minnich, 227 Ill. 430, 81 N. E. 336. We shall not stop to inquire whether these cases are distinguishable from the one before us. It will suffice to say that, if they are not, they proceed upon a theory of the relationship of a married woman to her estate which is not in harmony with the view taken by this court of the effect of the Constitution of 1849, and the statutes passed thereunder.

If these conclusions are correct, the findings of ratification are sufficient to sustain the judgment without regard to the further finding that, after the death of Robert Ross, Mrs. Ross, upon a new consideration, agreed to leave all of her property to the respondent. We need not, therefore, inquire whether the evidence is sufficient to support this additional finding, nor need we go into the various questions which arise in connection with it, such as the applicability of the statute of limitations to an action upon the new contract.

Some further points are made, and may be briefly discussed.

[12, 13] It is claimed that the plaintiff was guilty of laches, in that she did not bring her action for over two years after the death of Mrs. Ross. There is evidence, however, that the plaintiff believed that Mrs. Ross had left a will giving the entire estate to her, and that she commenced her action within a reasonable time after it became clear that no such will could be found. Furthermore, the court below was justified in concluding that the delay had not prejudiced the opposing parties. Nor was the action barred by limitation. The complaint was filed within the period fixed by any of the sections of the Code of Civil Procedure relied upon by the appellants. The amendment to the complaint, in so far as it alleged ratification of the original contract, did not set up a new cause of action.

[14] We see no force in the contention that the contract was invalid because made with the stepfather, Halbert, who, it is claimed, had not legal control over the child. The contract was made primarily for the benefit of the child herself. She was, if not the formal party, the real party in interest, and Halbert stood in a relation which authorized him to act in her behalf.

[15] The appellant assigns as error certain rulings on the admission and rejection of evidence. The only ones which call for particular notice are those relating to the declarations of Mrs. Ross. The declarations offered by the plaintiff, as a part of her case, were properly admitted as the declarations of a decedent against her pecuniary interest. Code Civ. Proc. § 1853. On the other hand, the court was right in rejecting evidence offered by the appellants to show declarations of Mrs. Ross in favor of the position assumed by the appellants, who claim under her in this litigation. It is sufficient, in support of the correctness of both classes of rulings, to refer to Rulofson v. Billings, 140 Cal. 452, 74 Pac. 35.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

175 Cal. 131

STIEGLITZ v. SETTLE et al. (L. A. 3806.)

(Supreme Court of California. May 16, 1917.)

1. Trial 🔑165—Motion for Nonsuit—Inferences.

In passing upon motion for nonsuit, every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374.]

2. Brokers 🔑41—Employment—Ratification—Power of Attorney—Authority.

A general power of attorney from a widow, sufficient to authorize the holder to agree on her behalf to pay the usual commission for a sale of her land, authorized, after consummation of the sale, a reduction of the agreement to pay commission to writing, thus curing the defect of the parol agreement, under Civ. Code, § 2307, providing that an agency may be created by ratification.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 41.]

3. Attorney and Client 🔑123(1)—Right to Deal with Client—Contract to Procure Purchaser.

An attorney is under no actual incapacity to deal with or purchase from his client, all required being a clear showing that there has been no abuse of confidence and no advantage taken; and an attorney who had acted for a widow in a partition suit had the right to contract with her to sell other land, if he could procure a purchaser, for the usual commission, particularly where he did not see her personally, and the explanation of the contract was made by, and her assent given to, her trusted agent and man of business.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 239, 245, 248, 249.]

4. Brokers 🔑85(1) — Realty Broker — Right to Commission — Employment Through Agent — Unfair Dealing by Agent.

The legal rights of an attorney, who, through a widow's man of business, contracted to procure a purchaser for her realty for the usual commission, were not affected by evidence, in his suit for the commission, tending to impeach the fair dealing of the widow's man of business with her.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 106, 108–110, 113, 115.]

Department 2. Appeal from Superior Court, Los Angeles County; F. E. Densmore, Judge.

Action by Henry Stieglitz against Maria Encarnacion de Sepulveda Settle and another. From a judgment for defendants, plaintiff appeals. Reversed.

William A. Alderson, of Los Angeles, for appellant. E. H. Bantzer and Davis, Kemp & Post, of Los Angeles, for respondents.

HENSHAW, J. Plaintiff sued defendant Maria Encarnacion de Sepulveda Settle to recover his commissions as broker for services which he had rendered in the sale of certain of defendant's land. The other defendant is the husband of Maria Encarnacion, married to her after the consummation of the transactions forming the basis of this litigation. At the conclusion of plaintiff's evidence defendants moved for a nonsuit upon "the general broad ground of insufficiency of the evidence to justify the decision and that the plaintiff's evidence showed moral turpitude." The court granted the nonsuit upon the ground that "the plaintiff had failed to prove a sufficient case for the jury, and the evidence introduced was insufficient to support a judgment for the plaintiff."

[1] The court's power to grant a nonsuit has been so often discussed, and the limitations of that power so often declared, that it should be necessary to do no more than refer to Estate of Arnold, 147 Cal. 583, 82 Pac. 252, Estate of Chevallier, 159 Cal. 161, 113 Pac. 130, and Estate of Caspar, 172 Cal. 147, 155 Pac. 631. In passing upon such a motion "every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of the" plaintiff. Estate of Arnold, supra. The evidence discloses that defendant Maria Encarnacion was a widow. She owned a one-half interest in 860 acres of land, a part of the Rancho Palos Verdes, and had other large property interests and land holdings. This particular land had come to her from her former husband, Sepulveda. She did not speak English. Apparently she could not write. Her trusted business manager and man of affairs was Richard Mahar, whom she had known long and well, and with whom she could converse in Spanish. Mahar held her general power of attorney. The plaintiff is, and for many years has been, an attorney at law. In the past he had been in several matters Mrs. Sepulveda's attorney at law. At the time of the transactions here questioned he was her attorney at law in a partition suit to divide the lands in the Rancho Palos Verdes above referred to. This action had been instituted some time before. It was the only pending matter in which plaintiff was acting as Mrs. Sepulveda's attorney at law. He was not her general counsel. She had never consulted him at his office. He had never been to her house more than three times, and she had never sought his advice upon her general affairs. Mrs. Sepulveda, as is not unusual with ladies in her position, needed money. While owning much land, she had no fixed income, and taxes and her personal expenditures were burdening her with debts. She told her attorney in fact, Mr. Mahar, that she wanted to sell her undivided interest in the Rancho Palos Verdes. The partition proceedings affecting this land had not been completed by final judgment, but had been practically closed. Mrs. Sepulveda talked many times to Mr. Mahar about selling the land and urged him to make and he did make efforts so to do, all of which he reported to his principal. A number of real estate agents became active in their efforts to secure purchasers. The bids and offers which he received he duly reported. As a result of all of these efforts, the highest and best offer which was obtained for the land was $250 an acre. Mr. Mahar talked this offer over with plaintiff, and both agreed that the price offered was too low, and Mr. Mahar so reported to his principal.

Then Mr. Stieglitz told Mr. Mahar that if he, with the approval and assent of Mrs. Sepulveda, would give him permission to sell the ranch on commission, he would use his endeavors to secure a purchaser. Mr. Mahar consulted Mrs. Sepulveda, and duly informed Mr. Stieglitz that he could go ahead and sell the ranch, and if he succeeded Mrs. Sepulveda would pay him the usual commission. Mr. Mahar, as does Mr. Stieglitz, testifies to this effect, and further that he did consult Mrs. Sepulveda, did explain to her that Mr. Stieglitz would endeavor to sell the ranch, upon the payment of the usual commission if he succeeded, asked her if she was willing to pay the commission under these circumstances, to which she replied, "Por supuesto"—of course. At this time Mr. Stieglitz had no particular purchaser in mind. He not only had not seen George Peck, who became the purchaser, but did not even think of him. After this agreement and understanding, which, because of the relations existing between the parties, plaintiff did not think necessary at the time should be in writing, Mr. Stieglitz used his best efforts to find a purchaser, and succeeded in the person of George Peck. Mr. Peck, after many negotiations with Mr. Stieglitz and Mr. Mahar, all of which were reported to Mrs. Sepulveda, finally purchased the land for $400 an acre; this purchase price being approved by Mrs. Sepulveda before the contract of purchase was entered into on her behalf by her attorney in fact. After the sale had been consummated, Mr. Stieglitz asked for payment of his commissions; but, owing to Mrs. Sepulveda's immediate need for money, that which was received from the first payment had been expended, and Mr. Mahar so explained to Mr. Stieglitz, saying that he would have to wait until July for his money, the sale having been effected on March 19th. Then, because of this delay, Mr. Stieglitz, expressing a willingness thus to wait for his compensation, and expressing also the natural apprehension that "something might happen to me or to him, thought it would be no more than right that an agreement be prepared, and that he sign the agreement with me." Mr. Stieglitz then prepared an agreement, dated March 17th (antedating by two days the sale of the land), which agreement authorized him to sell the land upon "the regular or customary commission for making said sale as fixed by the Realty Board of the City of Los Angeles." This was signed by Maria Encarnacion, by her attorney in fact, Richard Mahar, and bore also the signature of Mr. Stieglitz over his acceptance. Both understood the reason why the contract bore a date before its actual writing, and both understood and agreed that no concealment should be made of this circumstance, and none in fact was made. Thereafter and in the same year defendant Maria Encarnacion married defendant George Settle, and in September he called upon Mr. Stieglitz and asked him whether he had any claims against his wife. Mr. Stieglitz asserted that he did have such a claim in the matter of his commissions in the sale of this land, to which Settle replied that he would never get the commission, and that he would see that he did not.

[2] Touching briefly upon the law, no question arises but that the power of attorney held by Mr. Mahar was amply sufficient to authorize him to do everything which in fact he did do. But in addition to this is the evidence (unnecessary to establish the legality of Mr. Mahar's conduct, but standing undenied, as it does, persuasive of fair dealing) that Mrs. Sepulveda was fully advised of and fully assented to the principal transaction. Mr. Mahar, under his power of attorney, had the authority to enter into the contract with Mr. Stieglitz for the payment of this commission. The uncontradicted evidence is that he did so enter into it with the knowledge and approval of his principal. It was equally within his power to cure the defect of the parol agreement by subsequent ratification in writing, which was done and made. Civ. Code, §§ 2307, 2310.

[3] Touching Mr. Stieglitz' position and conduct there is absolutely nothing shown in the evidence which would forbid him, on either legal or ethical grounds, from entering into a contract with Mrs. Sepulveda which had no bearing on or relation to his position as her attorney at law in the partition suit, especially so as in the making of the contract he did not even personally see her, and so could not have personally influenced her, and the explanation of the contract was made by, and her assent given to, her trusted agent and man of affairs. An attorney is under no actual incapacity to deal with or purchase from his client. All that is required, where the relation of confidence exists, and where the questioned transaction has a bearing upon that relationship, is a clear showing that there has been no abuse of confidence and no advantage taken. Felton v. Le Breton, 92 Cal. 457, 28 Pac. 490; Cox v. Delmas, 99 Cal. 104, 33 Pac. 836; Vanasse v. Reid, 111 Wis. 303, 87 N. W. 192; 1 Story, Jur. § 313. "There is no authority establishing, nor was it ever laid down, that an attorney cannot purchase from his client what was not in any degree the object of his concern as attorney. * * * Under such circumstances he is not the attorney in hac re." Montesquieu v. Sandys, 18 Ves. 313.

[4] In support of this judgment, given on nonsuit, respondents seem to place reliance upon certain testimony given by Mr. Mahar to the effect that he understood that he and Mr. Stieglitz were to divide the commission, and that he thought he and Mr. Stieglitz might as well make a commission upon the sale of the property as anybody else, and also upon the fact that after the sale Mr. Peck insisted on giving him—Mr. Stieglitz—$500, which he refused to take, telling Mr. Peck that, if he wanted to give this money, to draw his check for that amount to Mr. Mahar, which Mr. Peck did, and that subsequently Mr. Mahar insisted upon Mr. Stieglitz taking half of the amount. As against this, however, is the positive testimony of Mr. Stieglitz that there had been no previous agreement between himself and Mr. Peck, or between himself and Mr. Mahar, concerning the $500, and that he never had any agreement with Mr. Mahar by which he—Mr. Mahar—was to receive any part of the commissions for the sale of the land. To sustain the nonsuit it would have to be said as matter of law that this evidence to which we have last adverted absolutely destroys all the force and effect of the rest of the evidence in the case. But this manifestly is not so. The most that can be said of it is that it is evidence tending to impeach the fair dealing of Mr. Mahar with his principal. It does not at all affect the legal rights of plaintiff as above set forth.

The judgment appealed from is therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

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175 Cal. 146

SMALLEY v. GEORGE C. PECKHAM CO., et al. (L. A. 3841.)

(Supreme Court of California. May 16, 1917.)

1. APPEAL AND ERROR 🔑1011(1)—REVIEW OF FINDINGS—CONFLICTING EVIDENCE.

Where the court's findings are supported by conflicting evidence, they will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988.]

2. APPEAL AND ERROR 🔑882(2)—RULING IN APPELLANT'S FAVOR—VENUE.

Appellant cannot complain on appeal of a ruling relating to change of venue consistent with his view of the matter in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3592.]

3. VENUE 🔑5(2)—CHANGE OF—CANCELLATION OF CONTRACT OF SALE.

Motion to change venue of action to rescind contract of sale for misrepresentation, from county where contract and representations were made to county where land was located, was properly denied.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 6.]

4. APPEAL AND ERROR 🔑236(1)—NECESSITY OF ASKING CHANGE OF VENUE.

Appellant cannot complain of court's refusal to allow a change of venue, where he filed no motion therefor, under Code Civ. Proc. § 396.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1384.]

5. EQUITY 🔑39(1)—RETENTION OF JURISDICTION ACQUIRED.

A court of equity, having once obtained jurisdiction, will decide the whole case, leaving nothing for future litigation.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104–109, 111, 114.]

6. COSTS 🔑13—EQUITY — DISCRETION OF COURT.

Awarding of costs in an equitable action is discretionary with the court.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 21, 25.]

Department 2. Appeal from Superior Court, Los Angeles County; N. A. Hawkins, Chas. Wellborn, Judges.

Action by M. E. Smalley against the George C. Peckham Company and others. From a judgment for defendants, and from orders denying motion for new trial and taxing costs, plaintiff appeals. Affirmed.

William Freeman, of Los Angeles, for appellant. Fred W. Morrison, of Los Angeles, for respondents.

HENSHAW, J. Plaintiff sued to rescind a contract into which he had entered for the purchase of several acres of land in the county of San Bernardino on the 21st of November, 1910. He served a notice and demand for rescission on January 27, 1912. The right to rescind is based upon the asserted fraudulent misrepresentations made by defendants to plaintiff to induce him, and under which he was induced, to enter into the contract of purchase. These false statements are declared to be representations that the land was of superior quality and especially adapted to the cultivation and production of orange trees and their fruit; that it was situated in the "orange belt," and was free from frost, and that the climatic conditions were especially favorable for the cultivation and production of citrus fruits; further, that the purchaser of each 10 acres would be entitled to $^{1}/_{10}$ of the water and water rights and pumping plant appurtenant to the tract free of charge, except for the expense of upkeep, and that the water supply was adequate to irrigate the land properly; that defendants "prevented and persuaded plaintiff not to make any inquiry for himself as to the truth of said conditions of climate and water"; that plaintiff did not read the agreement, nor consult any one about it, but relied solely on the defendants' representations; that after the execution of the agreement he discovered that "said land in quality, and said water, water rights, and pumping plant in quantity, were not as represented," and he so informed defendants, and plaintiff believes "that the demands for money for water by said defendants, their officers, agents, and employés were and are in excess of the pro rata expense provided by said agreement and contrary thereto"; that plaintiff paid in cash on account of the purchase of the land $1,000 and other smaller sums amounting to $180; and "that the consideration for his obligation under said agreement has failed in part and in whole, and has become entirely void through the fault of the said defendants, to the damage of the plaintiff in the sum of $1,180." The defendants answered, and for cross-complaint set up the contract, plaintiff's breach of it, and sought a decree giving plaintiff a reasonable time within which to be relieved from his default or suffer foreclosure of all his right and interest in and to the land. Judgment passed for defendants, and plaintiff appeals from the judgment, the order denying his motion for a new trial, and also from the order of the court taxing costs in the action.

[1] The brief quotations which we have made from the complaint will suffice to show its inartificiality as a pleading, and respondents argue with much force: First, that no damage is shown, and that fraud without damage furnishes no ground for action (Holton v. Noble, 83 Cal. 7, 23 Pac. 58); and, second, that nowhere in the pleading is it made to appear what injurious difference the plaintiff discovered between the land and the water right which he received and the land and water right for which he contracted, and that, therefore, there is an utter failure to show a difference in value, and, consequently, that the allegation that the consideration for the agreement "has failed in part and in whole and has become entirely void" is wholly unsupported by any allegation in the complaint. We need not, however, pause to discuss this, for a consideration of the evidence of plaintiff, even when it is upon a material matter, is sharply in conflict with the evidence of the defense, and the findings of the court, therefore, are supported, and will not here be disturbed.

[2, 3] The action was commenced in the county of Los Angeles. The defendants served notice that they would move for a change of venue to the county of San Bernardino, upon the ground that the real property affected by the litigation was situated in that county. An affidavit of merits was filed in support of this, and the motion was opposed by plaintiff, and was denied. The defendant Merchants' Bank & Trust Company had brought its action in San Bernardino county against this plaintiff for the enforcement of this contract, and the complaint in that action was identical with the cross-complaint filed in this. Before the court in San Bernardino county plaintiff's counsel represented that the action pending in Los Angeles county would determine all the questions involved in the San Bernardino county action, and the trial of the latter action was upon this ground postponed. Appellant here seemingly complains of the action of the trial court in concurring with his view that the place of the trial of the action should not be changed from Los Angeles county. Aside from the

fact that it does not lie in his mouth thus to argue, the court's ruling was sound. Grocers', etc., Union v. Kern, 150 Cal. 476, 89 Pac. 120.

[4, 5] But if appellant's objection is that the court retained jurisdiction of the action after the filing of the cross-complaint and should not have done so, the answer is twofold—that he made no motion for a change of venue (Code Civ. Proc. § 396), and that it is a familiar rule of equity that when the court has once obtained jurisdiction it will do complete justice by deciding the whole case and leaving nothing for future litigation (Booker v. Aitken, 140 Cal. 473, 74 Pac. 11).

[6] The defendants, prevailing in the litigation, filed a cost bill. The action was in equity, and the award of costs discretionary with the court. On motion of defendants it taxed the costs in the sum of $119.10, and judgment was entered accordingly. Appellant states that his bill of exceptions specifies the points and reasons so clearly that the error of the court in so taxing the costs will plainly appear without argument or authorities; but an examination of this bill of exceptions thus unnecessarily forced upon us shows that the court in no respect erred.

The judgment and orders appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

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175 Cal. 124

FIRST CONGREGATIONAL CHURCH OF CHRIST IN CORONA v. LOWREY et al. (L. A. 3681.)

(Supreme Court of California. May 12, 1917.)

1. PRINCIPAL AND SURETY 🔑100(3)—DISCHARGE—MATERIAL ALTERATIONS.

Relative to discharge of a building contractor's surety, alterations and omissions in work aggregating over $500 made on oral agreement of owner and contractor, while the contract provided that they should be made only after agreement in writing, were material.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 163.]

2. PRINCIPAL AND SURETY 🔑97—DISCHARGE—INJURY.

Under Civ. Code, § 2819, providing that a guarantor is exonerated if by any act of the creditor without consent of guarantor the principal's original obligation is altered in any respect, and section 2840, applying the same rule to sureties, a material change of principal's obligation without surety's consent discharges the surety without regard to the surety being injured by the alteration.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 146–168.]

3. PRINCIPAL AND SURETY 🔑97—DISCHARGE—SURETY COMPANY.

Civ. Code, §§ 2819, 2840, making a material change of principal's obligation without surety's consent discharge the surety, without regard to injury, apply to a corporation engaged in the business of suretyship.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 146–168.]

In Bank. Appeal from District Court of Appeal, Second District.

Action by the First Congregational Church of Christ in Corona, California, against C. L. Lowrey and another. Judgment for plaintiff, and defendants appeal. Reversed.

Ben Goodrich and Goodrich & Martinson, all of Los Angeles, for appellants. G. R. Freeman, of Willow, and Purington & Adair, of Riverside, for respondent.

HENSHAW, J. [1] This is an action brought against the surety on a contractor's bond. Defendant Lowrey had entered into a contract with the plaintiff for the construction of a church. He abandoned his contract, and plaintiff brought its action against him and against the surety to recover the amount of damages which it sustained by reason of this abandonment. The contract between the owner and the contractor made provision for alterations, deviations, additions, or omissions in the work to be done, and provided that the reasonable value should be added to or deducted from the contract price, "provided, however, that the character and valuation of any or all of said changes, omissions, or extra work should be agreed upon and fixed in writing, signed by the owner and the said contractor prior to the commencement of the work of making such alterations, deviations, additions or omissions." The court found that certain alterations and omissions were made and were agreed to between plaintiff and the defendant Lowrey. It found the value of these, item by item; one item amounting to $164.25, another to $209, and a third to $204. It further found that the character and value of these changes, omissions, and extra work were agreed upon between the owner and contractor, but were not agreed upon and fixed in writing or signed by the owner and contractor, prior to the commencement of the work, or at all. It still further found:

> "That none of such alterations, deviations, or omissions were detrimental to the interests of the defendant Pacific Surety Company, and did not materially alter the terms or conditions of said contract or bond, or change the contract between the plaintiff and said Lowrey or said Pacific Surety Company."

That the alterations, changes, and omissions were material, within the meaning of the decisions, there can be no doubt. Alcatraz, etc., Ass'n v. U. S. Fidelity & Guaranty Co., 3 Cal. App. 338, 85 Pac. 156; Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 99 Pac. 856; O'Neal v. Kelley, 65 Ark. 550, 47 S. W. 409; Beers v. Wolf, 116 Mo. 179, 22 S. W. 620.

Because of this finding that these changes were neither material nor detrimental to the surety, the trial court gave judgment for plaintiff, and this appeal has followed.

[2, 3] Appellant here contends that under

our statute law, and under our decisions, since the agreement between the owner and the contractor, the terms of which agreement measure the surety's rights and liabilities under its contract, were changed in a material respect without the consent of the surety, he is released from his obligation. Respondent contends that the trend of modern decision no longer favors those sureties who enter into such contracts for compensation and as a business; that as to them the rule of law permitting a guarantor to stand upon the letter of his contract is no longer in force; that the law governing insurers is the law which should be applied to them; and that in applying such law, to be relieved, they must not only show a variation, and a material variation, of the terms of the contract upon which their own contract of surety was based, but must further show that such material variation was injurious. Undoubtedly, there is authority for such a view, and many of the cases so holding will be found collated and discussed in the note to Cowles v. U. S. Fidelity & Guaranty Co., 98 Am. St. Rep. 838, and in Frost Guaranty Insurance, § 4 et seq. It would serve no profitable purpose to analyze these decisions, nor to search the laws of the states which have rendered them to determine whether or not the courts were, as this court is, bound by positive statutory declaration upon the subject, for in view of our own Code provisions such a discussion could have no value. It would be but a declaration by this court as to what it might think the law should be, but it could in no wise control our law as it actually is written. Our Code speaks with absolute finality upon the subject. Section 2819 of the Civil Code provides that a guarantor "is exonerated, * * * if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect." See, also, Civ. Code, § 2840, applying the same rule to sureties. Our decisions construing these sections uniformly hold that, if there has been such a change in the contract in any (material) respect, the inquiry there ends and the guarantor is exonerated, and that it is not a subject of inquiry whether the alteration has or has not been to his injury. Cadenasso v. Antonelle, 127 Cal. 382, 59 Pac. 765; Tally v. Parsons, 131 Cal. 516, 63 Pac. 833; Davisson v. East Whittier Land Co., 153 Cal. 85, 96 Pac. 88; Tuohy v. Woods, 122 Cal. 665, 55 Pac. 683; Dunne Investment Co. v. Empire State Surety Co., 27 Cal. App. 208, 150 Pac. 405, 411. It is to be noted, then, that neither our statute law nor our decisions under it have ever recognized that there is any distinction between a compensated and uncompensated surety or guarantor, nor between a corporate surety and an individual surety, nor between a corporation or an individual engaging in the business of suretyship or guarantyship for compensation and a corporation or individual who enters into a like contract without compensation. To impose such distinctions, while sections 2819 and 2840, Civil Code, read as they now read upon the books, would not be to interpret and to enforce the written law, but to make new law in hostility to it. It is for the Legislature, and not for the courts, to modify our statute law, if the lawmaking body shall believe that its former declarations touching the rights and liabilities of sureties and guarantors should be modified in respect to those sureties and guarantors who become such for compensation.

The judgment appealed from is therefore reversed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; SLOSS, J.

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175 Cal. 127

EELLS v. EELLS. (L. A. 4036.)

(Supreme Court of California. May 12, 1917.)

Appeal and Error ⚿1010(1) — Review — Findings of Fact.

In action by wife to cancel deed made to her husband, *held*, under evidence, that finding that conveyance was duly delivered to defendant in accordance with plaintiff's agreement so to do at the time she acquired title will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3981, 4024.]

Department 1. Appeal from Superior Court, Los Angeles County; Willis I. Morrison, Judge.

Action by Edith Eells against George Eells. From a judgment for defendant, and from an order denying plaintiff's motion for a new trial, she appeals. Affirmed.

Edith D. McKinley, for appellant. Williams & Rutan, of Santa Ana, and George P. Adams, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. In this action plaintiff sought a decree quieting her alleged title to certain real property described in the complaint, and also asked that a deed which purported to convey the same property to defendant be canceled and annulled. The court denied her the relief sought, and gave judgment in favor of defendant, from which, and an order denying her motion for a new trial, plaintiff appeals.

The action grows out of the following facts: The parties are husband and wife. At the time of the marriage in 1909 defendant, the husband, owned 19½ acres of land, upon which, at the request of plaintiff, he declared a homestead. He exchanged 9½ acres of this land for property in the city of Los Angeles, consisting of a house and lot, constituting the subject of suit, which was owned by one Susan A. Hobbs, who on December 17, 1912, conveyed the same to plaintiff as her separate estate. On February 12, 1913, plaintiff signed and acknowledged a deed conveying to defendant this property so acquired from Hobbs. The chief question involved concerns the delivery or nondelivery of this deed of conveyance, wherein defendant was named grantee.

The contention of plaintiff, supported by her testimony, is that the deed was so executed by her, not with the intention of a present delivery thereof to her husband, but with the purpose, in case of her death, of saving her estate the expense of administration, and that he secured possession of the deed by wrongfully abstracting the same from where she had placed it, between the mattresses of her bed. On the other hand, it was alleged in the answer, and testimony was offered in behalf of defendant which clearly tended to prove, that he was inexperienced and unfamiliar with legal instruments and their effect, while plaintiff was an attorney of several years' experience in the laws of conveyancing and familiar with matters relating thereto, and during her marriage had acted for defendant in the conduct and management of all such matters; that at the time of the exchange of the properties she assumed charge thereof, and stated to defendant that, if the title to the Hobbs property was placed in her name, she could manage the same and collect the rents thereof to better advantage, and, if so conveyed to her, she would, for his protection, immediately execute and deliver to him a deed to the property; that defendant, relying upon his wife's representations, and having implicit confidence in her expressed purpose to convey the property to him, consented to the lodgment in her of the title to the Hobbs property; that in compliance with her agreement so to do she, on February 12, 1913, made and delivered the deed to him, at the same time advising that no record thereof be made until after her death; that thereafter she took the instrument from a drawer, where he had deposited it for safe-keeping, and secreted it between the mattresses, from where he, upon finding it, took the same and had it recorded; and that the property so conveyed by Hobbs to plaintiff with defendant's consent in exchange for the 9½ acres of land was never intended by him to be the subject of a gift to plaintiff. All of these facts the court found to be true, in accordance with the evidence so offered on behalf of the defendant.

Appellant, who appears in propria persona, devotes much of her brief in an endeavor to show that the findings above referred to, and particularly that as to the delivery of the deed, are not supported by the evidence. The contention is wholly without merit. The most that can be said is that there is a sharp conflict between the testimony of the parties touching the matters, and the court, as it was fully warranted in doing, gave the greater weight to the testimony of defendant than it did to that of plaintiff. It thus appears that defendant's ownership of the property, as found by the court, is based upon a conveyance thereof duly executed and delivered by plaintiff to defendant in accordance with her agreement so to do, made at the time when in her own name she acquired title to the Hobbs property. This being true, it is immaterial whether or not other findings relating to plaintiff's alleged fraudulent acts in procuring the deed, and want of consideration paid therefor by her, are supported by the evidence. Conceding the absence of fraud on her part, and that her abandonment of the homestead declared by the husband constituted a part of the consideration for the Hobbs deed, it could not, under the circumstances shown, affect the judgment. Appellant has filed a voluminous brief devoted to a discussion of abstract questions of law not here involved, and to matters proper for the consideration of the trial court, and which it is presumed to have considered in determining the weight to be given the conflicting evidence.

The judgment and order appealed from are affirmed.

We concur: SLOSS, J.; SHAW, J.

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175 Cal. 118

PEOPLE v. HADLEY. (Cr. 2043.)

(Supreme Court of California. May 11, 1917.)

1. Criminal Law ⚷1130(2) — Appeal and Error—Briefs.

Where brief merely charged error in admission of evidence without pointing out error or the resulting prejudice, the matter will not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956, 2966, 2968.]

2. Criminal Law ⚷650—Evidence—Experiments.

Experiments touching ability of witness to have recognized accused on the night of the crime, as she testified, need not be carried out under absolutely identical conditions, even to the condition of leafage of trees existing at time in question; the experiment being later in the year.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1457.]

3. Homicide ⚷66 — During Attempt to Commit Burglary—Accidental Killing.

The fact that homicide committed by one while attempting burglary was accidental is immaterial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 85.]

4. Criminal Law ⚷781(6)—Instructions—Confessions.

Instructions that the fact that confession was obtained by police officers "presents an important item" in considering its voluntary character was erroneous as being an instruction regarding the weight of evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1868.]

5. HOMICIDE 🔑286(1) — EVIDENCE — INTENTION.

An instruction that the intention of accused at time of homicide is manifested by circumstances connected with the offense, and the accused's sound mind and discretion and the means used to accomplish the killing may be considered, was proper.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 586.]

In Bank. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Lon Hadley was convicted of murder, and appeals from judgment and from order denying motion for new trial. Affirmed.

Wellington W. Judd, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

HENSHAW, J. Defendant, a colored man, was charged with the murder of John McGovern. He was found guilty, and the death penalty was imposed. He has taken his appeal from the judgment and from an order denying his motion for a new trial.

[1] Certain rulings of the court in admitting and rejecting evidence are complained of. We are aided by no discussion of counsel pointing out either the error or the injury of these rulings. The brief limits itself to the bare statement that "the court erred" in sustaining this objection or in overruling that objection. This court has in numerous instances declined to consider objections so presented. People v. Woon Tuck Wo, 120 Cal. 294, 52 Pac. 833; People v. McLean, 135 Cal. 306, 67 Pac. 770; People v. Creeks, 141 Cal. 529, 75 Pac. 101. Nevertheless, owing to the gravity of the case, we have examined the record with care, and in none of the instances complained of do we find a ruling which would justify, much less demand, a reversal of the case. Some of these rulings were eminently sound. Others were rulings on evidentiary matters of trifling consequence. One only calls for specific consideration. The facts of the crime are that the defendant, about 20 minutes past 8 o'clock of the evening of April 3d, was in the act of burglarizing the home of the deceased, who at the time was absent. The deceased returned to his residence while the defendant was endeavoring to effect an entrance. He went to an outbuilding and picked up an axe and walked toward his house. This act of the deceased is explained by witnesses, who said that such was his practice, as McGovern thought that by taking the axe into his house at night burglars would have a less ready means of forcing an entrance. However, as he approached his door the defendant shot him twice and fled. His dead body was found in his yard the next day. Mrs. Young, a neighbor, who heard the shots, went to her window and saw a colored man, whom she identified as this defendant, "sneaking along the front of McGovern's house." This man climbed the fence and made his escape by a devious route. These were the circumstances of the homicide as testified to by Mrs. Young, though she did not know until the next day, after the body had been discovered, that McGovern had in fact been killed. The defense offered the testimony of one Compnext, for the purpose of showing that under the conditions existing upon the night and at the time of the homicide Mrs. Young could not have identified the defendant. It is extremely difficult to follow this examination from the record; as frequent references are made to a map showing the position of shrubbery, trees, and fences. It is therefore impossible in many instances to pass upon the pertinency of the evidence and the soundness of the rulings. Thus, as exemplars, the witness is asked, "Do these trees extend in such a way as to completely shadow, and did they at the time that this crime was alleged to have been committed, did they extend so as to completely shadow this down here?" The objection was sustained upon the ground that the question called for a conclusion of the witness. Of course, if the witness in fact knew, it was no more an objectionable conclusion than if he had been asked whether it were light or dark. Again he is asked, "Is there any point at which to your knowledge the electric light shines in there?" This would seem to call for a mere declaration of fact. But an objection was sustained to it as calling for a conclusion of the witness, and "no foundation laid." "Is Bay street a dark street?" is another question that was objected to as calling for a conclusion, and the objection upon that ground was sustained. Throughout the whole examination of this witness great stress seemed to be laid upon the fact that "no foundation was laid," though it does not appear that defendant's counsel was enlightened, nor yet is this court enlightened, as to precisely what was meant by this. Thus the court said:

> "Counsel, you will have to lay a foundation before you can ask any of these questions."

However, later in the examination the matter is illuminated by this statement of the prosecuting attorney:

> "Mr. Helms. At this time, perhaps, it would be well to state that counsel is apparently attempting to lay a foundation—I do not know, but I assume, that he is attempting to lay a foundation—I do not know, but I assume, that he is attempting to lay a foundation to show that either this witness or some other witnesses some time this month performed or attempted to perform some sort of an experiment down in the vicinity, or in the premises indicated, and that the purpose of that experiment would be to show that either this witness or some other witness with a similar group of facts, possibly as accurately reproduced as they could at that time reproduce them, undertook to determine whether or not some person, this witness or somebody else, located in the premises of Mrs. Young or approximately a similar position to that which Mrs. Young, according to her testimony, must have occupied on the night of the shooting—
>
> "The Court. Capt. Helms, I do not see how you can expect to stop counsel from putting on his evidence. * * *

> "Mr. Helms. The point of the objection on that question, your honor, is that at this season of the year, as is well known, a tree may be in full leaf, it may be in full leaf six weeks or two months ago but where a period of two months has elapsed the leafing of a tree in the spring of the year, and especially of a deciduous tree such as those trees evidently are, and not being citrus fruit trees, without any question there is a continual variation from week to week in the condition of the leafage. A sprout that will be that long will sometimes in three or four days become a foot long, a tender green sprout, the new growth, especially in the spring season. Objects that could perhaps be seen through the tree two months earlier in the spring could not at all be discerned through the leafage of the same tree, although at both times the tree might be in full leafage. For that reason, I was about to make the remark before, I think counsel will see that it is impossible to reproduce the conditions the same where we are dealing with growing matter. If the matter were a stone wall or wooden walls even that could be shown to be in the same condition, there might be a possibility of reproducing conditions, but suppose he reproduces physical conditions, then he has to reproduce a person with exactly the same capacity of vision that Mrs. Young had before he has the conditions the same as her observation."

[2] The court did not rule upon this statement, but it is quite apparent that the prosecuting attorney believed that unless the "experiment" touching the ability of one person to recognize another was carried out under identical conditions, even to the last leaf on the tree, with those which obtained when the witness Mrs. Young testified that she identified the defendant, the evidence was inadmissible. Of course such is not the law. Nor did the court rule that such was the law. And while it might well have shown a greater liberality in permitting counsel for the defense, manifestly inexperienced, to introduce his evidence, it cannot be said that the stringency of the court's rulings worked any hardship to appellant.

[3] Counsel next complains of all the instructions which the court gave and of all which it refused to give. But specifically complaint is made that the court instructed the jury that, if the death of a person results from the act of another while such other "was engaged in perpetrating or attempting to perpetrate robbery, burglary, or mayhem, in which case the fact that the killing was accidental is immaterial." The objection to this instruction is that it "called to the attention of the jury the fact that the defendant was charged with murder during an attempt to commit burglary." Such in fact was the case, and such in fact was the evidence, and that the instruction is sound in point of law is beyond doubt. People v. Milton, 145 Cal. 171, 78 Pac. 549; People v. Jones, 160 Cal. 370, 117 Pac. 176; People v. Witt, 170 Cal. 104, 148 Pac. 928.

[4] The defendant confessed the crime. The court refused to give the following instruction:

> "You are instructed that the fact that the questioning was done by police officers presents an important item for consideration in determining whether or not the confession was of a free and voluntary character."

In People v. Quan Gim Gow, 23 Cal. App. 507, 138 Pac. 918, the Court of Appeal in its general discussion quotes from Bram v. United States, 168 U. S. 557, 18 Sup. Ct. 192, 42 L. Ed. 568, to the following effect:

> "Whatever be the rule in this regard in England, however, it is certain that, where a confession is elicited by the questions of a policeman, the fact of its having been so obtained it is conceded may be an important element in determining whether the answers of the prisoner were voluntary."

An effort was here made to have this embodied into the form of positive law for the instruction of the jury. There is no warrant in the court's so doing. People v. Siemsen, 153 Cal. 387, 95 Pac. 863; People v. Luis, 158 Cal. 189, 110 Pac. 580. To have done so would have been a dangerous invasion of the rights secured to litigants against instructions by a court to a jury upon matters of fact. People v. Hawes, 98 Cal. 648, 33 Pac. 791; People v. Keith, 141 Cal. 686, 75 Pac. 304; Estate of Blake, 136 Cal. 311, 68 Pac. 827, 89 Am. St. Rep. 135.

[5] The following instruction which the court gave is complained of:

> "In determining the intention of the defendant at the time of the transaction complained of, it is important to consider the means used to accomplish the killing. The intent or intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused."

This precise instruction, however, has been declared to be a sound exposition of the law in People v. Besold, 154 Cal. 369, 97 Pac. 871, and People v. Wilkins, 158 Cal. 530, 111 Pac. 612.

The judgment and order appealed from are therefore affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.

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33 Cal. App. 386

L. W. BLINN LUMBER CO. v. COHN et al.

(Civ. 2214.)

(District Court of Appeal, Second District, California. April 5, 1917.)

1. MECHANICS' LIENS ⟹164(2) — BUILDING CONTRACT—EXECUTION IN WRITING.

Building contract, after describing work to be done, provided that all should be performed conformably to drawings and specifications by named architects, signed by parties, which were intended to be filed therewith, and which were identified by signatures of the parties. The document was filed in recorder's office, and three sets of specifications were filed with it, general specifications referring to construction of building in general, not referring to electric wiring or garage, specifications for electric wiring, and specifications for garage. The general specifications bore initials of the contractor, placed by him on each sheet, but did not have signature of the owner, except she wrote her initials on the fifth page. The same initials were placed on other sheets of the general specifications by one not the owner, but having the same initials, without authority from her and not in her presence. Wiring and garage specifications were neither signed nor initialed by the owner or contractor, but the owner's initials had been placed thereon by party with same initials acting under no authority from owner. When the several specifications were initialed they were not attached to the signed contract nor to each other. Later they were fastened together and filed for record by some person other than contractor. *Held*, that the contract was void because not in writing as required by law, so that materialman was entitled to have lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 289.]

2. Appeal and Error 🔑925(2) — Presumptions Favoring Court Below — Setting Aside Stipulation.

In suit to enforce a materialman's lien, where the parties stipulated on trial that the contract was in the form required by the lien law and recorded prior to commencement of the work, evidently in order to place before the court facts about which there was no controversy, and later plaintiff was allowed to amend by adding to its complaint a statement of the facts regarding the form of the contract on account of which plaintiff sought to attack its validity, and it was agreed that the court should first hear and dispose of the invalidity of the contract, the appellate court must assume, nothing appearing to the contrary, that the conduct of the trial under the amended pleadings, and the actual receiving and considering of evidence on the new issues, was understood by parties and court as having set aside the stipulation, and that the court was no longer bound thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3730-3733.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Suit by the L. W. Blinn Lumber Company, a corporation, against Alice B. Cohn, L. B. Cohn, and John Rebman. From a judgment limiting its lien, plaintiff appeals. Judgment so far as appealed from reversed, and trial court directed to amend the judgment to enforce plaintiff's lien as claimed for the full amount of the balance due as shown by the findings.

E. S. Williams, of Los Angeles, for appellant. W. O. Morton, Harry A. Hollzer, and C. B. Morton, all of Los Angeles, for respondents.

CONREY, P. J. On December 5, 1910, the defendant Alice B. Cohn as owner, and defendant John Rebman, as contractor, signed a document purporting to be a contract for the construction of an apartment building and garage on land of Mrs. Cohn in the city of Los Angeles. The writing provided that the whole of the work to be performed thereunder should be completed by the 1st day of April, 1911. This was not done, and on the 12th day of September, 1911, the buildings were not yet completely constructed. The owner took possession and proceeded to complete them, and they were fully and actually completed on the 30th day of October, 1911. Pursuant to a contract made with Rebman, the plaintiff furnished lumber to be used and which was used in the construction of those buildings, and on account thereof there became due to the plaintiff the sum of $9,180.61, balance unpaid of the value of the materials thus furnished. The court granted judgment against Rebman for that sum, with interest thereon at 7 per cent. per annum from October 3, 1911, together with $1.90 for cost of verifying and recording its claim of lien and its costs of suit herein. Plaintiff's claim of lien enforceable against the owner's property was allowed in the sum of only $5,962.65, with costs. The plaintiff has appealed from that part of the judgment which thus limits the extent of its lien.

Appellant claims that the building contract between Mrs. Cohn and Rebman was invalid because it was not in writing as required by law, and that therefore the plaintiff was entitled to have a lien for the full value of the materials furnished by it. The contract, after describing the work to be done, provided as follows:

> "All of which work shall be done and performed conformably to the drawings and specifications by Messrs. Neher & Skilling, architects, and signed by the parties hereto, which are intended to be filed herewith in the office of the county recorder of said Los Angeles county, and which are identified by the signatures of the respective parties hereto."

On December 10, 1910, that document was filed in the recorder's office of Los Angeles county, and at the same time there were filed with it three sets of specifications: (1) General specifications referring to the construction of the apartment building in general, but not including any reference to electric wiring or to any garage; (2) specifications for electric wiring; (3) specifications for garage. The general specifications bore the initials of John Rebman, placed by him on each sheet thereof. They did not have the signature of Mrs. Cohn, except that she wrote her initials, "A. B. C.," on page 5 thereof. The same initials, "A. B. C.," were placed on the other sheets of the general specifications by one A. B. Cohn, not the owner, Alice B. Cohn, without authority from her and not in her presence. The electric wiring specifications and the garage specifications were neither signed nor initialed by the owner nor by Rebman, but the initials "A. B. C." had been placed thereon by the said A. B. Cohn acting under no authority from Alice B. Cohn. At the time when the several specifications were initialed as above stated, they were not attached to the signed contract nor to each other. Afterwards they were fastened together and filed for record by some person other than and in the absence of John Rebman. Rebman did not sign or initial the specifications, except as above stated, and he never examined the same before they were recorded or after they were fastened together or after he signed and initialed the same as above stated.

Under decisions heretofore made and which fully state the rule and its reasons, it must be held that the purported contract is "wholly void," and the contention of the plaintiff must be sustained. Donnelly v. Adams, 115 Cal. 129, 46 Pac. 916; Donnelly v. Adams, 127 Cal. 24, 59 Pac. 208; West Coast Lumber Co. v. Knapp, 122 Cal. 79, 54 Pac. 533; San Francisco Lumber Co. v. O'Neil, 120 Cal. 455, 52 Pac. 728; Howe v. Schmidt, 151 Cal. 436, 90 Pac. 1056; Hartwell v. Ganahl Lumber Co., 8 Cal. App. 733, 97 Pac. 901. Respondents also rely upon Hartwell v. Ganahl Lumber Co., supra, and claim that the facts of this case are substantially like that case in which the validity of the contract was sustained. But the analogy does not hold. In that case the court upon the evidence before it held it as a presumption that the contract was signed by the owner and contractor in the condition in which it came to the court, to wit, with the plans and specifications attached thereto; and there was oral evidence that it was so signed. In that case also the specifications contained a statement describing them as specifications relating to a building to be erected for the named owner, together with a description of the lot on which the building was to be constructed. In the case at bar the findings of the court declare, as above stated, that the specifications and contract were not together when the contract was signed. It further appears that the electric wiring and garage specifications, although they contain the name of the owner and the names of the architects, do not contain any reference to the location of the land upon which the work was to be done.

[2] Respondents endeavor to avoid an adverse decision upon this branch of the case by suggesting that at the trial it was stipulated that the contract was in form required by the lien law and recorded prior to commencement of the work as required thereby, including the specifications and plans attached. It is true that such stipulation was made at the opening of the trial. The complaint at that time consisted of two counts, neither of which attacked the validity of the contract. The stipulation, therefore, evidently was made in order to place before the court facts about which there was no controversy, but which were necessary in order to present in connection therewith the facts about which controversy then existed. At a later time in the trial the plaintiff was allowed to amend its complaint by adding thereto a statement of the facts to which we have referred and on account of which the plaintiff sought to attack the validity of the contract. Since nothing appears to the contrary, we must assume that the further conduct of the trial under the amended pleadings, and the actual receiving and considering of evidence upon the new issues thus framed, was understood by the parties and by the court as having set aside the above-mentioned stipulation, and that the court was no longer bound thereby. Indeed, the bill of exceptions states that:

> "Thereupon it was agreed that the court should first hear and dispose of the issue of the invalidity of the contract."

The other principal ground of appeal presented by counsel for plaintiff assumes the validity of the building contract. In view of our decision against the validity of that contract, it becomes unnecessary to pass upon other questions.

That portion of the judgment from which the plaintiff, L. W. Blinn Lumber Company, appealed is reversed, and the trial court is directed to amend its judgment so as to recognize and enforce the lien of the plaintiff as claimed by it for the full amount of the balance due to it, as shown by the findings of fact.

We concur: **JAMES, J.; SHAW, J.**

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33 Cal. App. 385

GABBS v. COUNTRYMAN et al. (Civ. 2044.)

(District Court of Appeal, First District, California. April 5, 1917. Rehearing Denied by Supreme Court June 4, 1917.)

MORTGAGES ⚷25(3)—CONSIDERATION.

Plaintiff held defendant's note, secured by pledge of stock. Such note having matured without payment, it and the pledge were returned, and a note and mortgage executed and delivered by defendant to plaintiff. *Held*, that the cancellation of the previous note and return of the pledge were sufficient consideration for the note and mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 34.]

Appeal from Superior Court, City and County of San Francisco; A. E. Graupner, Judge.

Suit by Milton F. Gabbs against R. H. Countryman and others, in which the defendant filed a cross-complaint. From judgment for plaintiff and from an order denying a motion for new trial, defendants appeal. Affirmed.

Walter M. Willett and R. H. Countryman, both of San Francisco, for appellants. Chickering & Gregory, of San Francisco, for respondent.

PER CURIAM. This is a suit to foreclose a mortgage given to secure a promissory note executed by the defendants. Foreclosure was ordered against the mortgaged property, and defendants appeal from the judgment and from an order denying their motion for a new trial.

There is no merit in the first point, that the case was improperly or irregularly transferred from the department of the superior court to which it was originally assigned to the department of the court in which it was heard and determined.

Equally without force—savoring even of frivolity—are the objections to the rulings of the court on the admission and rejection of evidence.

The defendants in their answer and cross-complaint pleaded that there was no consideration for the execution of the note and mortgage, and they now contend that the finding of the trial court against them on that issue is not sustained by the evidence. This position is not well taken. The record shows that the plaintiff gave to the defendant R. H. Countryman the sum of $13,000 in consideration for a certain interest in the rentals of two buildings—the Delbert block and Countryman building—to be erected on the west side of Van Ness avenue in San Francisco shortly after the fire in April, 1906. Thereafter plaintiff became dissatisfied with the investment, and sold his interest in said rentals or buildings to said defendant, taking in exchange therefor the latter's promissory note for $14,072.50, secured by a pledge of 42 shares of the capital stock of the R. L. Radke Company. The note matured March 26, 1909. Nothing was paid upon it, and thereupon the note and the stock pledged as security for its payment were returned to Countryman, and the note and mortgage in suit were executed and delivered to the plaintiff. The consideration therefore for this note and mortgage, it is obvious, was the cancellation of the previous note and the return of the pledge, and the consideration for the first note was the relinquishment by plaintiff of any interest in the buildings, and the consideration for his interest in the buildings was the payment by him of the sum of $13,000 in cash to Countryman for such interest.

The judgment and order are affirmed.

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33 Cal. App. 390

POHLMANN v. PATTY, County Clerk.
(Civ. 2348.)

(District Court of Appeal, Second District, California. April 6, 1917.)

1. Elections 🔑115—Registration of Voters—Formal Defects in Affidavits.

Where county clerk of county, in making affidavits of registration of qualified voters, failed and neglected to enter fact that person being registered could read the Constitution in English, and could write his or her name, which was in fact the case, and failed to enter in other affidavits the number of the room and the floor or number of the room or floor occupied by the affiants, by receiving such affidavits and accepting them for registration purposes more than 30 days prior to an election to be held in a city, and by holding them in his office, together with the other affidavits of registration constituting the great register of the county, without objecting to their sufficiency when they were presented, and when he received them, the county clerk makes the certificates a part of the great register, and, having done so, he is without power to cancel the certificates or to withhold them from use in the election, and is without power thereby to deprive the registered voters of the right to vote at the election, since the clerk's acceptance of the certificates amounts to a judgment making them a part of the great register, though they are formally defective.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 110.]

2. Elections 🔑108—Affidavits of Registration—Cancellation—Statutes.

The instances specified in Pol. Code, § 1106, setting forth the instances in which it is made the duty of the county clerk to cancel entries of registration of voters, do not include the cancellation of affidavits of registration on account of defects of form, or on account of failure of the affidavits to contain answers to questions as to whether affiant could read the Constitution in English, etc., which, under section 1097, should have been answered; the provisions of the latter section being directory and not mandatory.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 105.]

3. Elections 🔑106—Affidavit of Registration—Refusal to Receive—Formal Defects—Statute.

County clerk might refuse to receive an affidavit of registration of a qualified elector defective in that it does not contain answers to questions as to whether affiant can read the Constitution in English, etc., required by Pol. Code, § 1097. In determining the sufficiency of affidavits, the clerk's acts are of a judicial nature, and, before accepting them, it is his duty to pass upon the certificates and see that they are sufficient in form.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 103.]

4. Elections 🔑108—Affidavits of Registration—Alteration by Clerk to Supply Formal Defects—Statute.

After accepting affidavits of registration of qualified voters so that they have become a part of the great register, the county clerk is without authority to change the affidavits by supplying omitted entries as to whether affiants can read the Constitution in English, etc., matters which, under Pol. Code, § 1097, should have been answered.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 105.]

Petition for mandamus by Frank Pohlmann against L. R. Patty, as County Clerk of San Bernardino County. Peremptory writ of mandate ordered to issue.

Ralph E. Swing and Frank T. Bates, both of San Bernardino, for petitioner.

PER CURIAM. On petition of Frank Pohlmann, an alternative writ was issued to L. R. Patty, as county clerk of the county of San Bernardino, requiring him to appear and show cause why a peremptory writ of mandate should not issue directing him to transmit, as part of the great register of the county of San Bernardino, certain affidavits of registration to the boards of election appointed to hold and conduct an election called to be held in the city of San Bernardino on the 9th day of April, 1917. Without any formal return, the respondent appeared personally before this court and stated that he is ready and willing to submit to such order as the court shall make; it being understood that the decision will be made upon the facts alleged in the petition.

For more than 30 days prior to the 9th day of April, 1917, the petitioner, and each of the other persons whose names are set forth in two certain exhibits attached to the petition, registered as qualified electors of the city of San Bernardino by subscribing and swearing to the affidavit of registration provided for that purpose by the respondent county clerk, and then and there answered each and every question asked of them. At the time of so registering, each of said petitioners was a resident of the precinct from which he registered. At said time, respondent failed and neglected, and has since failed and neglected, to enter in the affidavit of registration of each of the persons named in Exhibit A the fact that such person being registered could read the Constitution in the English language and could write his or her name. In fact, each of said persons could read the Constitution in the English language and could write his or her name. Respondent failed and neglected to enter in the affidavit of registration of each of said persons whose names appear in Exhibit B the number of the room and the floor or number of the room or floor occupied by said persons. Prior to the filing of this petition, the petitioner demanded that the respondent make the omitted entries in each and all of such affidavits of registration, but respondent refused to make such entries or correct such affidavits of registration. The respondent contends that each of said registrations is void and illegal, and that it forms no part of the great register of said county, and threatens to take and remove each of said affidavits of registration from the great register of said county, and threatens to withhold said affidavits of registration and not send or transmit the same or any of them to the boards of election appointed to conduct an election to be held in the city of San Bernardino on the 9th day of April, 1917. The petitioner maintains this proceeding for and on behalf of himself and the numerous persons whose names appear in said exhibits.

The affidavits in question showed all the qualifications of the electors as required by sections 1096 and 1097 of the Political Code, except as above stated. They have been regularly received and are in the hands of the clerk as affidavits of registration made by qualified electors. It is not contended that any reason exists why they should not be transmitted to the boards of election of the several precincts, except on account of those formal defects.

[1-3] It is our opinion that by receiving said affidavits of registration and accepting them for registration purposes at the times when presented and holding them in his office, together with the other affidavits of registration constituting the great register of San Bernardino county, without objecting to their sufficiency at the time when they were presented and when he received them, the county clerk made those certificates a part of the great register of said county. Having done so, he is without power to cancel those certificates or to withhold the same from use in the election to be held, and is without power thereby to deprive those registered voters of the right to vote at the election. Section 1106 of the Political Code sets forth the instances in which it is made the duty of the clerk to cancel entries of registration of voters. The instances there specified do not include the cancellation of an affidavit of registration on account of any defects of form, or on account of failure of the affidavits to contain answers to questions of the character hereinabove specified which, under the provisions of section 1097 of the Political Code, should have been answered. The provisions of the statute affecting the matters in question are directory and not mandatory. We do not doubt that the clerk might refuse to receive a defective affidavit, and it might be his duty to so refuse. The law places in his hands the business of receiving affidavits of registration and making up the great register. In determining the sufficiency of the affidavits, his acts are of a judicial nature, and before accepting them it is his duty to pass upon the certificates and see that they are sufficient in form. His acceptance of the certificates/amounts to a judgment making them a part of the great register. Thereupon the qualified voter becomes entitled to have his name upon the great register, and the clerk is not vested with authority to thereafter remove it therefrom. If subsequently there should occur any facts of the description contained in section 1106 of the Political Code, that section states that the clerk must cancel the registration, or, if any facts occur which result in a judgment of cancellation of a registration, it may be eliminated thereby as provided by section 1109 of the Political Code. In the absence of any of those conditions, the clerk may not interfere with the legal effect of any registration of a voter, and it is his duty to send the affidavits of registration to the boards of election as provided by law.

[4] Referring to the complaint of petitioner that respondent has refused to alter the affidavits of registration referred to in the petition by supplying the omitted entries therein, we are of the opinion that the county clerk is without authority to change them after they have been accepted and have become a part of the great register. The statements contained in such affidavits are the evidence furnished by the voter upon which the clerk has acted in receiving the voter's name for registration.

It is ordered that a peremptory writ of mandate issue to the respondent, directing that he furnish and transmit to the boards of election appointed to hold and conduct said election in the city of San Bernardino, as part of the great register of said county, the affidavits of registration referred to in the petition.

(175 Cal. 130)

BORNSCHEIN et al. v. WHITAKER

(S. F. 8343.)

(Supreme Court of California. May 15, 1917.)

APPEAL AND ERROR ⚷345(1)—TIME FOR FILING DEMAND FOR RECORD—STATUTE.

Ten days' time allowed "after notice of decision" denying motion for new trial "or other termination" of such a motion for filing demand for record under Code Civ. Proc. § 953a, or for serving proposed bill of exceptions under section 650, commences to run immediately upon trial court's failure to pass on motion within three months allowed by section 660 after verdict or service on the moving party of notice of the court's decision; written notice of the decision not being essential, and the law itself giving actual notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1895.]

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by George D. Bornschein and others against George W. Whitaker. Judgment for plaintiffs, and defendant appeals. On motion to dismiss appeal. Appeal dismissed.

Eugene F. Conlin, of San Francisco, for appellant. G. Gunzendorfer, of San Francisco, for respondents.

PER CURIAM. The ten days' time "after notice of decision" denying a motion for new trial or "other termination" of such a motion, within which a party may file demand for record under section 953a, Code of Civil Procedure, or may serve a proposed bill of exceptions under section 650, Code of Civil Procedure, commences to run *immediately upon the failure of the trial court* to pass on the motion within three months after the verdict of the jury or service on the moving party of notice of decision of the court. Section 660, Code Civ. Proc. *Written* notice of the decision denying the motion is not essential under these particular statutory provisions. *Actual* notice only is required, and in the event of such a termination of the new trial proceeding, as we have stated, the law itself gives the notice.

It follows that no valid proceeding for a record in lieu of a bill of exceptions, or for a bill of exceptions, was ever instituted, and consequently that the time for filing transcript on appeal in this court expired before the making of this motion.

This conclusion necessitates the dismissal of the appeal.

The appeal is dismissed.

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175 Cal. 192

OTIS v. ZEISS. (S. F. 7253.)

(Supreme Court of California. May 23, 1917.)

1. JUDGMENT 🔑461(5)—EQUITABLE RELIEF—FRAUD—SUFFICIENCY OF EVIDENCE.

In suit to set aside a judgment quieting title to a parcel of land, evidence *held* insufficient to establish the fraud, alleged by plaintiff, that defendant falsely stated in his complaint and affidavit that he was the owner in fee of the property, and that the statement was at the time known by him to be false and untrue.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 895.]

2. ATTORNEY AND CLIENT 🔑104—PRINCIPAL AND AGENT—KNOWLEDGE OF ATTORNEY AS KNOWLEDGE OF CLIENT.

Though knowledge of an attorney is knowledge of his client, the client will ordinarily be charged with constructive notice only where the knowledge of the attorney has been gained in the course of the particular transaction in which he has been employed by the particular client, a rule not without exceptions; but clear and satisfactory proof that knowledge of the former transaction was present in the mind and memory of the attorney at the time of the second transaction is necessary to bind the principal in the second transaction by constructive notice of the prior information of the attorney.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 92, 93.]

3. JUDGMENT 🔑461(1)—EQUITABLE RELIEF—FRAUD—BURDEN OF PROOF.

Fraud is not presumed, and must be proven, as in a suit to vacate a judgment for fraud.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 892.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Adolphus E. Graupner, Judge.

Action by James Otis, surviving trustee under the will of A. C. Whitcomb, deceased, and the decree of distribution made in the estate, against Louis Zeiss. From a judgment against him on granting of defendant's motion for nonsuit, plaintiff appeals. Affirmed.

Olney, Pringle & Mannon and J. R. Pringle, all of San Francisco, for appellant. Tum Suden & tum Suden, of San Francisco, for respondent.

SLOSS, J. Plaintiff appeals from a judgment entered against him upon the granting of defendant's motion for a nonsuit.

The action was brought to set aside a judgment obtained by the defendant, Zeiss, quieting title to a parcel of land in the city of San Francisco, described as "city slip lot No. 19." The action in which Zeiss had obtained this judgment was one brought under the provisions of the McEnerney Act, so called (Stats. 1906, p. 78). The ground upon which the plaintiff in this action sought to set aside such judgment was that it had been obtained by fraud. City slip lot No. 19 is part of a tract of land which in March, 1851, belonged to the state of California. In that month the Legislature passed an act (Stats. 1851, p. 307) granting said tract to the city of San Francisco for 99 years. The complaint alleges that this leasehold interest, described as the "city title," became vested in the defendant, Zeiss, and that the reversion, described as the "state title," was conveyed, in November, 1855, to one Callaway, and has since, by mesne conveyances, become vested in the plaintiff as trustee. The action brought by Zeiss to quiet his title was commenced by him on August 22, 1906, on which day he filed his complaint, accompanied by the affidavit required by the statute. The fraud charged is that Zeiss falsely stated in said complaint and affidavit that he was the owner in fee of the property in question, and that such statement was at the time known by him to be false and untrue. The affidavit also contained the statement that Zeiss did not know of any person who claimed an interest in the property, and this statement is alleged to have been false, and made with intent to deceive the court and induce it to give him judgment as prayed by him. Judgment in the action brought under the McEnerney Act was given and entered on the 19th day of December, 1906, and plaintiff alleges that he had no knowledge of the pendency of said action or of the judgment therein until April 1, 1908.

The answer denies a number of the allegations of the complaint, and particularly those alleging fraud on the part of the defendant. The motion for nonsuit was based on the ground that the various allegations of fraud had not been proven.

[1] We may assume that the complaint charged the kind of fraud which would afford ground for setting aside a judgment valid on its face. So assuming, we are nevertheless bound to hold that the plaintiff failed to introduce any evidence tending to establish the fraud alleged. It was stipulated, for the purposes of the present appeal, that plaintiff had shown "the outstanding title, viz. the state title, in himself." The essence of the charge against Zeiss is that he knew that the state title was outstanding, and intentionally concealed this fact in order to mislead the court into making a decree declaring him to be the owner of the land.

Here the proof fails. The only witnesses called by plaintiff were the defendant himself, and his attorney, Mr. Otto tum Suden. Zeiss testified that he had purchased the lot in 1893 at a referee's sale in a partition suit. At the time of making the purchase he applied for and obtained a loan from the German Savings & Loan Society, and gave a mortgage on the property to secure the same. Zeiss knew nothing of any outstanding claim, and bought the land believing that the title was good. The title was searched by the bank which made the loan. "I supposed all the time," he testified, "I was getting a good title when I bought that property." After purchasing, he improved the property. He never heard of any claim against it until after he obtained his McEnerney decree. He had paid all the taxes since buying the lot.

There is nothing in all this to warrant even a suspicion that Mr. Zeiss himself had any intimation of an outstanding claim against the property. As he testified, he fully believed that he was acquiring a title in fee simple, and his conduct comported with that belief. It is sought, however, to charge him with constructive knowledge of the state of the title, because, as it is claimed, Mr. tum Suden, who acted as his attorney at the time when he made the purchase, was, or ought to have been, aware of the fact that his client was acquiring only the leasehold interest, or "city title." Here again the evidence fails. Zeiss, on his direct examination, testified that he had asked tum Suden to examine the title for him, and supposed he had done so; also that he had bought the property on tum Suden's advice. Tum Suden had been one of the attorneys in the partition suit in the course of which the sale to Zeiss had been ordered. But Zeiss further testified that he did not know whether or not tum Suden had examined the title, or had ever seen the abstract. Zeiss made the arrangement for the loan with the German Bank, and "depended on them to do the rest." Tum Suden himself testified that he had never seen the abstract, but that the title had been examined by Mr. Goodfellow on behalf of the German Bank. While he (tum Suden) knew the distinction between a city title and a state title, he supposed that Zeiss was acquiring the state title. It is argued that because Mr. tum Suden was an attorney in the partition suit, he must have known the true state of the title. But there is no evidence to warrant this conclusion. It is not alleged in the complaint, and there is no evidence, that any of the instruments affecting the state title, except the original conveyance to Callaway, were of record. The proceedings in the partition suit are not shown in the transcript. Nor are we advised by the bill of exceptions what were the contents of the abstract which was examined at the time of Zeiss' purchase. We cannot assume, in order to support a charge of fraud, that these undisclosed documents contained evidence of an outstanding title. The appellants argue that the deed to Zeiss, which was approved by tum Suden, shows on its face that only a qualified interest was being conveyed. But they have failed to incorporate this deed into their bill of exceptions, and the statement therefore has no support in the record.

The argument of the appellants seeks to impute to Zeiss constructive knowledge of information said to have been obtained by tum Suden while the latter was acting as attorney for other clients. Zeiss was not a party to the partition suit.

[2] While the knowledge of an attorney is the knowledge of his client (6 C. J. 638; Mabb v. Stewart, 147 Cal. 413, 81 Pac. 1073), the principal will ordinarily be charged with constructive notice only where the knowledge of the attorney has been gained in the course of the particular transaction in which he has been employed by that principal (6 C. J. 639). This rule is not without exceptions. Pom. Eq. Jur. § 672. But "it seems conceded on all hands that clear and satisfactory proof that the knowledge of the former transaction was present in the mind and memory of the agent at the time of the second transaction is necessary in order to bind the principal in such second transaction by constructive notice of the prior information of the agent." Wittenbrock v. Parker, 102 Cal. 93, 103, 36 Pac. 374, 24 L. R. A. 197, 41 Am. St. Rep. 172. There is no such proof here, where the only affirmative evidence is that the agent did not know the alleged fact at all, and it is sought, on vague and incomplete premises, to infer that he might have had notice of the fact.

[3] It is elementary that fraud is not presumed, but must be proven. The appellant relies upon the rule laid down in Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007, that, where the question at issue is the state of the adverse party's mind, only slight evidence is required in the absence of a full disclosure by such party of the facts peculiarly within his own knowledge. Here, however, both Zeiss and his attorney did testify fully to all such facts. A finding of fraud in this case would have no support beyond that of shadowy and unsubstantial inferences which are in conflict with all the direct testimony.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

175 Cal. 198

In re DAVIS' ESTATE.

CARPENTER v. LEE.

(S. F. 7658.)

(Supreme Court of California. May 24, 1917. Rehearing Denied June 21, 1917.)

1. WILLS 🔑545(3)—ESTATES CREATED—REVERSION.

Under will devising estate to trustee to divide into five parts and pay one-fifth to each of several children, where one child died without heirs before testator's death, the disposition to him lapsed under Civ. Code, §§ 1310, 1343, and as to his portion there was intestacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1173.]

2. Executors and Administrators 🔑17(2) —Appointment—Right to Appointment.

Under will devising property in certain shares to children, but providing that the share of one child should be paid to her in monthly installments, the remainder after death to go to her children, where a child of such devisee petitioned for administration and the devisee contested the petition, but did not apply for letters herself, the petitioner was entitled to appointment under Code Civ. Proc. §§ 1350a, 1377.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 44.]

3. Executors and Administrators 🔑288—Special Administratrix—Distribution of Estate.

Where the executors named died, and a special administratrix was appointed to collect the assets of the estate, there could be no legal distribution until the appointment of a general administrator de bonis non, and an order for distribution was beyond the jurisdiction of the court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1136–1148.]

4. Appeal and Error 🔑634—Scope of Review—Authentication of Record.

An appeal from an order refusing to remove a trustee cannot be considered on the merits, if not supported by any authenticated record, but will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2775, 2829.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Proceedings in the matter of the estate of Eliza Davis, deceased, by Eliza E. Carpenter, for removal as administratrix of Sarah Lavinia Lee, and for her own appointment as such. From orders denying both prayers, the plaintiff appeals. Appeal from order refusing to remove trustee dismissed. Order denying application for letters reversed.

Wise & O'Connor, of San Francisco, for appellant. Louis Horwitz, of San Francisco, for respondent.

SHAW, J. Two appeals are here presented. The first is an appeal from an order denying the application of Eliza E. Carpenter for letters of administration upon the estate of Eliza Davis, deceased. The other is an appeal from an order denying the petition of Eliza E. Carpenter for the removal of the respondent, Sarah Lavinia Lee, from her office as trustee appointed by the court, under the will of Eliza Davis, deceased, and for the appointment of some other person in her stead.

Eliza Davis died testate on March 2, 1894, being then a resident of San Francisco. By her will the entire estate was devised to two trustees, namely, Joseph Donahue and Adam Grant, in trust, as follows: First, to convert the estate into money; second, to pay debts; third, to divide the residue of the estate into five equal parts and pay one-fifth to each of three of her children named, provided they should be discovered by the trustees within two years from the date of her death, to pay another fifth to her son Augustus Davis, and out of the remaining one-fifth to pay the respondent, Sarah Lavinia Lee, a daughter of the decedent, also known as Lavinia Lee, $40 per month during her natural life, and at her death the balance of said one-fifth to be paid to her children. It was further provided that if the trustees failed to discover the three first-mentioned children of the testatrix within two years from the death of the decedent, the shares given to them should be paid over to the other children, Augustus Davis and Sarah Lavinia Lee, but that the share of Sarah Lavinia Lee was "to be always subject to the above provision to pay it to her in monthly sums of forty dollars, during her life, and the remainder of her share, if any, to her said children, as aforesaid."

The will was duly probated and Adam Grant was appointed executor thereof. He died in 1898, and C. C. Webb was then appointed administrator with the will annexed. Webb died in 1903 and no successor or other general administrator of the estate has ever been appointed.

[1] The trustees were unable to discover either of the three children first mentioned. Augustus Davis died before the death of the testator leaving no children, or other living descendants, or wife, surviving. By the death of Augustus Davis without lineal descendants, the disposition to him lapsed. Civ. Code, §§ 1343, 1310. As to that portion there was intestacy. It is not necessary to the decision of this case to determine precisely the effect of these provisions. It is sufficient to note that the children of Sarah Lavinia Lee have a vested interest in the one-fifth part out of which, according to the first provision, she was to receive $40 per month during her life, and that they have a vested interest in one-half of the three-fifths conditionally given to the three undiscovered children, the effect being that her half of this three-fifths would be consolidated with the fifth directly given to her, and that out of the whole thereof she was entitled to receive only $40 per month during her life, and that the residue and remainder of that part of the estate would go to her children at her death.

The records in the estate were all destroyed by the conflagration of April 18, 1906. In 1910, by proceedings duly had, the record was restored. The two persons named as trustees in the will died. On November 1, 1910, on the petition of Sarah Lavinia Lee, the court appointed her to act as trustee under the will instead of the persons appointed by the will. The petition for the appointment of a trustee included an application for the appointment of a special administratrix of the estate, and thereupon the court also made an order appointing the said Sarah Lavinia Lee special administratrix of said estate, "with special and full power to collect and receive from the Pennsylvania Fire Insurance Company all money due on any policy of fire insurance, or due on any contract or for any reason, and to collect and preserve all the goods, chattels, debts, and effects of the decedent and to preserve from damage, waste and injury, the real estate." She gave bond as required by the order, and thereupon letters of special administration were issued to her, authorizing her to "collect and take charge of the estate of said deceased, and to exercise such other powers as may be necessary for the preservation of said estate." Thereafter she filed her final account as special administratrix, and the same was settled, showing a balance of money in her hands of $1,362.66. Afterwards, on April 4, 1913, said Sarah Lavinia Lee filed a petition for the final distribution of said estate. In pursuance thereof, the formal notice required by law having been given, the court, on April 23, 1913, made an order purporting to distribute the whole of said estate absolutely to the said Sarah Lavinia Lee.

[2] Eliza E. Carpenter is one of the children of said Sarah Lavinia Lee, and as such has a vested interest in the estate, under the terms of the will. She was therefore entitled to letters of administration thereon unless some other person having a better right applied for letters in opposition to her. On May 28, 1915, she filed a petition for the letters of administration here in question, and a petition for the removal of Sarah Lavinia Lee as trustee. Opposition to the petition for administration was made by Sarah Lavinia Lee, on the ground that there was no estate to be administered, and on the further ground that Eliza E. Carpenter was unfit to act in that capacity. Sarah Lavinia Lee, being the daughter of the decedent, was first entitled to letters, but as she did not apply therefor in opposition to the petition of Eliza E. Carpenter, the latter was entitled to administer. Code Civ. Proc. §§ 1350a, 1377. Upon the trial the allegation in the opposition, to the effect that Eliza E. Carpenter was an unfit person to act as administratrix, was withdrawn, and the petition for administration was denied, upon the theory that there was no estate to be administered. The contention of the appellant is that the court erred in its conclusion that the estate had been lawfully distributed. This is the principal question for consideration. The theory of the appellant is that there can be no distribution of an estate upon which there is no general administration, that the appointment of Sarah Lavinia Lee as special administratrix was merely for the special purpose mentioned in the order and in her letters as such, that it did not constitute her the general administratrix of the estate, and that after the death of Webb, and until general letters of administration de bonis non were granted, the court was without power or jurisdiction to make distribution thereof.

No rights of third parties are involved in the question as here presented and there is no claim that the petitioner has been guilty of laches sufficient to warrant a refusal of the appointment.

[3] We think this point is well taken. The powers of a special administratrix are drawn from the statute. "By our law he has the powers enumerated by statute, each and all of which pertain to the collection and preservation of the estate, and 'such others as are conferred upon him by his appointment.' Though the language above quoted is broad, its limitations are apparent. It is no general grant. It does not authorize the court to obliterate the distinctions between general and special administrators. The additional powers are only such as are incident to those designated, or in line with them." Estate of Welch, 106 Cal. 432, 39 Pac. 806. In accordance with these principles it was held in that case that the court had no authority, while there was a special administrator in charge of the estate and during the time when the general administration was suspended, to make a partial distribution. The court said:

> "If partial distribution can be decreed under section 1415, so also may general distribution, and all the distinctions between general and special administrators be thus swept aside. This was not the design of the lawmakers."

These principles are decisive of this case. If there can be no partial distribution during a time when there is no general administrator in office, much less can there be complete distribution. The decisions concerning errors made by the court in deciding a matter over which it has jurisdiction are not in point. The jurisdiction here involved is not that general probate jurisdiction which every superior court possesses under the Constitution, but a jurisdiction to pronounce a particular judgment in a particular estate. The superior court has general jurisdiction of matters of probate. The superior court of the city and county of San Francisco had and still has, in a certain sense, jurisdiction over the estate of Eliza Davis, deceased. But after the death of Webb, the administrator with the will annexed, it did not have further jurisdiction to proceed to close and distribute the estate until it had first appointed a successor to Webb in the general administration. The decree of distribution made under these circumstances was therefore of no effect. The court still retained jurisdiction of the estate, and it had the power, and it was also its duty, to appoint some one to take charge of the property and make the distribution in the regular manner provided by law. Estate of Pina, 112 Cal. 14, 44 Pac. 332.

[4] We find that the appeal from the order

refusing to remove Sarah Lavinia Lee as trustee is not supported by any authenticated record. Consequently we cannot consider it on the merits. Her claim, which she asserted in opposition to the application for letters of administration, that she is the absolute owner is, of course, inconsistent with her duty as trustee, but it is not determined in her favor by the refusal of the court to remove her. The proper course, with reference to the appeal from that refusal, is to dismiss it. We are not to be understood as holding that such an order is appealable. It is not included in the list of orders and judgments made appealable by sections 963 and 1701 of the Code of Civil Procedure.

The appeal from the order refusing to remove Sarah Lavinia Lee as trustee is dismissed.

The order denying the application for letters of administration is reversed.

We concur: SLOSS, J.; LAWLOR, J.

175 Cal. 187

In re AYERS' ESTATE. (S. F. 7307.)

(Supreme Court of California. May 23, 1917.)

1. Executors and Administrators 🔑314 (12) — Appeal — Review — Who may Complain.

An executor cannot question on appeal the estate's division among heirs and beneficiaries.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1293–1295.]

2. Appeal and Error 🔑161—Review—Who Entitled to.

Where testator's son under a distribution agreement received money and land to which the will did not entitle him, and mortgaged the land, he cannot question the validity of the agreement upon appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 979–983.]

3. Appeal and Error 🔑161—Review—Who Entitled to.

Ordinarily a party cannot accept the benefits of a judgment and also appeal from it, although appellant may accept what he is concededly entitled to, and appeal to establish his claim to something additional.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 979–983.]

Department 1. Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

In the matter of the Estate of David Ayers, deceased. From a decree of distribution, Charles Ayers, individually and as executor, appeals. Both appeals dismissed.

W. F. Cowan, of Santa Rosa, for appellant. J. R. Leppo and D. R. Gale, both of Santa Rosa, for respondent.

SLOSS, J. David Ayers died on the 30th day of June, 1912, survived by a daughter, Anna Mary Ross, and three sons, Charles Ayers, G. Lemuel Ayers and Clarence L. Ayers. On July 30, 1912, a paper was admitted to probate as the last will of said decedent. Charles Ayers and G. Lemuel Ayers were named in the will as executors and letters testamentary were issued to them. By the will the testator gave certain cash legacies to five grandchildren, and to Anna Mary Ross and Clarence L. Ayers. He also devised certain real property to two of his sons. In addition, he devised to Charles Ayers and G. Lemuel Ayers his "ranch on the Santa Rosa and Sebastopol road, Charles taking the east half thereof and G. Lemuel taking the west half thereof," the testator's intention, as expressed in the will, being to divide the ranch equally as to acreage, without regard to improvements. All the live stock, vehicles, and harness on the ranch, as well as any money or other personal property remaining after satisfying other legacies, was bequeathed in equal shares to the said four children of the testator. On July 29, 1912, Anna Mary Ross, Charles Ayers, G. Lemuel Ayers, and Clarence L. Ayers entered into an agreement for the division of the estate. By this instrument it was provided that 20 acres of the ranch above mentioned should be set off to Anna Mary Ross, and that the residue of money and personal property, over and above the legacies, should be divided equally among the three sons, no part thereof to go to Anna Mary Ross. The agreement described the 20 acres which were to go to Anna Mary Ross, and two parcels of about 40 acres each (comprising the rest of the ranch), which were to go to Charles and G. Lemuel, respectively. The 20-acre piece was at the easterly end of the ranch. In October, 1913, G. Lemuel Ayers, one of the executors, filed his petition for distribution, setting up the making of this agreement, and asking that the estate be distributed in accordance with its provisions, in so far as they conflicted with the terms of the will. Charles Ayers filed a petition, asking that the estate be distributed in accordance with the will. Anna Mary Ross filed an answer to the latter petition, setting up the making of the agreement. Charles Ayers then filed an answer to the petition of G. Lemuel Ayers, and to the answer of Anna Mary Ross. In this pleading he made allegations designed to show that his consent to the agreement entered into by the four children of David Ayers had been obtained by means of menace exercised by Anna Mary Ross, and that he had rescinded the agreement. The court below sustained the demurrers of Anna Mary Ross and G. Lemuel Ayers to this answer, and made its decree distributing the estate in accordance with the terms of the agreement. From this decree Charles Ayers, individually and as executor, appeals.

[1-3] The respondents move to dismiss the appeals. It is well settled that an executor has no standing to question, by means of an appeal, the division of the estate among the beneficiaries or heirs. Bates v. Ryberg,

40 Cal. 463; In re Wright, 49 Cal. 550; Roach v. Coffey, 73 Cal. 281, 14 Pac. 840; In re Williams, 122 Cal. 76, 54 Pac. 386.

The motion to dismiss the individual appeal is based upon the ground that, since the making of the decree, the appellant has been in the possession and enjoyment of all of the real and personal property distributed to him, and that, having thus accepted the fruits of the decree, he is not in a position to maintain an appeal from it.

By affidavits the moving parties show that immediately after the making of the decree of distribution, all of the distributees received and took possession, respectively, of all of the property distributed and awarded to them. Included in this was the sum of $630.83 in cash, of which Charles Ayers received one-third, i. e., $210.27, no part of said residue having been paid to Anna Mary Ross. The ranch described in the will contained a little over 100 acres, of which 20 acres were distributed to Anna Mary Ross, and two parcels, each containing 40.18 acres, to Charles Ayers and G. Lemuel Ayers, respectively. Charles Ayers, it is stated in these affidavits, has, ever since the making of the decree, been in possession of the 40.18 acres so distributed to him. Since the entry of such decree, the wife of said Charles Ayers has recorded a declaration of homestead covering said 40.18 acres. Furthermore, said Charles Ayers and his wife have executed two mortgages upon said tract to secure the payment of two notes for $1,200 and for $3,000, respectively. Both of said mortgages have been recorded, and the latter still remains unsatisfied of record.

The counter affidavit of the appellant does not deny the material facts thus stated. He deposes "that he has not, by conveyance, acquiescence, estoppel, or otherwise, conveyed any interest that he may have in said estate to any other person." He does not deny, however, that he has been in possession of the 40.18-acre tract, and he admits, in express terms, the execution of the two mortgages. With respect to the personal property, he denies that it was accepted or received by him, "with the idea of defeating the rights of any other person in case said decree of distribution shall be set aside or reversed." This evasive statement is, in effect, an admission of the receipt of the money. The force of the admission is not qualified by the affiant's disclaimer of an intent to defeat the rights of others.

"The right to accept the fruits of a judgment and the right of appeal therefrom are not concurrent. On the contrary, they are totally inconsistent. An election to take one of these courses is therefore a renunciation of the other." In re Shaver, 131 Cal. 219, 63 Pac. 340; In re Baby, 87 Cal. 200, 25 Pac. 405, 22 Am. St. Rep. 239; San Bernardino County v. Riverside County, 135 Cal. 618, 67 Pac. 1047; Turner v. Markham, 152 Cal. 246, 92 Pac. 485; Bunting v. Haskell, 152 Cal. 426, 93 Pac. 110; Walnut Irrig. Dist. v. Burke, 158 Cal. 165, 110 Pac. 517.

Where, however, the appellant is concededly entitled to that which he has accepted, but is claiming something more, he is not precluded from maintaining an appeal for the purpose of establishing his greater claim. San Bernardino County v. Riverside County, supra; Walnut Irrig. Dist. v. Burke, supra. The appellant seeks to bring the case within this limitation of the rule. But the facts do not fit the claim. Under the will the appellant was entitled to the east half of the ranch, and G. Lemuel to the west half. Under the agreement, carried into the decree, Mrs. Ross obtains 20 acres of the east half, leaving the remaining 80 acres to be equally divided between the appellant and his brother, G. Lemuel Ayers. The appellant's 40 acres, therefore, include 10 acres which, under the will, would have gone to his said brother. Not only has he gone into possession of land to which, under the will, he would not have been entitled, but he has incumbered it by a mortgage. Similar considerations apply to the personal property. Under the will, the residue of cash would have gone to the four children in equal shares. Under the decree Mrs. Ross received none of it, and the appellant took one-third, instead of the one-quarter which would otherwise have come to him.

Both appeals are dismissed.

We concur: SHAW, J.; LAWLOR, J.

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175 Cal. 191

AYERS v. ROSS et al. (S. F. 7305.)

(Supreme Court of California. May 23, 1917.)

APPEAL AND ERROR 🔑150(1) — REVIEW — MOOT QUESTION.

Plaintiff's appeal, in action to set aside a distribution agreement, will be dismissed where a decree of distribution, enforcing such agreement, has previously become final, and appellant has accepted benefits of that adjudication.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 934, 946.]

Department 1. Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by Charles Ayers against Anna Mary Ross and others. Judgment for defendants, and plaintiff appeals. Appeal dismissed.

W. F. Cowan, of Santa Rosa, for appellant. J. R. Leppo and D. R. Gale, both of Santa Rosa, for respondents.

SLOSS, J. The essential facts of this appeal are stated in the opinion in Estate of Ayers (S. F. No. 7307) 165 Pac. 528, just decided. Here the plaintiff brought a civil action to set aside the agreement between the four children of David Ayers for the division of the estate. The grounds of attack are the same as those set up by him in the probate proceeding. A demurrer to the complaint was sustained without leave to amend. The record contains a document entitled "Judgment by the Court," and from this judgment the plaintiff appeals. It may well be questioned whether the entry in question constitutes a judgment, or is merely an order sustaining the demurrer, and therefore not the subject of an appeal. But passing this point, it appears that, since the taking of the appeal, the controversy has been decided against the appellant's claims by the granting of a decree of distribution in accordance with the terms of the agreement. It further appears that the appellant has accepted the benefits of this distribution. Upon these grounds respondents move to dismiss the appeal.

The decree of distribution having become final by our order dismissing the appeal therefrom, the matters there determined against this appellant are no longer open to question. He is not therefore in a position to question the correctness of the adjudication in favor of the validity of the agreement. In re Blythe, 108 Cal. 124, 126, 41 Pac. 33. Having accepted the benefits of that adjudication, he cannot appeal from the present judgment, which, like the decree of distribution itself, rests upon a basis which is inconsistent with the maintenance of the position asserted by the complaint.

The appeal is dismissed.

We concur: SHAW, J.; LAWLOR, J.

175 Cal. 171

MOORE et al. v. STRAYER et al. (L. A. 5009.)

(Supreme Court of California. May 18, 1917.)

APPEAL AND ERROR ⚷345(1)—TIME FOR APPEAL—STATUTE.

Under Code Civ. Proc. § 941b, requiring notice of appeal to be filed within 60 days after entry of judgment, provided that, if proceedings on motion for new trial are pending, the time for appeal shall not expire until 30 days after entry in the trial court of order determining motion "or other termination," the quoted phrase refers to section 660, making court's failure to decide motion within three months "after the verdict of the jury or service on the moving party of notice of a decision of the court" equivalent to a denial of the motion; hence it was immaterial that the notice of intention to appeal was filed before notice of decision of the court, since the statute relates to the power of the court, and not merely to the rights of the appealing party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1895.]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Rebecca J. Moore and another against Henry Strayer and others. Judgment for defendants, and plaintiffs appeal. On motion to dismiss appeal. Motion denied.

M. B. Butler, of Pasadena, for appellants. Tanner, Taft & Odell, of Los Angeles, for respondents.

VICTOR E. SHAW, Judge pro tem. The judgment from which plaintiffs and cross-defendants appeal was entered on May 1, 1916. Appellants, without waiting for service of notice of the decision of the court (which notice, as shown by the record, was in fact duly served on June 23d), served and filed their notice of intention to move for a new trial on May 15th, which motion, pursuant to notice given of the time of hearing thereof, was made July 3d. The court, however, made no ruling thereon until September 18th, on which date it made a formal order denying the motion. Respondent's contention is that the motion was denied by operation of law three months after the filing of the notice of intention, which expired on August 15th, and hence the notice of appeal filed October 17th was too late.

We do not so construe the statute. Section 941b of the Code of Civil Procedure provides that notice of appeal shall be filed within 60 days after entry of judgment, provided, however:

> "If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion."

The words "other termination" include by way of reference the denial of the motion by operation of law as provided in section 660 of the Code of Civil Procedure, where it is said:

> "The power of the court to pass on motion for new trial shall expire within three months after the verdict of the jury or service on the moving party of notice of the decision of the court. If such motion is not determined within said three months, the effect shall be a denial of the motion without further order of the court."

Under this provision the three months' time, within which the court was empowered to act upon the motion, did not commence to run until "service on the moving party of notice of the decision of the court." This notice, as we have seen, was not served until June 23d, which date marks the time from which to measure the three months' period within which the court was vested with jurisdiction to pass upon the motion. If the rights of the party appealing were alone to be considered, the giving of the notice of intention might, as to him, be construed as a waiver of service of notice of decision, but the provision relates to the power of the court, jurisdiction of which to pass upon the motion is divested only by the service of notice of decision followed by the lapse of a period of three months, during which it is empowered to act on the motion for a new trial. It thus appears that the time within which the court was, under the provision of section 660, supra, required to act upon the motion, did not expire until September 23d. The act of the court in making the order denying the motion was had on September 18th, which was five days before the expiration of the three months from service of the notice of decision.

It follows that the notice of appeal served on October 17, 1916, was within the time specified therefor.

The motion to dismiss is denied.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; SHAW, J.; HENSHAW, J.

(175 Cal. 196)

In re WISE'S ESTATE. (L. A. 4505.)

(Supreme Court of California. May 24, 1917.)

1. EXECUTORS AND ADMINISTRATORS 🔑24 — RIGHT TO APPOINTMENT—PUBLIC ADMINISTRATOR.

Under Code Civ. Proc. § 1365, stating the order of precedence of applicants for letters of administration, the public administrator takes precedence of "any person legally competent" who is not entitled to letters by virtue of relationship, and the grantee of a person entitled as heir or next of kin has no right in preference to the public administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 132–140.]

2. EXECUTORS AND ADMINISTRATORS 🔑17(2, 7)—RIGHT TO APPOINTMENT — PUBLIC ADMINISTRATOR.

Where the heirs are nonresidents, they are not entitled to administer under Code Civ. Proc. § 1369, and hence cannot nominate the administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 44, 57–59.]

Department 1. Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Proceedings in the matter of the estate of Mary O. Wise, deceased. From an order denying the petition for letters of administration, A. C. Mouser appeals. Affirmed.

A. C. Mouser, of San Diego, in pro. per. Hamilton & Lindley, of San Diego, for respondent.

SHAW, J. The appellant, A. C. Mouser, appeals from an order of the superior court denying the petition of two nonresidents, heirs of the decedent, for letters of administration upon the estate of Mary O. Wise, deceased, to Mouser, and granting letters thereon to Edwin Reed, who was the public administrator of the county of San Diego. Mary O. Wise died intestate seised of real property situated in said county. The only fact by virtue of which the appellant claims the right to letters is that, since the death of the decedent, he has received a conveyance from one of her heirs purporting to convey to him all of the right, title, and interest of said heir in a part of the said real property of which Mary O. Wise died seised. The said heir was not and is not a resident of the state of California.

[1, 2] The right to letters of administration upon the estate of one who dies intestate is controlled by section 1365 of the Code of Civil Procedure. Under that section, persons are entitled to letters in the following order:

> "1. The surviving husband or wife, or some competent person whom he or she may request to have appointed. 2. The children. 3. The father and mother. 4. The brothers. 5. The sisters. 6. The grandchildren. 7. The next of kin entitled to share in the distribution of the estate. 8. The public administrator. 9. The creditors. 10. Any person legally competent."

The opening clause declares that relatives are entitled to administration only when they are entitled to succeed to the personal estate. It will be seen that the public administrator takes precedence of "any person legally competent" who is not entitled to letters by virtue of relationship. There is no provision that the grantee of one of the persons entitled as heir or next of kin shall have the right in preference to the public administrator. As the heirs were nonresidents, they were not entitled to administer. Code Civ. Proc. § 1369. Hence they could not nominate. Estate of Beech, 63 Cal. 458. It follows that the appellant had no right to letters, and that the court below properly refused to grant the petition as against the public administrator, who also applied for such letters. There are cases holding that where a person dies testate and the executor named in the will fails to apply for letters, the court, under section 1323 of the Code of Civil Procedure, may appoint "any other person interested in the will" who petitions therefor, and that this gives authority to appoint the grantee or assignee of a person who takes under the will. In re Bergin, 100 Cal. 376, 34 Pac. 867; Estate of Engle, 124 Cal. 292, 56 Pac. 1022. These cases have no application to the rights of persons to administer upon the estate of an intestate.

It is unnecessary to consider the respondent's objection to the transcript.

The order is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

(175 Cal. 166)

PAYNE v. CUNNINGHAM. (L. A. 4011.)

(Supreme Court of California. May 18, 1917.)

CONTRACTS 🔑229(2)—BUILDING CONTRACT—SUPERINTENDENCE.

A building superintendent's contract that the superintendent should be paid 10 per cent. upon the cost provided the buildings were completed for an amount not exceeding a certain sum, and providing that "should he fail to keep within the above-mentioned maximum cost then no charge should be made for such superintendence for such excess," did not, in case the cost exceeded the maximum sum, release the owner from obligation to pay the percentage charged on such maximum sum, but relieved him from paying the percentage only as to the excess above such sum.

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by John A. Payne against Rose M. Cunningham, administratrix. From a judgment, defendant appeals. Reversed and remanded, with directions.

Tanner, Odell, Odell & Taft, of Los Angeles, for appellant. Pendell & Gleason and Schweitzer & Hutton, all of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. Plaintiff brought this action alleging a breach of contract on the part of C. B. Cunningham (now deceased, and for whom his administratrix has, pending suit, been substituted), in that he had failed to complete the alteration and construction of certain buildings within the time and for the amount agreed upon to plaintiff's damage in the sum of $4,000.

With his answer denying the material allegations of the complaint, defendant Cunningham filed a cross-complaint, wherein he alleged that by an agreement in writing plaintiff employed him to superintend the construction and alteration of certain buildings and for his services agreed to pay him upon completion thereof 10 per cent. of the total cost, which cost was $9,848.31, and for which percentage therein, amounting to $984.83, notice of claim of lien was duly filed. For a second cause of action, cross-complainant alleged that under the authority of plaintiff and for his use and benefit he paid out and expended for labor and material used in the construction of said buildings $421.47, no part of which has been paid and for which and the sum of $984.83 he prayed judgment against plaintiff, and asked that the latter sum be declared a lien upon the property, foreclosure of which was sought. The answer to the cross-complaint admitted the making of the contract whereby defendant was to receive 10 per cent. of the total cost of the building, but alleged that by the terms of the contract defendant and cross-complainant agreed that the maximum cost of the building should not exceed $7,400, and that defendant was to have no compensation for his services if the cost of construction and alteration exceeded said sum. As to the second cause of action, the answer does not deny that cross-complainant, under the authority of plaintiff, paid out for labor and material used in the erection and construction of said buildings the sum $421.47, but merely denies that such sum is due cross-complainant from plaintiff for labor and material used.

The court found that the parties entered into a written contract, the substance of which is as follows: Cunningham was to "obtain bids and subcontracts, for and in the name of the party of the first part (Payne), covering the furnishing of such materials and labor as may be required in the construction and alteration of said buildings, and any and all bids and subcontracts must be approved and signed by the party of the first part." Cunningham agreed "to furnish a bond of two thousand ($2,000) dollars to insure the correctness of materials and the faithful performance of workmanship, also the completion of the construction and alteration of said buildings within the maximum cost of seven thousand four hundred ($7,400.00) dollars, including his compensation for managing the construction and alteration of said buildings, * * * and have the construction and alteration of said buildings completed within (90) days from the date of signing this agreement." Payne agreed "to promptly pay all bills for material and labor when same are accompanied by an order stating the amount of the said bill and signed by the party of the second part (Cunningham)." Payne also agreed to pay the party of the second part as compensation for his services the sum of ten (10%) per cent. of the total cost of the buildings upon completion, provided the party of the second part completes said buildings within the maximum cost above mentioned. Should he fail to keep within the above-mentioned maximum cost then no charge shall be made for such superintendence for such excess." The court, reciting that oral and documentary evidence was introduced, further found that Cunningham did not agree to complete the construction and alteration of the buildings mentioned in the contract within a maximum cost of $7,400 or any other sum; that he did not give the bond mentioned in the contract; that plaintiff allowed him to proceed with the prosecution of the work without giving a bond; that, while it was true that Cunningham agreed to complete the construction and alteration of the buildings within 90 days from the date of the contract, such agreement was conditioned upon Payne, the owner, complying with certain provisions thereof, among which was one that cross-complainant should be allowed to obtain the bids and subcontracts covering the furnishing of materials and labor, instead of which, however, Payne himself assumed the procuring of such contracts and, in one instance, without cross-complainant's knowledge or consent, let a contract for plumbing which was not completed within the time allowed by the terms of the contract for the entire completion of the construction and alteration of the buildings, and that Payne was not damaged by any delay on the part of Cunningham to complete the building within the time mentioned in the contract; that it is true that the total cost of said construction and alteration was the sum of $9,848.31, and also true that Payne "signed all subcontracts that were in writing and had knowledge of all subcontracts let without writing, and had opportunity to know the amounts thereof, and made no objection thereto until the said buildings were completed, and that during the construction of said buildings he himself was present, observing the said construction and taking part in the ordering of materials and letting of subcontracts"; that Cunningham "entered upon the duties prescribed in said contract and continued to perform said duties until said buildings were entirely completed according to the plans and specifications as modified by plaintiff," for which he has received no compensation; and that Cunningham "paid out for labor and material used in said building over and above the moneys received by him from plaintiff the sum of four hundred and twenty-one and $^{47}/_{100}$ ($421.47) dollars." Claim of lien for the $984.83 was duly filed.

Upon these findings the court rendered judgment denying plaintiff's right to recover anything upon his complaint, and, as to defendant, likewise denied recovery upon the cross-complaint of her intestate other than an award of $10 costs. From judgment so denying her the relief prayed for, cross-complainant prosecutes this appeal upon the judgment roll alone, claiming that upon the findings she is entitled to judgment.

The court in express terms found that Cunningham did not agree that he would complete the construction and alteration of the building for a sum not exceeding $7,400, and, conceding the contract ambiguous in this respect, we must assume the interpretation thereof thus given on the oral evidence introduced to be correct. The provision in the contract to the effect that plaintiff would pay Cunningham 10 per cent. upon the cost provided the structures were completed for an amount not exceeding $7,400, read in connection with the sentence following it that "should he fail to keep within the above-mentioned maximum cost then no charge shall be made for such superintendence for such excess," should not be construed as releasing plaintiff from the obligation to pay the percentage charge on the $7,400 which he agreed to pay, but that as to such excess only no charge should be exacted by Cunningham. To say that, if the building cost $5 more than the $7,400, so specified, Cunningham should receive nothing for his services, would lead to an absurdity. Moreover, it appears that the plans and specifications were modified and changed by plaintiff, and that Cunningham, with the full knowledge of plaintiff who made the contracts for labor and materials, performed the service of superintending the work without objection from plaintiff until the building and alterations were entirely completed according to these modified plans and specifications.

As to the $421.47 alleged by Cunningham to have been paid out by him under the authority of plaintiff for labor and material used in the construction of the buildings and for which a personal judgment is asked, not only is there no sufficient denial of such fact, but the court found the allegations to be substantially true.

The judgment is reversed, and the cause remanded, with directions to the court below to enter judgment upon the findings in favor of cross-complainant upon the first cause of action for $740 with the usual decree for the foreclosure of claim of lien therefor filed, together with judgment in favor of cross-complainant and against plaintiff for the sum of $421.47 upon the second cause of action.

We concur: SHAW, J.; SLOSS, J.

175 Cal. 303

TAYLOR v. AVILA. (Sac. 2276.)

(Supreme Court of California. May 24, 1917.)

1. Appeal and Error 🔑934(2) — Presumptions Favoring Trial Court.

The Supreme Court must assume, in favor of the judgment below for plaintiff, that the trial court indulged a presumption which was warranted by the facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3777.]

2. Waters and Water Courses 🔑151—Conveyance of Fee — Extinguishment of Easement—Statute.

In view of Civ. Code, § 1105, providing that a fee-simple title is presumed to be intended to pass by the grant of real property, unless it appears from the grant that a lesser estate was intended, where the owner of land and plaintiff, who had acquired a prescriptive right to maintain and use a ditch for irrigation across such land, conveyed to defendant, by a grant, bargain, and sale deed, for the actual consideration of $1,750, the land together with all water rights, ditch rights, etc., used to irrigate the lands described, the conveyance extinguished all easements which plaintiff possessed over the land, and the last clause of the description did not reserve to grantor the easement she had over the land to use a ditch to irrigate her adjoining land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 155.]

3. Deeds 🔑22—Grant, Bargain, and Sale Deed—Estoppel of Grantor.

A grant, bargain, and sale deed operates to pass title in fee unless it contains in itself some limitation, exception, or reservation, and estops the grantor from thereafter claiming any right or estate in the land conveyed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 40–42.]

4. Deeds 🔑117—Property Conveyed—Appurtenances—Statute.

Though by Civ. Code, § 1104, the appurtenances to land conveyed by grant, bargain, and sale deed passed by operation of law without express mention, a deed of a tract which was part of a larger tract, "together with any and all water rights * * * made use of for the purpose of irrigating or draining said land," cannot be construed as a reservation of the water rights, as the use of the unnecessary words does not justify giving them an effect opposite to their express import.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 336–341.]

Department 1. Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Isabella Taylor against Manuel

J. Avila. From the judgment and an order denying new trial, defendant appeals. Judgment and order reversed.

H. Scott Jacobs, of Hanford, for appellant. Miller & Miller, of Hanford, and Frank B. Graves, of Lemoore, for respondent.

SHAW, J. The defendant appeals from the judgment and from an order denying a new trial.

The plaintiff sued to establish and quiet title to her alleged right to maintain and use a water ditch extending from a branch of the main canal of the Lemoore Canal & Irrigation Company southerly through the land of the defendant to and over the land of plaintiff. The court found that the plaintiff was the owner of the alleged easement through the lands of the defendant and gave judgment accordingly.

The facts involved can best be shown by a chronological statement. In the year 1903, plaintiff owned 80 acres of land, being the west half of the northwest quarter of section 15, and the defendant, or his predecessors, owned the land immediately adjoining the same on the north situated in section 10. About that time, the ditch in question was constructed. It ran along the eastern edge of defendant's land to and into the plaintiff's tract, and was used to conduct water from said canal to and over the plaintiff's 80-acre tract for its irrigation, being also used by the defendant on his land for a like purpose. In that year plaintiff conveyed to one Gularte the northern 25 acres of her 80-acre tract, without reservation. Notwithstanding this conveyance, she thereafter continued to use the ditch as before, for the irrigation of the remaining 55 acres. The court found that this use was under claim of right, adverse to Gularte, and that thereby in the year 1913 she had acquired a prescriptive right to maintain and use said ditch for that purpose. On July 11, 1913, she and Gularte conveyed the said northern 25 acres of land to the defendant. The deed of conveyance described the property conveyed as follows:

> "All that certain lot, piece or parcel of land situate, lying and being in the county of Kings, state of California, and bounded and particularly described as follows, to wit: The north 25 acres of the northwest quarter of the northwest quarter of section 15, township 19 south, range 20 east, M. D. B. & M., *together with any and all water rights, ditch rights, or interests in ditches, canals, water or water rights, made use of for the purpose of irrigating or draining said lands or any of said lands above described.*"

The deed was in the form of a grant, bargain, and sale deed, and purported to be made for the consideration of $10. The actual consideration as it appears from the evidence, was $1,750, which sum was paid by the defendant to Gularte and the plaintiff jointly.

The defendant claims that the finding that the plaintiff had acquired the right to use the ditch, as against Gularte, by the adverse use mentioned, is without support in the evidence. He also claims that, even if it be conceded that a prescriptive title was acquired by the plaintiff, the deed of conveyance executed by the plaintiff and Gularte operated to convey to the defendant the absolute fee in the 25 acres and extinguished any easement therein which plaintiff may have possessed at the time.

[1] There is evidence sufficient to support the finding that the plaintiff, prior to the execution of said deed, had, by prescription, acquired title to the use and maintenance of the ditch over the said 25 acres which was then owned by Gularte. There was evidence to the effect that the plaintiff had continuously used the ditch to carry water from the canal to her land, for its irrigation, for more than five years prior to the execution of the aforesaid deed. The defendant contends that there was no evidence that this use was made under a claim of right, and hence that the use was not of the adverse character necessary to the acquisition of a title by prescription. The court may reasonably have inferred from the evidence that the use was made without consulting Gularte, openly and in the same manner as if the plaintiff had the absolute right to such use. From all these facts, the court might have presumed that the use was under claim of right and adverse. Franz v. Mendonca, 131 Cal. 205, 63 Pac. 361; s. c., 146 Cal. 642, 80 Pac. 1078; Silva v. Hawn, 10 Cal. App. 544, 102 Pac. 952; Evans Ditch Co. v. Lakeside Ditch Co., 13 Cal. App. 119, 108 Pac. 1027. We must assume, in favor of the judgment, that the court did indulge in this presumption. It constituted evidence in the case and was sufficient, in connection with the other evidence, to support the finding of title by prescription.

[2] We see no escape from the conclusion that the conveyance of 1913, by plaintiff and Gularte to the defendant, operated to extinguish all easements which the plaintiff then possessed over the said 25 acres of land.

> "A fee-simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended." Civ. Code, § 1105.

[3] The rule that a grant, bargain, and sale deed operates to pass the title in fee, unless it contains in itself some limitation, exception, or reservation, and that it estops the grantor thereafter from claiming any right or estate in the land so conveyed, is too well settled to require citation of authority. We find in the above deed no limitation or qualification whatever upon the fee simple estate granted. The plaintiff, having made such conveyance, is estopped from asserting that it did not convey the entire estate in the land described.

[4] The contention of the plaintiff that the last clause of the description, the italicized portion, qualifies the fee-simple estate granted, and, in effect, reserves to the grantor the

easement she theretofore had over the 25 acres, for the use and maintenance of the ditch wherewith to carry water across the same for the irrigation of the remaining 55 acres, cannot be sustained. The language is without ambiguity, and its entire purport is to transfer to the grantee all water rights, ditch rights, or interests in ditches, canals, water, or water rights, used to irrigate or drain the said 25 acres. It has no application or effect to reserve any then existing water rights, ditch rights, or other easements over the 25-acre tract for the benefit of the 55 acres. It may be conceded that the italicized clause in the conveyance was unnecessary, since the appurtenances to the land conveyed would pass by operation of law without express mention. Civ. Code, § 1104; Cave v. Crafts, 53 Cal. 140. But the language purports to grant easements to the grantee, not to reserve easements possessed by the grantor. However unnecessary it may have been, it could not by construction be given the opposite effect to that which the language plainly expresses. We are therefore forced to the conclusion that by this deed the plaintiff conveyed away all her interest in the easement over the 25 acres of land which she now seeks to have established, and it operated to defeat her rights, so far as the 25-acre tract is concerned.

The circumstances attending the execution of this deed suggest a probability that the parties intended to include in the deed a reservation in favor of the grantor of the existing easement she then possessed over the 25 acres of land as alleged in the complaint, and that by mutual mistake it was omitted therefrom. But the complaint contains no allegation of such mistake, and it does not seek any reformation of the deed. If any such mistake was made, the plaintiff can only avail herself of the benefits thereof by an appropriate amendment of the complaint when the case again reaches the trial court.

As the record stands, we have no choice but to reverse the judgment and order, and it is so ordered.

We concur: SLOSS, J.; LAWLOR, J.

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175 Cal. 161

TRACY v. SMITH et al. (L. A. 3983.)

(Supreme Court of California. May 18, 1917.)

1. Vendor and Purchaser 🔑44—Validity of Contracts—Falsity of Representations—Evidence.

In an action to rescind a contract to purchase land, and to recover back the purchase price, evidence *held* sufficient to warrant findings that the vendor's representations as to the condition of a water plant through which the land was irrigated, and that the locality in question was free from frost, and a damaging frost had never been known, were false.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 69–76.]

2. Vendor and Purchaser 🔑36(2)—Validity of Contracts — Representations — Facts or Opinions.

Representations by vendors of land planted to citrus trees that a damaging frost had never occurred in the locality, and that the water plant through which the land was irrigated was in a splendid condition, were not mere statements of opinion, but were representations of material existing facts, as to which, since the representations were positive and unqualified, the truth should be established in the form made.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 40, 53.]

3. Vendor and Purchaser 🔑36(2)—Validity of Contracts — Representations — Facts or Opinions.

While a further representation that the land was absolutely free from frost might, if considered alone, be deemed merely an expression of opinion, the false statement in connection therewith that a damaging frost had never been known in that neighborhood gave the statement that the property was absolutely frostless the character of a statement of fact rather than a mere opinion.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 40, 53.]

4. Vendor and Purchaser 🔑37(4)—Validity of Contract—False Representations—Failure to Investigate.

The purchaser was not precluded from rescinding and recovering back the purchase price, because of failure to make inquiry, and investigation, the result of which would have disclosed the true condition of the water system, and the fact that severe frosts had occurred, where she was an inexperienced woman, without knowledge of the subject with which she was dealing, and there were no circumstances attending the transaction calculated to arouse her suspicion.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 57.]

5. Appeal and Error 🔑173(10)—Defenses—Laches—Failure to Urge Below.

In a purchaser's action to rescind a contract and recover back the purchase price, laches could not be urged on appeal as a defense, where it was not raised in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1104–1107.]

6. Vendor and Purchaser 🔑123—Actions for Rescission — Laches — Necessity of Pleading.

Under Code Civ. Proc. § 434, providing that, if certain objections to the complaint be not taken by demurrer or answer, the defendant must be deemed to have waived the same, an objection to rescission by a purchaser on the ground of laches was waived when not pleaded.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 221–227.]

7. Vendor and Purchaser 🔑119—Rescission by Purchaser—Laches.

Where a purchaser induced to buy land planted to citrus trees, in July, 1912, by misrepresentations that a water plant, through which it was irrigated, was in good condition, and that damaging frosts had never occurred, did not discover until March, 1913, that her trees were killed by frost, and then learned that heavy frosts had occurred in previous years, and shortly thereafter consulted an attorney under whose advice she immediately took steps to secure redress, and did not learn until after suit was brought of the falsity of the representations as to the water system, there was no bar by laches.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 212–214.]

Department 1. Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by A. I. Tracy against Wm. M. Smith and another, individually and as a copartnership doing business as Smith & Mizener. From a judgment for plaintiff, defendants appeal. Affirmed.

Humphrey Marshall, Jr., and Frederick A. Preston, both of Los Angeles, for appellants. W. C. Shelton, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. Action to rescind a contract whereby plaintiff agreed to buy from defendants for a stipulated sum a five-acre tract of land, planted to one-year old citrus trees, and to recover the sum of $1,500 paid defendants on the purchase price thereof, upon the ground that plaintiff was induced to make the contract and payment of purchase money thereon through and by means of false and fraudulent representations made by defendants as vendors of the same. From a judgment in favor of plaintiff defendants appeal.

It appears without controversy that plaintiff, a widow, having inherited a small sum of money from the estate of a deceased brother, conceived the idea of investing it in an orange grove. She was introduced to defendant D. A. Mizener, who, with Wm. M. Smith, constituted the copartnership of Smith & Mizener, which owned a subdivision of land in Los Angeles county called Orchard Dale. To secure a supply of water for the irrigation of the subdivision they organized a water company, which at the time of the transaction with plaintiff had installed a water system consisting of wells and some twelve miles of pipe lines for the development and distribution of water, shares in which company were allotted to and sold with each tract of land. Plaintiff was shown a lot designated on the map of said subdivision as lot 50 of block 3, containing approximately five acres, which in May, 1912, had been planted to orange trees, and for the purchase of which, together with 10½ shares of stock in said Orchard Dale Water Company evidencing her right to the use of water thereon, she, on July 8, 1912, entered into the contract which it is sought to rescind.

It is conceded that prior to the time that plaintiff entered into the contract the defendant D. A. Mizener represented to her that the Orchard Dale Water Company had then developed an unlimited supply of water amply sufficient for any use which the tract and the lots therein would ever require, and that the plant and water system through and by means of which the water was distributed was perfectly built and equipped and in such splendid condition that, barring minor repairs thereto, the cost of water to the stockholders in said company for the first five years would be the cost of production only, that the land was located in a district that was absolutely frostless, and that damage by frost had never been known in the neighborhood, all of which representations so made to plaintiff by Mizener the court found to be untrue and known by him to be untrue when made. The court further found that plaintiff was a woman of little experience in business and knew nothing of the subjects of representation, other than the statements so made to her by defendant Mizener, upon which she relied believing them to be true, and, because thereof, she was induced to and did enter into the contract.

Notwithstanding the repeated declarations of this court that, where there is a substantial conflict of evidence touching an alleged fact, a finding thereon by the trial court will not be disturbed, appellants attack the findings for want of sufficient evidence to support them.

[1] To quote at length the testimony would be an idle task. Suffice it to say that an examination of the record, while showing a conflict in the testimony offered, exhibits ample evidence tending to prove each and every fact found of which complaint is made. That the locality was not free from frost, but subject to killing frost, appears from the fact, conclusively shown, that all the trees, several hundred in number, planted in the succeeding spring upon said lot, though protected by paper wrappings, were during the winter of 1912–13 killed, and that, contrary to defendant's statement that "a damaging frost had never been known in that neighborhood," evidence was received which strongly tended to prove that during the winter immediately preceding the making of the contract severe frosts occurred in that locality doing great damage to the orchards and destroying many of the newly planted orange trees, all of which facts were well known to Mizener.

The finding that the representations in regard to the supply of water and the condition of the distributing system were untrue is supported by evidence given by Mizener himself, who was a member of the board of directors of the water company. His testimony was to the effect that at the time he made the statements to plaintiff he knew that a large part of the distributing system had deteriorated to an extent that rendered it unfit for use, that it was necessary to immediately replace some 6,000 feet of the main pipe line, and that the condition and quality of the water in one of the wells was such that the use thereof would have to be abandoned, in connection with which was the testimony of the president of the water company to the effect that for a long time prior to September, 1913, the condition of the pipe lines was such that from 15 to 20 per cent. of all the water pumped was lost by leakage, and that in September, 1913, the board of directors determined it to be necessary to make repairs, install new pipe, and develop an additional supply of water at a cost to the stockholders of $25,000. Indeed, it is impossible to perceive how the court could have reached any conclusion other than that the representations made by Mizener to plaintiff with reference to the water and distribution system were untrue.

[2] Appellants contend that, conceding a sufficiency of evidence to support the findings, the representations so found to have been made were matters of opinion only, and hence, even if they were false and untrue, such fact constituted no ground for an action of rescission on the part of plaintiff. The condition of the water system, and whether or not a damaging frost had ever occurred in the locality were material existing facts as to which, since the representations were positive and unqualified, the truth thereof should be established in the form made. In Sheer v. Hoyt, 13 Cal. App. 662, 110 Pac. 477, it is said:

> "Matters which might otherwise be only expressions of opinion, when stated as accomplished facts by one of the parties to a contract, and accepted and relied upon by the other as such, may, and often do, become the basis of actions for fraudulent misrepresentations."

See, also, Bickel v. Munger, 20 Cal. App. 633, 129 Pac. 958.

[3] It is true that as a rule expressions of opinion, whether real or pretended as to what may or may not occur in the future, or as to matters equally within the power of both parties to ascertain, are not deemed representations upon which, though admittedly false, an action can be founded. Winkler v. Jerrue, 20 Cal. App. 555, 129 Pac. 804. Hence, considered alone, the statement that the land was "absolutely free from frost" might be deemed merely a prediction or an expression of Mizener that in his opinion the locality would never be subject to frost. It was, however, a positive representation by one assuming to have knowledge of the subject, based upon a statement known by him to be false in fact that "a damaging frost had never been known in that neighborhood," which, if true, when made in connection with the statement that the property was absolutely frostless, warranted the making of the latter and gave it the character of a like statement of fact rather than a mere opinion. Muller v. Palmer, 144 Cal. 305, 77 Pac. 954.

[4] It is next insisted that plaintiff is not entitled to recover because she had opportunity for making inquiry and investigations, the result of which, if made, would have disclosed the true condition of the water system, and the fact that during the previous winter severe frosts had occurred in the neighborhood as a result of which much damage was done to the orchards, and many of the young trees killed. There were no circumstances attending the transaction calculated to arouse the suspicion of an inexperienced woman without knowledge of the subject with which she was dealing, or cause her to question assurances from Mizener that what he told her in response to her inquiries would be the truth. There is no rule of law which, under the circumstances here shown, required plaintiff in dealing with defendant to have acted upon the assumption that he was dishonest, and the law will not deny her redress because she failed to act upon such assumption.

> "The fraudulent vendor cannot escape from liability by asking the law to applaud his fraud and condemn his victim for his credulity." Strand v. Griffith, 97 Fed. 854, 38 C. C. A. 444; Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011; Eichelberger v. Mills Land & Water Co., 9 Cal. App. 628, 100 Pac. 117.

[5-7] The question of plaintiff's laches as a defense was not raised in the trial court, and hence should not, for the first time, be urged here. Indeed, objection to the recission on that ground, since not pleaded, is deemed waived. Code Civ. Proc. § 434. Moreover, if considered on the merits, the contention is ill founded, since it is shown that she did not discover that her trees were killed by the frost until March, 1913, and then learned of heavy frosts occurring in prior years. Shortly thereafter she consulted an attorney as to her rights, under whose advice she immediately took steps to secure redress for the deceit practiced upon her. Indeed it was not until after the filing of the first complaint in the action that she learned of the fraudulent representations as to the condition of the water system.

The judgment is affirmed.

We concur: SLOSS, J.; SHAW, J.

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175 Cal. 173

In re WILLITS' ESTATE. (L. A. 4726.)

(Supreme Court of California. May 21, 1917.)

1. WILLS 🔑55(1)—CONTEST—SUFFICIENCY OF EVIDENCE.

Evidence regarding an 88 year old testator's Spiritualistic activities, his belief in mediums, etc., *held* to sustain a verdict that his will leaving his property, except for minor legacies, to a Spiritualist companion, who had obtained some $85,000 from him during his lifetime, was void because of her undue influence and his mental incapacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137–140, 148–150, 161.]

2. WILLS 🔑329(3)—CONTEST—INSTRUCTIONS.

In a will contest, instructions that contestants must prove their case by preponderance of the evidence and that the burden of proving testator's mental incapacity was upon contestants *held* to sufficiently charge regarding the burden of proof.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 776.]

3. WILLS 🔑330(3)—CONTEST—INSTRUCTIONS.

In a will contest, an instruction that an 88 year old testator was mentally incapacitated if he did not appreciate the nature of his property and his children's claims to his bounty *held* warranted by evidence regarding his belief in Spiritualistic mediums and gifts of $85,000 to a woman Spiritualist companion.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 781.]

Department 2. Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

In the matter of the estate of Milton L. Willits, deceased. From a decree denying the will probate and from an order denying a new trial, Emma Helmer appeals. Affirmed.

Earl Rogers, W. H. Dehm, and Milton M. Cohen, all of Los Angeles, for appellant. Kemp, Mitchell & Silberberg, and Enyeart & Holton, all of Los Angeles, for respondents.

HENSHAW, J. Milton L. Willits died testate on January 6, 1915. At the time of his death he was 88 years and 2 months of age. The will was executed about 11 weeks before his death, and thus about 3 weeks before his eighty-eighth birthday. He left surviving him five adult children. By his will each of these children was bequeathed a legacy. To one was given $1,500, to another $1,000, to two others $500 each, and to the fifth the cancellation of a debt owed to the father. He gave also to two grandchildren $500 each. He then bequeathed to Bertha Helmer $1,000, and all the rest and residue of his estate of every kind and character to her sister, Emma Helmer. By this will the specific legacies amounted to $5,500. The total value of his estate at the time of his death is shown to be $2,500. This will was offered for probate. Two of the sons contested, and as grounds of contest pleaded: First, that the testator was not of sound and disposing mind at the time of the execution of the will; and, second, that the will was the product of undue influence exercised upon the testator by Emma Helmer.

In this contest the jury found for the contestants upon both of the grounds advanced. From the decree denying the will probate and from the order refusing to grant her motion for a new trial Emma Helmer appeals, and on appeal and as the principal ground for the reversal of the decree and order insists that the evidence is insufficient to sustain the verdict of the jury.

In view of the fact that the value of the testator's estate disposable under his will is but $2,500, and that the specific legacies amount in value to $5,500, it is at once apparent that Emma Helmer, the residuary legatee and devisee, will take nothing under the will. Her appeal, however, will be understood when it is explained that in the three years immediately preceding his death, during which time the deceased was in intimate association with Emma Helmer, he gave to her and she received from him real and personal property of a value in excess of $85,000, which property was all of the property which the old man owned, so that at the time of his death nothing remained but a small amount of personal property, live stock, and farming implements upon a valuable farm in Illinois, which farm he had previously deeded to her. Of everything but this personal property he had stripped himself or been stripped. Moreover, of his five adult children some were married and with children of their own. None of them was in affluent circumstances, several of them quite poor. Some of them had lived upon and faithfully worked the father's farm in Illinois. The meager legacies, the face value of which they could not receive, were all that was left to them, while this stranger in blood, who had known him casually for but one or two years and intimately for the three years preceding his death, took or was given all that the old man had. Actions are pending against Emma Helmer, instituted by the heirs at law of the deceased, for an accounting of his moneys, which in large sums came into her possession during his lifetime, and which she contends were gifts from him, and to set aside conveyances of real property which he made to her. Manifestly, if the heirs at law should be successful in these actions, the property thus recovered would become the residuum of his estate and fall under the residual clause of his will, by which Emma Helmer would take it all. Hence, while taking nothing under the will as it now stands, her contingent interest is very large, and hence, therefore, her appeal from the decree denying it probate.

As the principal proposition advanced upon appeal is the insufficiency of the evidence, a résumé of that evidence becomes necessary. Milton L. Willits, born in 1826, early in his lifetime married, became a farmer in Illinois, and by thrift and industry acquired large and valuable holdings of farm land. His wife bore him ten children, five of whom survived her and are still living. She died in 1869, and he became interested in Spiritualism. This study or pursuit obsessed him. He endeavored to make a medium of his second wife, and the family friction which resulted led to proceedings instituted in the courts of Illinois to have him declared incompetent. In this his second wife and some of his children joined. A verdict of the jury favored him. His children grew up without any serious estrangement apparently resulting from this. His second wife was divorced and died, and his interest in Spiritualism waxed. In his own home he had "circles" about three times a week, attended other "circles" away from home, and had a "cabinet" for Spiritualistic purposes built in his house. He firmly believed not only that he held through mediums direct communication with spirits in the other world, but that these spirits could take to themselves matter and so "materialize"; that through their direct aid and instrumentality one received messages, directions as to the conduct and the management of one's worldly affairs, artistic development in "picture making," in medicine and healing. He had for "guides" a band of spirits who were active in various branches for which they were best fitted. The personnel of this band changed from time to time. Some were the spirits of people that he had known on this earth; others he had never known. Thus Dr. Dent, a former friend, was the head of the band that exercised healing powers. Maude Adams, the actress, was to him "Little Maudie" and was one of his spiritual guides. He knew that she had been a famous actress, but he knew also that she had "passed over" because she told him so. When it was established to him that "Little Maudie" was alive and still devoting her histrionic genius to the delight of audiences here on earth, he satisfactorily explained that sometimes evil spirits did this sort of false impersonation. The same is true of a "medium," Mrs. Karcher, into whose hands he fell. Mrs. Karcher was just on the point of perfecting herself by self-abnegation and study so that she could transmute dross into gold and silver ores of great value. More than this, she could, when she had attained full power, "materialize" these valuable metals out of airy nothingness. Mrs. Karcher secured a written contract under which the deceased bound himself to maintain her during her period of study until she perfected herself, when out of the profits which would immediately follow she was to repay him. He became alarmed about Mrs. Karcher, declaring not unwisely, as his experience proved, "that he was afraid of women; they always had gotten my money." So he gave her $100 and fled. He was perturbed for fear Mrs. Karcher would seek him out and endeavor to enforce his contract, but was much relieved when her spirit appeared and told him she was dead. Being afterwards advised that Mrs. Karcher was still upon this earth, he declared that there must be some mistake about it, as her spirit had certainly appeared to him.

Paying more attention to chronology, after the divorce from his second wife, Mr. Willits became interested in a medium who was a great "magnetic healer," and installed her with her husband and son on his farm, where they remained for over a year. In 1882 or 1883 there was laid out at Mt. Pleasant Park, at Clinton, Iowa, a Spiritualistic camp ground where were held annual meetings. Mr. Willits assisted in its organization, advanced money, joined as maker of a note to secure a loan for it, was a director, and attended every meeting from its organization until his death, except in the years 1912 and 1913. In this park he built two cottages which he rented during the meetings, himself living in one of them. About 1897 he came to this state under the directions of the spirits and became involved with the Karcher woman, as above related. Leaving California, he went to Chicago, and from 1902 to 1907 spent the major portion of his time with a Mrs. Green, who there resided. Mrs. Green was a medium, and séances were held at her house. With Mr. Willits' assistance she was developing a higher order of Spiritualism known as the "Magi." The members of this society of Magi called to their aid in their troubles over mundane affairs the spirits of the ancient Atlantians, who had their earthly residence upon the now submerged continent of Atlantis. Mr. Willits' especial "guide" or "control" during this period was an Atlantian spirit called "Billy." These researches into higher spiritual truths and demonstrations were rudely interrupted by the police of Chicago, who broke into one of Mrs. Green's meetings and after a fight arrested her.

After this experience, with faith unshaken, he continued to attend the meetings at the Spiritualistic camp. He was confirmed in his devotion by a communication which he received from Mr. Burdick, whom he had known on earth, and who had "passed over," Mr. Burdick telling him that the $5,000 which he had loaned to the Mt. Pleasant Park was the best investment he (Mr. Burdick) had ever made, the reason being, as Mr. Burdick's spirit explained, that when he "passed over," because of this loan, the spirits "in the other world had met him and taken good care of him and fixed him up right." Mr. Willits' own exposition upon this subject was that the more you did for Spiritualism in this world the better off you were with the spirits in the next world, and he instanced the case of a friend of his, William Drury by name. William Drury in his lifetime had done nothing for Spiritualism, and when he "passed over" he was left in "outer darkness"; the spirits did not receive him very well, and he did not get along with them, but, being informed of this, he, Mr. Willits, got in communication with them and fixed it up so that now "Mr. Drury was doing fairly well."

Thus Mr. Willits' life flowed on, very much under the guidance of the communications which he received from the spirit world through the mediums whose society he frequented. In 1908 he first met Emma Helmer at the Spiritualistic camp, and again in 1910. Their acquaintance up to this time was casual. Emma Helmer's occupation was that of a stenographer. She had spent several years in that capacity in a lawyer's office in Denver, Colo., and she had been a public stenographer. She was interested in Spiritualism. She addressed the camp meetings upon the wonders of Spiritualism. She was active in endeavoring to sell "scholarships" which entitled the holder to take a course of study in spiritualism and for the sale of which she received a commission. Knowing Mr. Willits but casually, in 1910, after the camp meeting, she sent him a Christmas card. Later he wrote to her, asking her if she would take care of the renting of his cottages in 1911, and she agreed to do so. At the camp meeting of 1911, which both attended, they came into close personal relationship. To a witness who was present at that camp meeting, a Miss Burton, Mr. Willits expressed the desire to find Mr. Green (the husband of Mrs. Green, the medium above mentioned) and to induce him to go with him to California. Emma Helmer, being told of this by Miss Burton, asked Miss Burton to "tell Mr. Willits that 'I will take him to California. That is just where I want to go, but I can't go unless I find some one to pay my traveling expenses.'" The result was that when Mr. Willits left the camp ground Emma Helmer went with him. They traveled about together, going to New Boston, in Illinois, where was Mr. Willits' farm; thence to Colorado, Emma Helmer's home; thence back to New Boston; then to San Diego, Cal.; and finally to Los Angeles, where a home was bought and paid for with Mr. Willits' money. They moved from this first home to another in Los Angeles, and there he lived with the Helmer family until his death. He thus lived with the Helmers for the last 3 years of his life, from the time when he was 85 years of age until he was 88 years of age. During their travels, of course, Mr. Willits paid all expenses. Within two months after they were settled in Los Angeles Miss Helmer received from him $1,000. Within three months she had received over $4,000. In a period of 7 months she was the recipient of $12,670. In the year 1913 she obtained over $4,000. In 1914 she obtained over $3,000. This was all the money which he had accumulated in the past years, and in addition to this she received the major portion of the money which he received from the sale of a part of his farm land—all of it indeed save that which went for the payment of his obligations. Before this friendship sprang up his monthly expenditures had not exceeded $100. Afterward he not only withdrew and turned over to Emma Helmer all the moneys which he had accumulated and all that came in as proceeds from his farm, but he was constantly importuning his banker in Illinois to send on every deposit made to his credit as promptly as possible. Every one of these deposits was turned over to Miss Helmer. In these years he was physically feeble, his personal expenditures negligible, for he seldom or never left the Helmer home excepting in the company of Emma Helmer. He wrote a number of letters quite by himself. Later his correspondence was taken over by Emma Helmer, and his letters were typewritten by this competent stenographer.

In 1914 Emma Helmer and her mother accompanied or took the old man to the Iowa Spiritualistic camp meeting. She carried the purse and attended to all the details of travel. Their relationship was such that at the camp meeting Mr. Bloomer, a friend of Mr. Willits, complimented him on his "fine-looking wife." Miss Helmer replied: "We are not married. I am keeping house for him. God sent me to take care of him." They made this Eastern trip in the late summer or early autumn of 1914, but in the middle of April preceding Mr. Willits executed to Emma Helmer his deed of all of his Illinois lands. The deed was prepared by Miss Helmer herself. The form appropriate for such a conveyance under the laws of the state of Illinois, and the description of the property, being obtained from Mr. Willits' papers and the deed itself typewritten by Miss Helmer. After the deed was so drawn by Miss Helmer in her home she escorted the old man to a notary public, where he executed it and gave it to her. She did not have it recorded until after his death, and indeed maintained the utmost secrecy about it, even under circumstances, as will hereinafter appear, where a disclosure was manifestly called for. While at the camp meeting in Clinton, Iowa, in like manner the deceased conveyed to her the two cottages which he owned. This conveyance she had placed of record, and it is not without significance that the deed to the Iowa property, which in all probability would not come under the notice of the deceased's relatives, was recorded, while the utmost reserve was maintained in the matter of the deed to the farm in Illinois where Mr. Willits' children resided. Leaving the camp meeting, the three, Mrs. Helmer, Miss Helmer, and Mr. Willits, went to New Boston, near to which town his farm was situated. They saw none of Mr. Willits' children, and it is doubtful whether those children were advised of their father's presence. This last visit to New Boston was made after Mr. Willits had conveyed to Miss Helmer all of his real property. Notwithstanding this, he gave a written option while at New Boston agreeing to sell his ranch for $150 an acre, except 80 acres of rough land which was to be sold at $100 an acre, and agreeing further to pay $1 per acre commission upon such sale. Miss Helmer explains this act of Mr. Willits as being his endeavor "to get a price on the land," but it is not a strained inference to conclude that he thought that he was giving an option for the sale of real property which was his own.

While they were thus visiting at New Boston, and on the eve of their departure for California, they were served with summons in conservator or guardianship proceedings instituted by one or more of the children. Mr. Willits became much excited, but Miss Helmer quieted him, telling him to keep cool, that "she would see him through; that she had not been in a law office four years for nothing." Mr. Willits was on the verge of a collapse. Mr. Campbell, a disinterested witness, testified that Miss Helmer declared that these proceedings "were a disgrace that the children had brought upon Grandpa that she was not going to stand for, but she would spend her own money if necessary in order to defend his good name." Mr. Campbell explained that senility was not a reflection upon his good name, but was a mere matter of physical and mental decadence, and that the action was quite natural, because he knew that in his "normal mind he [Mr. Willits] would desire his property to go to his children." He also told Miss Helmer, who solicited him to bear testimony to Mr. Willits' competency, that he could not take the witness stand and say that he considered Mr. Willits capable of handling his own affairs, and referred to the control exercised in those affairs by the spirits. Miss Helmer "said that was a matter of religious belief and ought not to enter into business affairs. But I pointed out to her in what manner that might easily influence the disposition of a man's property." All this resulted in Miss Helmer seeking the services of Mr. Hanna, an attorney at law in the nearby town of Monmouth. In the conversations and consultations over the matter of the conservator proceedings, at all of which Miss Helmer was present, she made no disclosure to Mr. Hanna of the fact that Mr. Willits had given to her substantially all that he possessed. The conversations assumed that Mr. Willits was still a prosperous, prudent farmer, whose children were endeavoring to take his "property" away from him. Miss Helmer is particular to say that they were endeavoring to take his "property," and not his "farm"; Mr. Willits' property at that time, under Miss Helmer's contention, being wholly and exclusively the small amount of personalty left on her farm. Notwithstanding the fact that one of the specific charges in the conservator proceedings was that he was squandering and dissipating his estate, she made no disclosure to Mr. Hanna of what in fact Mr. Willits had done for and given to her.

It was there and at that time and under these conditions that the will here questioned was drawn and executed in the office of Mr. Hanna. The circumstances leading up to the making of the will are narrated by Mr. Hanna and Miss Helmer. They are somewhat vague, but it does appear that Mr. Hanna, the attorney for Mr. Willits only in the conservator proceedings, asked Miss Helmer if Mr. Willits had made his will, and when it was found that he had not, he was advised to do so. The conversations were for the most part in the presence of Mr. Hanna, Miss Helmer, and her mother, though Mr. Hanna conversed with Mr. Willits alone. As a result of his conversation with Mr. Willits, and without suggestion from any one else, the will was drawn in accordance with Mr. Willits' expressed wishes. Mr. Hanna dictated the terms of the will, Mr. Willits came back in the afternoon of the same day the will had been prepared, it was read to him, and its legal effect explained. No one was present when it was read and explained to him, and Miss Helmer was not present when it was executed. Immediately thereafter Mr. Hanna secured the presence of Mr. McCray and Mr. Martin, two business men of the town and wholly disinterested, and they witnessed the execution of the will. Such is Mr. Hanna's version, given by deposition.

Notwithstanding this testimony, the two disinterested witnesses to the execution of the will declared that there was a lady in the room at the time Mr. Willits executed the will in their presence, that it was not a stenographer in Mr. Hanna's office, as Mr. Hanna endeavored to make it appear, but it was a young woman in street clothes, whose name they believed was Helmer, and, as their recollection served, she had her hat on. Of significance in this connection is the varied evidence given by Miss Helmer herself. Upon the witness stand Miss Helmer testifies positively that she was not present at the time the will was made; that she went to Mr. Hanna's office in the afternoon to take Mr. Willits away with her; that she did not hear the reading of a will to Mr. Willits and did not see the witnesses who signed the will as witnesses; she did not hear the will read nor any of its provisions and did not know of the execution of the will until afterward, when Mr. Willits told her he had a will drawn and gave it into her charge. Miss Helmer first gave her deposition concerning these matters. This deposition was transcribed and submitted to her for correction. She retained it in her possession for some weeks. During this time the deposition of Mr. Hanna was taken in Illinois, and Mr. Hanna, it will be remembered, testified that Miss Helmer was not present at the reading of the will to Mr. Willits or at its execution. The following excerpts from Miss Helmer's testimony are illuminating. The answers which are canceled are those answers which appeared in the original transcription of her deposition. The amended answers were given under the indicated circumstances, the emendations being underscored. Asked how she obtained possession of the will, her answer is:

Willits
"Mr. ~~Hanna~~ gave it to me to take, and I returned it to Mr. Hanna afterward."

Asked when she first saw the will in Mr. Willit's possession she answered:

after we left
"Back there ~~in~~ Mr. Hanna's office."

Her deposition then proceeds as follows:

"Q. Do you remember the fact that Mr. Martin and Mr. McCray were called in from another office to witness the will?
I don't know anything about it.
"A. ~~I think they were."~~
"Q. During the time you were there was this will signed?
I don't know.
"A. ~~Probably~~.
"Q. Don't you know that was the fact?
I don't know that it was.
"A. ~~I guess that was so.~~
"Q. Did you hear the will read at that time?
"A. No, sir.

"Q. Did you hear any of the provisions of it?
Just a little.
"A. Yes, sir.
"Q. You heard all of that read to Mr. Willits by Mr. Hanna?
No
"A. ~~Yes,~~ sir.
"Q. You were near enough so that you could hear the reading of that will?
of a little of it.
"A. Yes, sir; I heard the reading of ~~that will.~~
"Q. And then Mr. Willits signed it?
I don't know when he signed it.
"A. ~~Yes sir; I think he signed it then.~~
"Q. And then he called out the two witnesses and signed it before them?
I do not know when the witnesses were called in,
"A. No sir; ~~they called them in before.~~
"Q. And he signed it in the presence of the witnesses?
He evidently did.
"A. ~~Yes sir; in the presence of the witnesses.~~
"Q. After this was all read over, what did Mr. Willits say?
I don't know what he said; I was not there.
"A. ~~He didn't say anything.~~
"Q. He didn't say, 'That is all right'?
How can I tell when I was not there?
"A. ~~He didn't say anything I suppose that is so he said, 'That is all right.'~~
"Q. Did he say anything?
Mr. Hanna could tell you.
"A. ~~I think that is what he said.~~
"Q. Isn't it a matter of fact that he did not know what was being talked about?
I don't believe Mr. Willits ever signed anything he didn't understand.
"A. ~~Of course he knew what it was. He made it himself. He ought to know it was all right.~~
"Q. Didn't he say to Mr. Hanna, 'That is all right; that is the way I want it'?
I do not know what he said.
"A. ~~I think he did say it.~~
"Q. As a matter of fact, Mr. Willits was so deaf that he couldn't hear?
He could hear when spoken to distinctly.
"A. ~~Yes sir.~~
"Q. He read it so loud that you and everybody else could hear?
"A. Yes, sir.
"Q. Were the witnesses present when the will was being read over to Mr. Willits?
I suppose so.
"A. ~~Yes sir.~~
"Q. And they discussed the contents of the will with Mr. Willits?
Maybe they did.
"A. ~~They talked to him and had a conversation with him.~~
"Q. What did he say?
know what they said.
"A. I don't ~~remember.~~
"Q. Didn't he tell you that people could come back?
under certain conditions.
"A. He believed that they could communicate.^
"Q. And appear to them?
"A. Yes, sir.
{he might have thought this possible."

The argument of appellant is that Mr. Willits, notwithstanding his age, was a shrewd, prudent business man of cultivated mind; that he was a student of Spiritualism, no more; and that his Spiritualistic theories were not permitted by him to influence him in the conduct of his daily life and business affairs. The evidence upon these matters, besides that of disinterested witnesses, is abundant from the writings of the deceased himself. Touching his cultivation and Spiritualistic beliefs the following are extracts from a letter written by him in 1912 to a comparative stranger, who he apparently thinks is related to him. He writes to him something of his genealogy, explaining that:

> "On my mother's side of the family they wer what wer called Pensylvaney Duch both family were Quakers so we belong to that sock my father & mother died with what was called milk sickness one dieng one day and the other the next."

He then proceeds:

> "I spent the most of the last ten years in the city of Chicago Ill in the family by the name of Green the wife of Mr. Green is what is known as a materializing medium. This somewhat strange process consists in reclothing the spiritual body in a real material body as it seams in the mortal body this is accompisid by by the help of the of a band of kemests on the spirit side of life who are able to draw the necessary elements from the meduom & the sitters in the circle to reclothe the spiritual form my own experience has proved to me beond a posable doubt that this is a truth. How do I know this to bee true because I had had actual communication with many people that I was well acquainted with they lived in the life form also those that I never knew on earth spirit communion I think is the grandest thing that came to earth without it we could get no evidence of a futur life all Bibles all evidence of a future life would bee imposable By what natrar is this wonderful blessing secured by the messmerick or psychic law of controle which enables one person to controle the physical body of another person I have been given the proscess by which this is obtained is to depolarize the brain cells that is to throw the celles into a negative condition this anables the spirite or operator to express itselfe the same that it does or can through its own organism you know it is n uncoman thing for people to be paralozed and loose controle of part of their physical bodies and sometimes the hole physical structure."

In 1907 the husband of one of his daughters had died. His name was Hollis. He writes to his daughter that he has heard from Hollis in the spirit world, and tells her:

> "Bro H H Roberts & his Sone Earnest wer hear the Son to get help Hollis brought for the same purpose here they meet their Friends this gives the Spirite a better opportunity to gain strength and light I was toled that Hollis & Earnest were about in the same Condition."

Hollis and his wife owed Mr. Willits money in his lifetime. When Hollis died he left his wife in poverty. The father enforced from his widowed daughter the collection of this debt upon the ground that Hollis in the spirit world had directed him so to do, and he writes to her:

> "Well that was Fortunate inDeed for if I had not been here and so situated that I could arrange matters with Hollis agreeable to his wishes to have the Debt payed off theire could have been nothing done to settle the Debts satisfactorily so I feel sure evry thing has turned out for the best."

It will be remembered that he sold 80 acres of his land for $14,000. That was in 1912, and while he was living with Miss Helmer. By far the greater portion of this money went to Miss Helmer. A disinterested witness testified that Mr. Willits told him that:

> "He had got orders to sell that land. He said he had been told to sell it and his business here was to sell it. He said he had a communication from the spirit world."

Touching his mental condition during the last portion of his life, his mind was feeble, his memory bad, and he either did not understand or took no interest in anything saving Spiritualism.

> "He told me many times that that was one of the greatest things that he could do. Every dollar that he spent in developing mediums and assisting the spirits to manifest would be a great source of pleasure to him in the future life."

[1, 2] It would be a serious reflection upon the intelligence of the profession if space should be given to a discussion of the sufficiency or insufficiency of this evidence to support the verdict. It speaks so positively and convincingly as to require no comment, and we pass on, therefore, to the asserted errors in the matter of the instructions which the court gave and refused to give to the jury. The first complaint is that the court refused to instruct the jury that the burden of proof was on contestant to establish the allegations of incompetency and undue influence. Yet throughout its instructions the court with much repetition did so instruct the jury. Thus it told the jury:

> "One has the right to make an unjust will, an unreasonable will, or even a cruel will. He may make an unjust, an unnatural, or capricious will. Unless you believe the contestants have proven their case by a preponderance of the evidence, you must find for the proponent."

Again, after telling the jury that the presumption of law was that the testator was of sound and disposing mind on the date on which the will was made, the court added:

> "Likewise in this connection the burden of proving the contrary by a preponderance of the evidence rests upon the contestants."

[3] The court instructed the jury as follows:

> "You are instructed that, if M. L. Willits was of unsound mind either as to the nature and extent of his property or as to his relation to his children and the nature of their claims to his bounty, he cannot be regarded as of sound mind and memory, though he may have been of sound mind as to all other persons and matters."

The objection to this instruction does not appear to be that it contains any erroneous declaration of law, but only that there was no evidence in the case to which it was applicable, appellant declaring that:

> "There is an abundance of evidence in the case presented by the contestants themselves showing that the decedent at all times was perfectly competent to understand the treatment accorded him by his children in contrast with that of strangers who took care of him, and that he had full understanding of the status of his property."

The foregoing summarization of the evidence, imperfect as it is, is a complete answer to this objection.

Having thus considered all of the propositions advanced by appellant, it follows that the judgment and order appealed from should be affirmed; and it is so ordered.

We concur: MELVIN, J.; LORIGAN, J.

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33 Cal. App. 452

BAILEY v. BAKER, Sheriff. (Civ. 2055.)

(District Court of Appeal, Second District, California. April 17, 1917.)

PROCESS ⚷52—EXECUTION—EXPIRATION OF SHERIFF'S TERM.

Under Pol. Code, § 4171, process remaining with a sheriff, partly unexecuted, at expiration of his term, is to be executed by his successor; so that mandate requiring him, after such time, to complete the execution commenced by him, is wrong.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 59–63.]

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Mandamus by Matthew Bailey against T. A. Baker, Sheriff of Kern County. From an adverse judgment, defendant appeals. Reversed.

J. W. Wiley, of Bakersfield, for appellant. E. L. Foster, Geo. E. Whitaker, and Chas. A. Barnhart, all of Bakersfield, for respondent.

CONREY, P. J. The defendant appeals from a judgment directing the issuance of a peremptory writ of mandate requiring him, as sheriff of the county of Kern, to take possession of and deliver to the plaintiff certain described personal property. A former judgment, rendered in October, 1913, after an order sustaining a demurrer to the petition, was reversed by this court. For a statement of the facts alleged in the petition we refer to that decision. Bailey v. Baker, 28 Cal. App. 537, 153 Pac. 242. The case was tried by the superior court in January, 1916, and the present appeal purports to be from a judgment rendered on February 9, 1916.

The court found the facts in accordance with the allegations of the petition; also that the personal property described in the petition was not claimed by any person other than the Security Trust Company; also that, after having taken possession of the property as required in the claim and delivery proceedings in the action of Bailey v. Security Trust Company, the defendant sheriff redelivered the same to that corporation, although there had not been given to the plaintiff, Bailey, any notice of time and place when the sureties would justify, and the sureties did not justify upon the redelivery undertaking which had been given by the Security Trust Company to the sheriff. The court further found that the term of defendant Baker as sheriff expired in January, 1915, and that from and after that date one D. B. Newell was and is the duly elected, qualified, and acting sheriff of Kern county.

Appellant claims that the judgment should be reversed, for the reason that a writ of mandate may not issue against an ex-sheriff to compel him to perform duties under process placed in his hands while he was sheriff. We have decided this question in another proceeding incidental to the present case. Ex parte Baker, 162 Pac. 922. That was a habeas corpus proceeding, arising out of an order committing Baker to the custody of the sheriff for contempt by reason of his refusal and neglect to comply with the directions of the writ of mandate issued in this case. This court held that the duties of sheriff under the facts of this case were controlled by section 4171 of the Political Code, wherein it is provided that:

> "* * * When any process remains with the sheriff unexecuted, in whole or in part, * * * at the expiration of his term of office, said process shall be executed by his successor or successors in office. * * *"

Having stated the rule that the powers of the office shall not continue to be exercised by one whose term has expired, we said:

> "Unexecuted process in his hands does not lose its force, but the power of the law with respect to such process thereafter moves through the arm of the new officer, to whom whatever belongs to the office should be delivered."

We are satisfied with the conclusions reached in Ex parte Baker, supra, from which the further conclusion follows that the appeal should be sustained.

The judgment is reversed.

We concur: JAMES, J.; SHAW, J.

33 Cal. App. 418

CASTRO POINT RY. & TERMINAL CO. v. ANGLO-PACIFIC DEVELOPMENT CO.

(Civ. 2017.)

(District Court of Appeal, First District, California. April 16, 1917. Rehearing Denied by Supreme Court June 14, 1917.)

EMINENT DOMAIN ⟹198(1)—LAND FOR RAILROAD—PUBLIC NECESSITY.

In the absence of express provision in Civ. Code, § 465, and Code Civ. Proc. §§ 1238, 1241, 1244, relating to acquisition by eminent domain of lands for use of a railroad corporation, and defining the procedure therefor, which would require it to show affirmatively that there is an existing public necessity for the construction of the road for which the land is sought, that is not a question to be litigated, except to the extent that a person whose lands are sought to be taken may put in issue the good faith of the corporation in seeking to acquire the land for a private interest or end rather than for the public use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 528.]

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Condemnation proceedings by the Castro Point Railway & Terminal Company against the Anglo-Pacific Development Company. From an adverse judgment, defendant appeals. Affirmed.

Reed, Black, Nusbaumer & Bingaman, of Oakland, for appellant. McCutchen, Olney & Willard, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff in an action for the condemnation of certain lands of the defendant in the city of Richmond for the use of the plaintiff as a railroad corporation. The cause was tried before the court without a jury. The evidence was not voluminous, and there is little, if any, dispute as to the facts of the case. The main and practically the only question involved is as to the sufficiency of the plaintiff's proof to warrant the trial court in denying the defendant's motion for a nonsuit and to justify its judgment of condemnation. Upon the trial of the cause, the plaintiff introduced in evidence a certified copy of its articles of incorporation, showing that it was a regularly organized railroad corporation, having for its object the construction of a railroad for the doing of a general freight and passenger business; and also presented in evidence the resolutions and maps of the corporation showing the proposed route of its railroad and the site and location of its terminals, and also showing the location of the lands of the defendant and others proposed to be taken. From these maps it appeared that the proposed railroad would be about two miles long, having its northern terminal in the hamlet of Winehaven, where it would connect with a railroad already there known as the Belt Line, and running around the easterly and northerly shores of the Richmond peninsula, and that the plaintiff's proposed line would thence extend southerly along the shore line of the peninsula to deep water. There was then presented the testimony of the chief engineer of the plaintiff, who testified that he had made surveys of the route and terminals of said railroad, and that the lands of the defendant sought to be condemned formed a part of said route and of one of said terminals, and were necessary for such uses, and that the work of constructing said railroad was in progress. With these proofs the plaintiff rested its case, whereupon the defendant moved for a nonsuit upon the ground that the plaintiff had offered no proof showing any public necessity for the existence of such a railroad or for the taking of the lands in question. The court denied this motion, whereupon the defendant offered evidence tending to show that there were other lands which it was claimed were equally available for the uses to which the plaintiff proposed to put the land sought to be condemned, and also tending to show that there was no present public necessity for the building of said railroad growing out of an existing freight or passenger traffic needing to be served by it. The defendant also tendered some evidence showing that the incorporators of the railroad in question were also the principal owners of a rock quarry at or near its proposed northern terminal, and which would be chiefly benefited by the construction of the railroad. The court, however, rendered judgment in plaintiff's favor, whereupon the defendant prosecutes this appeal.

The sole question presented to the court upon this appeal is as to whether the plaintiff, in addition to the proofs above set forth, was required to show affirmatively that there existed a public necessity for the railroad for the uses of which the lands of the defendant were sought to be taken. The contention of the appellant is that, when this issue is raised by the pleadings, the burden is cast upon the plaintiff to make such affirmative showing as to the existence of a present public necessity for the railroad in question. On the other hand, the respondent maintains that when the plaintiff has shown, as it did in this case, that it was a railroad corporation duly organized for the purpose of constructing and operating a railroad and conveying freight and passengers for hire, and that the land sought to be condemned was necessary for the uses for which it is sought, it has sufficiently established its right to the exercise of eminent domain in the taking of said lands for such uses under section 465 of the Civil Code and section 1238 of the Code of Civil Procedure.

We feel constrained to give our concurrence to the above contention on the part of the respondent herein from a consideration of the terms of the sections of the Codes above cited, and from what appears to us to be the settled view of the courts of this state respecting the proofs required in cases of this character. Section 465 of the Civil Code in its enumeration of the powers of railroad corporations provides:

> "Every railroad corporation has power: * * * (7) To purchase lands * * * to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts, or acquire them in the manner provided in title 7, pt. 3, Code of Civil Procedure, for the condemnation of lands."

Section 1238 of the Code of Civil Procedure, under the title of "Eminent Domain," provides as follows:

> "Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: * * * (11) Railroads. * * *"

Section 1241 of the Code of Civil Procedure, under the same title, contains the following provision:

> "Before property can be taken, it must appear: (1) That the use to which it is to be applied is a use authorized by law; (2) that the taking is necessary for such use; provided, when the legislative body of a county, city and county, or an incorporated city or town, shall, by resolution or ordinance, adopted by a vote of two-thirds of all of its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county or incorporated city or town, of any proposed public utility, * * * and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor."

Section 1244 of the Code of Civil Procedure under the same title prescribes what the complaint in a condemnation suit must contain, as follows:

> "The complaint must contain: (1) The name of the corporation, association, commission or person in charge of the public use for which the property is sought, who must be styled plaintiff. (2) The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants. (3) A statement of the right of the plaintiff. (4) If a right of way be sought, the complaint must show the location, general route, and termini, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding. (5) A description of each piece of land, or other property or interest in or to property, sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract or piece of property, or interest in or to property. * * *"

A comparison of these several sections of the Code setting forth the right and the procedure in cases of eminent domain discloses that their only statement as to the cases wherein any proof or showing of a public necessity for the taking of property under the right of eminent domain designates cases where municipal corporations are seeking through their legislative bodies to acquire property for public uses; and that in such cases the resolution or ordinance of such legislative body shall be conclusive evidence of the public necessity of such proposed utility or improvement. In all other cases where private property is so sought to be taken by those entitled to exercise this right under section 1238, Code of Civil Procedure, all that is required to be shown is that the use for which the property is to be taken is a public use, and that the property is necessary for such use. By the express terms of section 1238 it is provided that railroads are public uses in behalf of which the right of eminent domain may be exercised; while section 465 of the Civil Code expressly grants to railroad corporations the right to acquire lands by condemnation to be used in the construction and maintenance of their roads. It would thus appear that there is no express requirement in the sections of our Code which relate to the acquisition of lands for the use of railroad corporations through the exercise of eminent domain, and which define the procedure therefor, which would require these quasi public corporations seeking to exercise that right to show affirmatively that there is an existing public necessity for the construction of the particular railroad for the uses of which such lands are sought to be taken.

In the early case of Contra Costa R. Co. v. Moss, 23 Cal. 324, it was held that, when the Legislature determines that railroad corporations were so far public in their nature as to be entitled to exercise the right of eminent domain, the necessity for the particular railroad seeking to exercise that right was hereby established, and that the question as to whether there was a public need for such railroad was no longer a judicial question except in cases where the rights of private ownership were being invaded under pretense of an appropriation for a public use.

In the case of City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604, which was an action for the condemnation of lands for sewer purposes, it was held that when the Legislature had defined sewerage to be one of the public uses for which private property may be taken, and when a city or town decides for itself, as it may do, that a sewer is desirable, it is not bound to prove that such sewer is necessary, but only that the taking of the property it seeks to condemn is necessary for the construction of the sewer; "when it shows that the use to which the property is to be applied is a public use (and that is shown by the statute in this case), the inquiry on that head is closed. Code Civ. Proc. § 1241."

In the case of San Francisco & San Joaquin Valley R. Co. v. Leviston, 134 Cal. 412, 66 Pac. 473, the case of City of Pasadena v. Stimson, supra, was cited as authority for the proposition that, as to the necessity for the right of way, the existence of the public use and the location through the defendant's land established the necessity.

While the decisions of the courts of other jurisdictions are not uniform upon the subject, the effect of the foregoing cases would seem to be to settle the law in this state in favor of the view that, when the Legislature has declared that railroad corporations shall have the right to condemn lands of private persons for their uses, the question as to whether there is a present public need for the construction and operation of the particular railroad seeking to exercise that right is no longer a judicial question to be litigated in the condemnation proceeding, except to the extent that a private person whose lands are sought to be taken may put in issue the good faith of the railroad corporation in seeking to acquire his land for uses which are not public but really to subserve some private interest or end; and such we understand to be the full extent and effect of the cases of County of San Mateo v. Coburn, 130 Cal. 631, 63 Pac. 78, 621, and of Madera Railway v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27. In so far as this latter issue is presented in the case at bar, it need only be said that, without reviewing it, the evidence sufficiently justifies the findings of the lower court to the effect that the plaintiff is acting in good faith in seeking to construct, maintain, and operate its railroad, and that the same will be of benefit and use to the public; and that, while it is true that the incorporators of the plaintiff are also directors and stockholders of certain corporations engaged in the operation of quarries which will be benefited by the building of such railroad, it was nevertheless not incorporated for the mere purpose of being of private benefit to those interested in said corporations, but was incorporated for the purpose of building and operating a railroad between certain termini, and that said railroad will be so situated when constructed as to be of benefit and use to the public. These findings of the trial court will not, under the settled rule, be disturbed upon appeal.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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33 Cal. App. 424

PEOPLE v. MASCHINI. (Cr. 380.)

(District Court of Appeal, Third District, California. April 16, 1917.)

1. Criminal Law ⟹1132—Appeal—Failure to File Brief or Appear—Procedure.

The Attorney General properly submitted the cause for determination upon the record, where accused filed no brief on appeal, and, although notified that cause had been placed on calendar, made no appearance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2980–2983.]

2. Criminal Law ⟹1159(3)—Appeal—Questions for Jury.

Where the only effect of accused's testimony as corroborated was to produce a conflict in the evidence, the case was for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076.]

3. Criminal Law ⟹1159(4)—Appeal—Credibility of Witnesses.

Whether certain testimony offered by defense to impeach a state witness accomplished its purpose was for jury to decide.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3077.]

Appeal from Superior Court, Humboldt County; Clifton H. Connick, Judge.

Thomas Maschini was convicted of selling alcoholic liquors in "no-license territory," and he appeals from the judgment and order denying him a new trial. Affirmed.

G. M. Pittman, of Eureka, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was by information charged with, and by a jury convicted of, the crime of selling alcoholic liquors in supervisorial district No. 2, in Humboldt county, which is alleged to have been at the time of the commission of the act so charged "no-license territory"; it having been assigned to that category by the electors of said supervisorial district at an election held therein under the provisions of the so-called "Wyllie Local Option Law" (St. 1911, p. 599) on the 23d day of April, 1912.

The appeals are from the judgment and the order denying him a new trial.

[1] Although the record on appeal was filed on the 17th day of November, 1916, in the Supreme Court, to which the appeal had erroneously been taken, and the cause transferred to this court and the record filed here on the 21st day of November, 1916, the defendant failed to present and file a brief within the time required by the rule of this court, and none has since been filed or permission to file one asked for. The cause was placed upon the calendar of the regular April term of this court, beginning on the 9th day of April, 1917, and when so placed upon said calendar the attorney of record of the defendant was regularly notified of that fact. When the cause was called for hearing and argument, the defendant was not represented by counsel, nor did he appear in person to support his appeal, and no oral argument in his behalf was made. The Attorney General, in view of the situation thus presented, properly submitted the cause for determination upon the record. People v. Coates, 163 Pac. 502; People v. Magri, 163 Pac. 503.

We have carefully examined the testimony, the rulings of the court upon the evidence, and the instructions. We have not discovered any prejudicial rulings admitting or rejecting testimony, and the charge to the jury contains a fair and correct statement of the principles of law pertinent to the issues.

It is not deemed necessary to reproduce herein, even synoptically, the testimony from which the jury reached their conclusion that the accused was guilty as charged in the information. It is sufficient to say that we have, as stated, carefully read it, and thereby have been convinced that it fully supports the conclusion that, on the 20th day of August, 1916, supervisorial district No. 2 of Humboldt county was dry or no-license territory; that the unincorporated town of Shively is situated within said "dry" unit; that the defendant kept a hotel in said town; and that on the day named he sold to one C. E. Gardner, an attaché of the office of district attorney of Humboldt county, in the presence and sight of one H. F. Kilker, another attaché of said office, a bottle of whisky, and received in payment therefor from said Gardner the sum of 50 cents.

[2, 3] The defendant positively denied selling any intoxicating liquor to Gardner, on the day named or at any other time, further testifying that what he did sell to him was soda water, and there was apparently some corroboration of that testimony. But manifestly the most that this court can say of that testimony is that its effect was only to produce a conflict in the evidence, which it was solely within the competency of the jury to resolve. And it was entirely with the jury to decide whether certain testimony offered by the defense in impeachment of the character of the witness Gardner for truth, veracity, and integrity was or was not sufficiently persuasive to accomplish its purpose.

The record presents to us no other alternative but to affirm the judgment and order, and it is so ordered.

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33 Cal. App. 397

ROEBLING CONST. CO. v. DOE ESTATE CO. (Civ. 1625.)

(District Court of Appeal, Third District, California. April 12, 1917. Rehearing Denied by Supreme Court June 11, 1917.)

Contracts ⟹289—Sufficiency of Performance—Building Contract.

A building contract specifying material and method of work for constructing cement floors to be approved by owner's architect is complied with, and contractor entitled to compensation, where specifications are followed and monthly certificate of architect approving work is obtained, although the flooring subsequently proved unsatisfactory, and the architect refused a final certificate on account of such defects.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1310.]

Appeal from Superior Court, City and County of San Francisco; L. F. Price, Judge.

Action by the Roebling Construction Company against the Doe Estate Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. C. Campbell, Weaver, Shelton & Levy, of San Francisco, for appellant. F. M. Parcells, of San Francisco, for respondent.

CHIPMAN, P. J. The action was brought to recover a balance of $12,039.75 alleged to be due upon the contract price for concrete work performed on the Wiley B. Allen building in San Francisco. The complaint sets forth in hæc verba the contract upon which the action is based. Among its provisions are the following:

"First. The contractor agrees, within the space of fifty (50) working days from and after the date of recording of this contract, to have the foundations in shape to receive the cast-iron bases and sidewalk beams (balance of work in 35 working days); to furnish the necessary labor and materials, including tools, implements and appliances, required, and perform and complete in a workmanlike manner all the trench, excavating reinforced concrete foundations, reinforced basement walls, basement floor, all floor and roof slabs, penthouses, all girder and column concrete, fireproofing, all concrete sidewalks, retaining walls, etc., and other works shown and described in and by, and in conformity with the plans, drawings and specifications for the same made by Havens & Toepke, the authorized architect employed by the owner, and which are signed by the parties hereto, one set of which is on file in the office of the city and county recorder, and the other in the office of the architect subject to inspection by parties interested.

"Second. Said architect shall provide and furnish to the contractor all details and working drawings necessary to properly delineate said plans and specifications; and the work is to be done and the materials furnished in accordance therewith under the direction and supervision and subject to the approval of said architect, or a superintendent selected and agreed upon by the parties hereto, within a fair and equitable construction of the true intent and meaning of said plans and specifications. * * *

"Fifth. The owner agrees, in consideration of the performance of this agreement by the contractor, to pay, or cause to be paid, to the contractor, his legal representatives or assigns, the sum of thirty-nine thousand five hundred seventy-six dollars in United States gold coin, at times and in the manner following, to wit, seventy-five per cent. of the amount of labor performed and materials erected at building and as estimated according to the whole contract price and payable on the first day of each month, commencing on the first day of August, 1908, and the balance to wit, the sum of nine thousand eight hundred and ninety-four dollars, thirty-five days after completion and acceptance by the architects of this contract.

"Provided, that when each payment or installment shall become due, and at the final completion of the work certificates in writing shall be obtained from the said architect, stating that the payment or installment is due or work completed, as the case may be, and the amount then due; and the said architect shall at said times deliver said certificates under his hand to the contractor or, in lieu of such certificates, shall deliver to the contractor in writing, under his hand, a just and true reason for not issuing the certificates, including a statement of the defects, if any, to be remedied, to entitle the contractor to the certificate or certificates. And in the event of the failure of the architect to furnish and deliver said certificates or any of them, or in lieu thereof the writing aforesaid, within three days after the times aforesaid, and after demand therefor made in writing by the contractor, the amount which may be claimed to be due by the contractor, and stated in the said demand by him for the certificate, shall, at the expiration of said three days become due and payable and the owner shall be liable and bound to pay the same on demand.

"In case the architect delivers the writing aforesaid in lieu of the certificate then a compliance by the contractor with the requirements of said writing shall entitle the contractor to the certificate. * * *

"Thirteenth. The payment of the progress payments by the owner shall not be construed as an absolute acceptance of the work up to the time of such payments; but the entire work is to be subject to inspection and approval of the architect or superintendent at the time when it shall be claimed by the contractor that the contract and works are completed; but the architect or superintendent shall exercise all reasonable diligence in the discovery and report to the contractor as the work progresses of materials and labors which are not satisfactory to the architect or superintendent so as to avoid unnecessary trouble and cost to the contractor in making good defective parts. * * *

"All floor slabs in the third, fourth, fifth, and sixth floors except in corridors and lavatories to be cemented over with a coat at least ¾" thick made of equal parts of fine, sharp, clean, screened gravel to equal parts of either Golden Gate or Standard cement as selected. Said cementing to be perfectly smooth and and well troweled and to be perfectly level. * * *

"Before the concrete topping is placed on concrete floor slabs throughout third, fourth, fifth, and sixth floors see that all concrete work is well cleaned off (broom cleaned) then well wet and dusted with cement, all to be done before the top coat of cement is applied."

Paragraph 4 of the complaint was amended during the trial to read as follows:

"That each and every of the covenants and conditions in said agreement contained upon the part of said plaintiff to be by it kept and performed have been fully complied with, kept, and performed by it. And plaintiff further says: That it did all the work in said contract mentioned, and duly performed on its part, in every respect, said work according to specifications and terms of the contract. That said work was fully performed, finished, and completed by plaintiff on or about the 1st day of July, 1909. * * * That thereafter, to wit, on the 25th day of September, 1909, plaintiff demanded of defendant's architects certificates in writing for the payments, in said contract mentioned and provided to be made unto plaintiff, then remaining unpaid, but plaintiff says said architects refused to deliver to plaintiff such certificates in writing for said payments, and ever since have refused and still refuse, to deliver the same unto plaintiff. That of the sum of $39,576, the amount by said defendant agreed to be paid to plaintiff for said work, as in said contract provided, no part thereof has been paid saving and excepting the sum of $27,536.25, so that plaintiff says, and charges the fact to be, that a balance of $12,039.75 is due, owing and unpaid therein."

The answer set up the defense of nonperformance. A cross-complaint was also filed by defendant alleging damages: (1) Cost of linoleum laid down to minimize the damages; (2) loss of rentals; (3) estimated cost of completing the work required by the contract, amounting in all to $19,753.20. As the decision of the court was against the defendant upon the issue of performance, it necessarily disposed of the claim for damages. Says the brief of defendant:

"If the decision thereon be upheld, the litigation will be concluded in all respects; if the court shall hold that the plaintiff did not perform, the matter will be at large and a new trial of all issues will be in order."

The controversy involves only the work done in the construction of the top cement finish upon the third, fourth, fifth, and sixth floors of the building. The court made the following findings:

"III. As to the allegations contained in amended paragraph IV of said complaint, and the denials of said allegations contained in paragraph V of the defendant's answer herein, the court finds that plaintiff fully performed all of the covenants and conditions of said contract, and the modification thereof set forth in paragraph III as amended, upon its part to be kept and performed, and did all the work in said contract mentioned, and did fully perform on its part, in every respect, said work according to the specifications and terms of the contract; and did fully perform, finish, and complete said work in compliance with all of the conditions, and in accordance with the plans and specifications, of said contract on the 1st day of July, 1909.

"As to said allegations and denials, the court further finds that the construction and installation of the top cement finish upon the third, fourth, fifth, and sixth floors of the building in which the work was contracted to be done and performed was completed by plaintiff on or about the 29th day of March, 1909, in accordance with the specifications and conditions of said contract, in a good and workmanlike manner, and when completed, as aforesaid, said top cement finish was well troweled, perfectly smooth, and perfectly level; that on said date said top cement finish was in a wet and soft condition, well troweled, perfectly smooth, and perfectly level, and thereupon plaintiff covered said top cement finish of said floors with sand, in order to facilitate the drying and hardening of said top cement finish upon said floors; that on the 5th day of May, 1909, said sand was removed, whereupon it was discovered that in the interim said top cement finish had become dry and had become hardened, and was on said date found to be cracking, checking, and loosening from the slab or rough concrete upon which said top cement finish had been applied; that thereafter said top cement finish of said floors continued to crack and check and become loosened from said slab or rough concrete, and said cracking, checking, and loosening increased steadily until approximately 50 per cent. of said top cement finish of said floors had been cracked, checked, or loosened from said slab or rough concrete; that said condition of said floors continued up to the date of the trial of this action.

"That said contract expressly provides that the architect for the owners of said building shall provide and furnish to the contractor all details and working drawings necessary to properly delineate said plans and specifications, and that the work shall be done and the materials furnished in accordance therewith, under the direction and supervision, and subject to the approval of, said architect, or a superintendent selected and agreed upon by the parties thereto; and the court here finds that the materials used by plaintiff in the construction of the top cement finish of the third, fourth, fifth, and sixth floors of said building were inspected and approved by the architect for said building, or his authorized representatives; and that said materials were mixed in the proportions specified by the contract; and that the work of laying or installing the same upon said floors was all done and performed by plaintiff under the inspection, direction, and supervision of said architect, or his authorized representative, and approved by him, from the commencement of the laying of said top cement finish until its completion, on or about the said 29th day of March, 1909; that the cracked, checked, and loosened condition of said top cement finish was not discovered by, or known to, either plaintiff or defendant until the sand was removed therefrom, on or about the 5th day of May, 1909; that said condition of said top cement finish was and constituted the first intimation received by defendant as to the ultimate condition of said floors."

Upon the matters set up in defendant's cross-complaint and the answer thereto, the court made the following findings:

"As to the allegations set forth in paragraph XII of plaintiff's answer to the first count of the cross-complaint herein, the court finds that on or about the 29th day of March, 1909, the plaintiff and cross-defendant herein had fully performed and completed that portion of the work stipulated to be done by it under its said contract with said cross-complainant, comprising the cement topping of the third, fourth, fifth, and sixth floors of said building, leaving the same perfectly smooth, well troweled, and perfectly level, and that, in performing said work, cross-defendant fully complied with the requirements of said contract, which specified that the floor slabs on said floors should be cemented over with a coat at least three-fourths of an inch thick, made of equal parts of fine, sharp, clean, screened gravel to equal parts of either Golden Gate or Standard cement, as selected; that thereafter, to wit, on or about the 5th day of May, 1909, said cement topping or surface on said floors was discovered by said cross-complainant and said cross-defendant to have cracked and checked in several places on each of said floors, whereupon and thereafter, and at various times during the months of May, June, July, and August, 1909, cross-defendant removed the cracked portions of said cement topping and replaced the same with the materials and in the proportions and in the manner as required by the specifications aforesaid each and every time leaving the cement topping so removed perfectly smooth, well troweled and perfectly level; that the checked and cracked condition of said floors was in no wise caused by any act or thing done, or any act or thing undone, by cross-defendant, or to any fault, lack of good workmanship or failure or refusal to comply with the specifications of said contract upon its part to be performed; that the cracking and checking of said cement topping upon said floors was caused by the improper mixture of gravel and cement, said gravel and cement having been mixed and laid down by plaintiff in the proportion of equal parts, being the proportion specified and required by the contract."

Plaintiff had judgment as prayed for, from which defendant appeals as also from the order denying its motion for a new trial.

Appellant's contentions are:

"I. The findings and the evidence both establish that the plaintiff did not perform the work required by the contract in that the top cement finish on four floors of the building was cracked and loose from the rough concrete.

"II. The complaint and the evidence both establish that the plaintiff did not obtain the acceptance nor the certificates of the architect which under the contract were the prerequisites of payment of the money sued for, but, on the contrary, that the architect refused to accept the work. There is no averment, finding, or suggestion of proof that the architect's decision was impelled by fraud or resulted from mistake."

It is obvious from the findings that the trial court decided that plaintiff had fully performed its contract, in respect of these floors, by constructing them, as it had agreed to do, in accordance with the plans and specifications prepared by defendant's architects and written into the contract. Defendant's position is that if a possible way was open to plaintiff by which it could have produced a good floor it was its duty to do so, failing which the consequences must fall upon plaintiff; that, in short, it guaranteed a good floor unless it was impossible to build it by following the specifications.

Plaintiff's contract was to do certain concrete work in connection with the construction of a class A steel and concrete building being erected by defendant. The portion of the work which plaintiff was to do was specifically pointed out; the materials it was to use and the proportions of the ingredients of the concrete were specifically mentioned and the manner in which plaintiff was to apply the mixture carefully provided for. The evidence was that plaintiff performed the work in strict compliance with the requisites of the specifications, and, with the exception of the floors mentioned, the result was entirely satisfactory.

It appears that in constructing these floors plaintiff laid the concrete foundation, or built what are termed the "floor slabs," but did not put on the finishing coat until a month or six weeks later; plaintiff being engaged upon other parts of the work meanwhile. Before the finishing coating was laid on the slabs, the latter were cleaned and prepared as directed by the specifications, the top coating was made "perfectly smooth and well troweled and perfectly level," as called for in the specifications. The surface was then covered with sand, an approved method of protecting the cement in the process of hardening or curing, and adhering to the slabs. Later, as found by the court, on the removal of this sand, cracks in the cement and failure to unite with the slabs in places were disclosed. All this work at its various stages was done under the personal inspection of the architect or his representative, and, as the court found, with his approval. The court found that plaintiff "laid the cement topping upon the third, fourth, fifth, and sixth floors of said building in a good and workmanlike manner, and did fully perform and complete the work thereof in compliance with the conditions and in accordance with the plans and specifications of the contract." Plaintiff's attention having been called to the defective condition of the floors, it promptly expressed its willingness to remedy it, and it made an attempt to do so by relaying the defective places in the top coating, in doing which it followed the requirements of the specifications for this work in every particular; but the mixture failed to unite with the slabs, the result being that about 50 per cent. of the floors was in this defective condition when plaintiff completed his contract and had called for a certificate of final completion, which was refused. There was evidence tending to show that a better result might have been obtained had plaintiff put on the top finish contemporaneously with laying the slabs; that to have "scored" the top cement finish on the concrete slabs, or to have marked the floors off into "expansive joints," would also have been in accordance with good workmanship; that the cement finish might have been flooded with water and allowed thus to dry or cure and less shrinkage might have followed. These suggestions of experts were obtained upon defendant's theory that, had there been any possible way to do the work which would have avoided what happened, it was plaintiff's duty under the contract to adopt such way regardless of the obligations imposed by the terms of the contract and regardless of the duty put upon the architect in the matter of personally directing, instructing, inspecting, and supervising the work. Scoring was not mentioned in the specifications. The architect testified:

> "Q. As a matter of fact, you personally directed them to omit the scoring? A. They asked me how I would like to have the floors scored. I said, 'No,' make the floors smooth and level."

Nothing was said in the specifications about getting the top finish on simultaneously with the fabrication of the slabs. The specifications read:

> "* * * Before the concrete topping is placed on concrete floor slabs throughout third, fourth, fifth, and sixth floors, see that all concrete work is well cleaned off (broom cleaned) then well wet and dusted with cement; all to be done before the top coat of cement is applied."

These directions were faithfully followed. They show clearly, however, that the laying on of the top finish contemporaneously with the construction of the slabs as the work progressed was not contemplated. The witnesses generally agreed that to have laid the top coating contemporaneously with the other work on the floors would have been the best practice, though some of them thought it impracticable and much more expensive than the course taken. Architect Toepke testified:

> "Q. Then, in your opinion, it would make no difference whether the cement coating was laid simultaneously with the concrete slab, or some time afterwards? A. Well, I do not see that there would be but very little difference."

And this may account for the absence of any such requirement in the specifications or any directions other than therein expressed. The contract expressly provided that all work shall be done "in accordance with the plans and specifications prepared by Havens & Toepke, architects, and under their direction, supervision and control," and "material delivered or work erected not in accordance with the plans and these specifications must be removed at the contractor's expense and replaced with other material or work satisfactory to the architects"; but it was also provided that the architects "shall exercise all reasonable diligence in the discovery and report to the contractor, as the work progresses, of materials and labors which are not satisfactory to the architect or superintendent, so as to avoid unnecessary trouble and cost to the contractor in making good defective parts." The delay in putting on the top finish was known to the architects, and, if it was likely to affect the work injuriously, the architects in fairness should have called attention to it. They made no objection, but supervised the putting on of the top finish and approved the work. Furthermore, the work on the four floors was finished on February 26, 1909, "with the exception of an opening of a brickmason's hoist," estimated to cost $120, and, on March 1, 1909, a statement of the condition of the work at that time was presented to defendant, a bill made out, and demand made for payment, and the record shows that payment was made on the architects' certificate that this particular work of laying the top cement finish was completed with the exception of a small amount of trowel finish about the elevator opening, amounting to $120. And the court found that all the floor work, including the top finish, was completed on or about March 29, 1909, "under the direction, inspection, and supervision of said architect, or his authorized representative, and approved by him, from the commencement of the laying of said top cement finish until its completion." Except as to this small bit of work, noted in the statement, the architects' certificate was in effect a certificate of the completion of the work on these four floors on March 1st. It is urged by defendant against this conclusion that the architects could not at that time (March 1, 1909) have known what subsequently developed and hence could not have intended to certify to the completion of the work. But they knew as much as plaintiff knew, and they knew that plaintiff was doing the work and in fact did the work precisely as it had agreed to do it, and, unless it can be held that plaintiff guaranteed the work to result in a perfect floor, it seems to us that defendant ought not to be permitted now to go behind the certificate of its agents chosen by it to pass upon this very matter. We cannot say that the contract imported such guaranty. It seems to us that, when the plaintiff agreed "to furnish the necessary labor and materials, including tools, implements and appliances, required, and perform and complete in a workmanlike manner * * * all floor and roof slabs * * * and other works shown and described," etc., its engagement was to do this, as the contract specifically provides, "in conformity with the plans, drawings and specifications for the same made by Havens & Toepke, the authorized architects employed by the owner, * * *" and "under the direction and supervision and subject to the approval of said architects." This interpretation, we think, is, as the contract provides, "within a fair and equitable construction of the true intent and meaning of said plans and specifications." Where, in the erection of a building, the owner agrees to pay a certain sum for doing a certain part of the work and specifically provides the kind of materials to be used and the manner in which they are to be used and stands by and directs and afterwards approves the work, the risk of its serving the purpose intended by the owner is clearly upon him.

Appellant cites English and American cases in which the contractor was held to have guaranteed good results in the absence of an express warranty to that effect, although counsel say:

> "In some cases a contrary conclusion has been reached where the plans and specifications are furnished by the owner and the builder merely agrees to perform the labor and furnish the materials specified."

We do not feel called upon to give particular attention to the cases cited in which we think the rule enunciated will be found to rest largely either upon the terms of the contract, or upon the character of the work to be done. The rule applicable here, we think, will be found in Bancroft v. S. F. Tool Co., 120 Cal. 228, 52 Pac. 496, and Mannix v. Tryon, 152 Cal. 31, 91 Pac. 983. And the distinction made in these cases is pointed out in Bryson v. McCone, 121 Cal. 153, 53 Pac. 637, where it was held that defendant undertook, not only to make the plant according to specifications, but also guaranteed that it would do certain work. In Mannix v. Tryon it was said:

> "He (the plaintiff) did not agree generally to plaster the dwelling, which would leave to him the selection of the materials and the method of doing the work. His agreement was to do it in a way that the owner and the original contractor had designed; according to the specifications which they had agreed on. He had no discretion in the matter. When he followed strictly those specifications, used exactly the materials they called for in the composition of the mortar and hard finish, and applied them in a workmanlike manner, he did all his contract called for. He did not contract for results, but only to do the work in a specified way."

Jones & Laughlin Steel Co. v. Abner Doble Co., 162 Cal. 497, 123 Pac. 290, is a case where it was contended that the contractor warranted that the floors of the warehouse, being constructed in part with materials furnished by plaintiff, would bear certain weights. Speaking of the defendant, the court said:

> "The inference is that it could and would judge for itself as to the sizes of beams required. It had a competent and experienced architect in its employ. There is nothing necessarily showing that the defendant was not, or did not consider itself, competent to determine the matter, or that it relied on plaintiff's advice or suggestions regarding it; or that plaintiff offered or undertook to give such advice."

We have not referred to the evidence and the findings as to the cause of the cracking and checking of the top dressing. The court found, and there was evidence to support the finding, that:

> It "was caused by the improper mixture of gravel and cement, said gravel and cement having been mixed and laid down by plaintiff in the proportion of equal parts, being the proportion specified and required by the contract."

We cannot see that it was essential to the finding of the court that plaintiff had fully performed its contract, to make a finding as to the improper proportions of sand and cement in the mixture required by the specifications, as the cause of the defects in the floors. If, as we hold, plaintiff contracted only to furnish the materials and do the work in compliance with the plans and specifications and in good and workmanlike manner, the cause of the defects would be immaterial. Whatever the materiality of the finding may be, if any, its tendency is to fix the responsibility upon defendant by whose direction this improper mixture was used.

It appeared that the last progress payment was made by defendant in pursuance of the last certificate issued by the architect, April 7, 1909. The bill, dated April 1, 1909, states on the debit side the total due under the contract at that date, less 25 per cent. Then follow payments as credits and dates of payment, including the March payment, leaving a balance, $836.25, for which a certificate was given. The final bill rendered is dated June 23, 1909, in like form, for the whole contract price less the credits from the beginning to the April 1st bill, inclusive, and less the 25 per cent. reserved under the contract. During the ensuing months, plaintiff endeavored to remedy the defects in the floors, keeping itself strictly within the specifications, but met with the same difficulty encountered in first laying them. On September 24, 1909, plaintiff made written demand on the architects for certificate of acceptance and final payment, and on September 27, 1909, the architects replied, stating:

> "That a certificate of acceptance will not be issued for the reason that the cement topping of the third, fourth, fifth, and sixth floors is not in compliance with the specifications, it being loose in several places and badly cracked and will not be acceptable to owner in its present condition."

It appeared that, beginning on September 1, 1908, and continuing monthly on the first of each succeeding month to April 1, 1909, inclusive, architects' certificates were issued and payments promptly paid thereon, and up to this time no question arose as to materials or workmanship. The top dressing of these floors was substantially completed in February, with the exception of the little work already pointed out costing $120, and this remaining work was done in March and carried into the bill of April 1st, which was paid on the architects' certificates.

Plaintiff relies and, it seems to us, with justifiable confidence, upon the case of City Improvement Co. v. City of Marysville, 155 Cal. 419, 101 Pac. 308, 23 L. R. A. (N. S.) 317. It is true that in that case there was a final certificate of completion, and this is urged as one of the grounds for distinguishing the two cases. It seems to us that, so far as the work in question is concerned, the March certificate, while perhaps not an acceptance, was a certificate of the completion of the work in accordance with the plans and specifications, and the court found that this work had been fully performed and completed on March 29th.

The rule is well established, as stated in Coplew v. Durand, 153 Cal. 278, 279, 95 Pac. 38 (16 L. R. A. [N. S.] 791):

> "Where work is to be done to the satisfaction of a person, evidenced by a certificate to that effect, the production of such a certificate is a condition precedent to a right of action upon the contract." City Street Improvement Co. v. Marysville, supra; Cal. Sugar Agency v. Penoyer, 167 Cal. 274, 279, 139 Pac. 671.

The court said, in Coplew v. Durand, supra:

> "The case which is thus presented is one where the work has been completed to the satisfaction of the owner and architect, and the latter thereafter and without warrant refuses to issue his certificate for the final payment. The refusal under these circumstances being unreasonable, the necessity for the production of the certificate is dispensed with."

It must not be overlooked that the only part of the work now or at any time in controversy was the top dressing of the floors. We have seen that the March certificate of completion covered this work, and it was paid for on that certificate, so that it cannot be said the plaintiff was wholly without the architects' certificate. The refusal to issue the final certificate in September was based upon the claim "that the cement topping of the third, fourth, fifth, and sixth floors is not in compliance with the specifications." The evidence was, and the court found, that the work was done in conformity with the specifications in every particular, and at the time of its completion no question arose as to any feature of the work. On the contrary, it was declared by the architect Toepke to be satisfactory. The reason given for the refusal was not founded on the facts, nor upon what we regard as the fair construction of the contract, and can only be based upon the theory that plaintiff guaranteed a good floor, which was a matter not within the province of the architect to foreclose and make the ground of his refusal; neither is it a theory justly deducible from the provisions of the contract.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

33 Cal. App. 411

KARAHADIAN v. LOCKETT. (Civ. 2021.)

(District Court of Appeal, First District, California. April 14, 1917. Rehearing Denied by Supreme Court June 11, 1917.)

1. VENDOR AND PURCHASER 🔑137—CONTRACT—CONSTRUCTION.

A contract for purchase of land conditioned upon the purchaser's attorney approving the title does not authorize such attorney to arbitrarily or capriciously reject the title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 260.]

2. VENDOR AND PURCHASER 🔑16(1)—ACCEPTANCE OF CONTRACT—WHAT CONSTITUTES.

Part payment of the purchase price constitutes an acceptance of terms contained in a contract for sale of land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 17.]

3. BROKERS 🔑52 — COMPENSATION — SUFFICIENCY OF SERVICE.

A vendor's broker is entitled to commissions where prospective purchaser executed a valid contract of purchase, although such agreement contemplated that it would be followed by another contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 73.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by K. Karahadian against Philip Lockett. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Everts & Ewing, of Fresno, for appellant. John Shishmanian, Barbour & Cashin, and D. A. Cashin, all of Fresno, for respondent.

LENNON, P. J. The plaintiff in this action was employed and authorized by the defendant "to sell" certain real property belonging to the defendant, and "to receive any deposit" which might be paid on account of the purchase price. Thereafter the plaintiff, as the agent of the defendant, entered into a written contract with parties known as "Kludgian brothers" to purchase the defendant's property for the sum of $14,000, but upon terms slightly different from those originally proposed and authorized by the defendant. The defendant, however, in writing ratified the contract thus made by the plaintiff, and accepted from him the sum of $200, which, simultaneously with the execution of the contract, had been paid to plaintiff by the intending purchaser on account of the purchase price. In addition to containing all of the essentials of a valid and enforceable contract of purchase and sale, the contract in question provided that "upon a favorable report of the attorneys" for the purchaser concerning the title to the property the parties thereto would enter into an agreement for the purchase of the property "upon the terms and conditions therein mentioned." Subsequently the attorney for the purchasers rejected the title to the property for alleged defects, which it is admitted did not exist, or if existing could have been readily cured. Ultimately the purchaser refused upon demand to perform his contract, and declined the defendant's tender of a deed to the property. The defendant had agreed to pay the plaintiff 5 per cent. of the purchase price in the event of a sale. Upon substantially these facts the case was tried in the court below and judgment rendered for plaintiff in the sum of $700 upon a finding to the effect that the plaintiff had procured a purchaser for defendant's property who had entered into a valid and enforceable contract binding him to purchase. The evidence we think supports this finding.

[1-3] The clause in the contract concerning the necessity for a favorable report upon the title to the property from the attorneys of the purchaser cannot be construed, as counsel for the defendant contends, to mean that the obligation of the purchaser was dependent upon a mere arbitrary, capricious, and whimsical rejection of the title to the property by his attorney. Obviously the clause in question did not have the effect of making the contract here involved merely an agreement for an option to purchase rather than a completed contract of purchase and sale. The payment of the deposit of $200 on account of the purchase price was an acceptance of the terms and conditions of the contract (Benson v. Shotwell, 87 Cal. 49, 25 Pac. 249, 681; Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123); and while it savored to some extent of a preliminary contract which contemplated that it would be followed by another contract of purchase and sale, nevertheless inasmuch as it was mutually obligatory and contained in and of itself all of the essentials of a valid and enforceable contract, obviously the defendant, had he so desired, could have compelled the intending purchaser to perform, and therefore neither the latter's refusal to accept the deed tendered to him, nor his failure to enter into the second contract, could operate to defeat the plaintiff's right to recover his commission from the defendant.

The judgment and order appealed from are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

33 Cal. App. 414

FAIRMONT CREAMERY CO. v. LOS ANGELES ICE & COLD STORAGE CO.

(Civ. 2217.)

(District Court of Appeal, Second District, California. April 14, 1917.)

1. Factors 🔑52—Pledge of Goods.

Though, before a car of eggs is consigned to a factor, he had obtained customers therefor, he receives the property for the purpose of making a transfer, within Civ. Code, § 2991, providing that one who allows another to assume the apparent ownership of property for purpose of making any transfer of it cannot set up his own title, to defeat a pledge of the property, made by the other, to one who received the property in good faith in the ordinary course of business and for value.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 83, 84.]

2. Factors 🔑52—Pledge of Goods—Good Faith of Pledgee.

For defendant who took a pledge of a car of goods from a factor to whom plaintiff had consigned them to be a pledgee in good faith, and so under Civ. Code, § 2991, entitled to hold them against plaintiff, he need not have examined the bill of lading, which in fact gave the factor apparent ownership, but he could at his risk assume that it did.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 83, 84.]

3. Pledges 🔑9—By Apparent Owner—For Value.

So far as a pledge by apparent owner of property is for past indebtedness, it is not for value, necessary under Civ. Code, § 2991, to be good against the real owner.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 20.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the Fairmont Creamery Company against the Los Angeles Ice & Cold Storage Company. Judgment for plaintiff, and defendant appeals. Reversed.

Sidney J. Parsons and Horace Wilson, both of Los Angeles, for appellant. Henry K. Norton and Wilbur Bassett, both of Los Angeles, for respondent.

CONREY, P. J. Action for conversion. Judgment was rendered in favor of the plaintiff, and the defendant has appealed from the judgment.

As shown by the evidence, it appears that on the 17th day of June, 1913, one Fred F. Lambourn was engaged in business at Los Angeles as a broker selling merchandise on behalf of consignors, and also as a dealer in merchandise on his own account. He had been in business for several years, and so continued until the 4th day of August, 1913, when he was adjudged bankrupt. The plaintiff was engaged in the produce business at Omaha, Neb., and had been doing business with Lambourn as broker since April, 1911. On June 5, 1913, Lambourn telegraphed to plaintiff that he had sold a car of eggs. The telegram was as follows:

> "Sold car candled current receipts fifty three and over small dealers eighteen cents track. Wire car number and when can ship."

On June 7, 1913, the plaintiff shipped the carload of eggs thus ordered and made the consignment directly to and in the name of Lambourn. The car arrived at Los Angeles on June 17th. When the merchandise was shipped from Omaha, a bill of lading therefor, showing the shipment from plaintiff to Lambourn, was received by plaintiff from the railroad company and was mailed by the plaintiff to Lambourn. According to the testimony of plaintiff's sales manager, this was done that Lambourn "might obtain possession of the eggs for the purpose of making delivery to the various parties to whom he had made sale as our broker." At the same time, the plaintiff forwarded, through the Omaha National Bank to that bank's correspondent in Los Angeles, a draft on Lambourn directing him to pay to the order of the Omaha National Bank the sum of $2,160 "and charge to account of this company." The draft was not paid.

On June 17, 1913, Lambourn informed the superintendent of the defendant that he had a car of eggs and wanted a loan on it. The eggs were taken into possession of defendant and placed in its warehouse, and defendant issued to Lambourn a warehouse receipt therefor. Thereupon, and on the same day, the defendant loaned to Lambourn the sum of $2,300, taking his note for that sum, together with an agreement pledging and depositing with the defendant said carload of eggs as collateral security for the payment of that or any other liability or liabilities of Lambourn to the defendant, "due or to become due or that may be hereafter contracted." At all times mentioned in this opinion Lambourn was indebted to the defendant in an aggregate amount much exceeding the value of the property claimed by the plaintiff in this action. The evidence does not show when this indebtedness, other than the $2,300 loan, was incurred, except that defendant had been making loans to Lambourn for about two years, and on August 4, 1913, he owed it $90,000. In making that loan of June 17th the defendant made no special inquiry as to ownership of the merchandise and did not see or ask to see the bill of lading. It simply accepted Lambourn's statement that he had the car there and the fact that it was there.

The defendant did not, at the time of making the loan and receiving the pledge, have any knowledge concerning the ownership of the property other than that it was in possession and control of Lambourn, as above stated. On September 10, 1913, the defendant sold said lot of eggs and received therefor the sum of $2,880. On September 24, 1913, the plaintiff made written demand upon the defendant, stating therein that the plaintiff "is the sole owner" of said property stored with defendant in the name of Fred F. Lambourn, and demanded immediate delivery thereof and offered "to pay all reasonable charges upon said eggs upon delivery of same."

The first and principal question presented here arises under appellant's claim that the evidence is insufficient to support the finding that the plaintiff was the owner and entitled to the possession of the goods at and after the time of the transactions which took place between the defendant and Lambourn on the 17th day of June. Appellant relies upon certain sections of the Civil Code.

> "A factor has ostensible authority to deal with the property of his principal as his own, in transactions with persons not having notice of the actual ownership." Civ. Code, § 2369.

It appears that Lambourn was a "factor" within the definition stated in Civil Code, § 2026, which says:

> "A factor is an agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser."
>
> "One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title, to defeat a pledge of the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business, and for value." Civ. Code, § 2991.

[1] Replying to the contention of appellant under these provisions of the statute, and especially under section 2991, Civil Code, counsel for respondent first argue that upon the facts shown Lambourn did not have apparent ownership of the property; that he did not receive the goods "for the purpose of making any transfer," since the goods when shipped had already been sold and were consigned to Lambourn purely as a bailee to make delivery. We do not agree that his authority was thus limited. It may be that the property had been sold in the sense that there were purchasers to whom the goods were intended to be distributed by Lambourn, but there remained to be done by him the acts which would transfer the eggs to those purchasers. In the meantime they could not be identified as belonging to any purchaser, and the property remained in possession of Lambourn for the purpose of making those transfers.

[2, 3] Counsel for respondent further suggest the fact that the defendant did not inquire of Lambourn as to the form of the bill of lading and never saw that document until the day of the trial. Therefore they say that as to them Lambourn had mere possession,

and that appellant cannot in any sense be said to be a pledgee who received the property in good faith in the ordinary course of business. We think that it was not necessary for appellant to examine the bill of lading. By acting upon the assumption that Lambourn had such bill of lading and without examining the same for itself, appellant took the risk that he might not have any such document in his possession. But, since he did have it, the case is the same as if appellant had examined it and relied upon the evidence obtained by its own inspection.

Respondent's counsel refer us to Akron Cereal Co. v. First National Bank, 3 Cal. App. 198, 84 Pac. 778, where the provisions of section 2991 were considered. That case, like the case at bar, was an action for conversion of goods which had been forwarded to a point where they were to be sold or distributed. But the facts were essentially different from the present case, since, among other things, it appeared that the merchandise had been shipped by the plaintiff to its own order, and the terms of the bill of lading had not been such as to vest apparent ownership in the agent. The court there said that, in order that by reason of the pledge made to the defendant the plaintiff should be deprived of his right to the property, it was incumbent upon the defendant to show that the pledgor had been allowed by the plaintiff to assume the apparent ownership thereof for the purpose of making a transfer of it. "The pledgee must show the existence of these conditions as well as good faith on his part before he can claim a title superior to that of the original owner." Referring to the person in possession who made the pledge of the property, it was said:

> "His apparent ownership of the property is limited by its source, and the rights of the defendant to the property as against the plaintiff are limited in the same manner."

Admitting the full force of these principles, nevertheless we think that the defendant has shown that Lambourn's apparent ownership of the merchandise at the time when he attempted to pledge it to the defendant was caused by the conduct of the plaintiff in consigning it to Lambourn for the purpose of transferring it to purchasers, and defendant is entitled to the protection given by section 2991 of the Civil Code.

The court determined that the value of the goods was $3,120. The pledge was good as against the plaintiff's claim, for the amount of the debt created by the $2,300 loan, and for any additional advances made thereafter by the defendant to Lambourn. It was not, as against the plaintiff, valid as security for indebtedness existing prior to June 17, 1913, since as to such indebtedness it was not a pledge made "for value."

The judgment is reversed.

We concur: JAMES, J.; SHAW, J.

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33 Cal. App. 426

PEOPLE v. SCHMIDT. (Cr. 475.)

(District Court of Appeal, Second District, California. April 16, 1917. Rehearing Denied May 14, 1917. Denied by Supreme Court June 14, 1917.)

1. HOMICIDE 🔑234(1) — PARTICIPATION OF DEFENDANT—SUFFICIENCY OF EVIDENCE.

In a prosecution for murder by dynamiting, evidence *held* sufficient to show defendant's active participation in the crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 482.]

2. CONSTITUTIONAL LAW 🔑197 — EX POST FACTO LAW—TIME.

The time important to be taken into consideration in determining whether a law is ex post facto or not is the time and the state of the law when the alleged offense was committed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 550.]

3. CONSTITUTIONAL LAW 🔑197 — EX POST FACTO LAW.

Where, after a murder and before indictment was filed against defendant, Pen. Code, § 995, was amended to take away defendant's right, on motion to set aside indictment, to urge any objection to grand jurors which would be good on challenge to the trial jury, either as to the panel or an individual juror, and such law became operative after the indictment was filed, and before defendant was arrested, and before he made his motion to quash the indictment, such law was not objectionable as ex post facto, as it related to procedure, and did not deprive defendant of a substantial right.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 550.]

4. INDICTMENT AND INFORMATION 🔑137(1, 4) —MOTION TO QUASH—STATUTE.

Defendant, on motion to quash the indictment, can urge only such grounds as are permitted him by Pen. Code, § 995; moreover, no inquiry can be made as to the sufficiency of the evidence or the mode of examining witnesses before the grand jury.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480, 483.]

5. DISTRICT AND PROSECUTING ATTORNEYS 🔑3(1)—APPOINTMENT OF DEPUTY—STATUTES.

Despite Pol. Code, § 4230, fixing the compensation of county officers, not limiting them in the employment of deputies, a county officer, such as the district attorney, is entitled to appoint as many deputies as he chooses, providing that, if he appoints any in excess of those for which compensation is provided to be paid from the public treasury, he must, under section 4024, pay such deputies at his own expense, if they are to receive compensation.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 10–12, 15.]

6. CRIMINAL LAW 🔑1158(3) — REVERSAL — RULINGS ON CHALLENGES TO VENIREMEN.

On challenges to veniremen for bias, to justify reversal the evidence given by the venireman upon his examination must be practically without conflict as to the fatal points, and be so opposed to the decision of the trial court that the question becomes one of law.

7. JURY 🔑103(14)—BIAS—STATUTE.

In a prosecution for murder by dynamiting a newspaper building, where it appeared that veniremen had heard of the explosion shortly after it occurred, had read newspaper accounts and discussed the explosion with persons not connected with the case, etc., and that they had an opinion, which would require evidence to dislodge, that the building had been blown up by dynamite unlawfully exploded with criminal intent, it appearing from their answers that the foundation for any opinion entertained by them was public rumor, statements in public journals, and common notoriety, each declaring his ability to lay the opinion aside and consider the case against defendant fairly and impartially, denial of challenges to the veniremen for actual bias was properly made, in view of Pen. Code, § 1076, declaring that where the opinion of a venireman is founded on public rumor, statements in public journals, etc., he shall not be disqualified, providing it appear that he can act impartially, etc.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 474, 478.]

8. CONSPIRACY 🔑47 — EVIDENCE — ACTS OF CONSPIRATORS—PROOF OF CONSPIRACY.

In proving a conspiracy, it is not necessary that proof be made that the parties met and actually agreed to undertake performance of the unlawful act, but a conspiracy may be shown by proof of facts and circumstances sufficient to satisfy the jury of its existence, by leaving the weight and sufficiency of the evidence to the triers of the questions of fact.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105–107.]

9. CRIMINAL LAW 🔑423(3) — EVIDENCE — CONSPIRACY.

In a prosecution for murder by dynamiting a building, where the evidence established a nation-wide conspiracy on the part of a labor union to terrorize open-shop employers by means of dynamite and nitroglycerin outrages, it was proper to show all the acts, declarations, and correspondence had between persons concerned referring to the means and methods employed and to be employed in furthering the common design, though defendant for the first time took an active part in the conspiracy a considerable time after explosions in the eastern part of the country had been produced.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 991, 992.]

10. CRIMINAL LAW 🔑423(9) — EVIDENCE — CONSPIRACY.

In such prosecution, declarations of any of the conspirators, made after any particular explosion had been caused, were not inadmissible as having been made subsequent to the completion or accomplishment of the object of the conspiracy, which was still alive and in effect with its ultimate objects unattained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1000, 1001.]

11. CRIMINAL LAW 🔑404(4)—EVIDENCE—DEMONSTRATIVE EVIDENCE.

In such prosecution, evidence consisting of a suit case, containing an alarm clock, a coil of black fuse, some blasting caps, and copies of newspapers containing accounts of the destruction of the newspaper building, such suit case having been found in the checking room at a ferry station in a different city some months after the explosion, was competent; the clock and other contents being of a kind similar to those used by defendant's coconspirators in the manufacture of their infernal machines.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891, 893, 1457.]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

M. A. Schmidt was convicted of murder, and, from the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

Nathan C. Coghlan and Edwin V. McKenzie, both of San Francisco, Job Harriman and J. H. Ryckman, both of Los Angeles, and William F. Herron, of San Francisco, for appellant. U. S. Webb, Atty. Gen., Robert M. Clarke, Deputy Atty. Gen., and Thomas Lee Woolwine, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for the People.

JAMES, J. Appeal from a judgment directing the imprisonment of the defendant in the state penitentiary for the period of his natural life, and also from an order denying his motion for a new trial.

The defendant was accused by an indictment of a grand jury of the county of Los Angeles, in which several other defendants were named, of having on the 1st day of October, 1910, feloniously and with malice aforethought murdered one Charles Hagerty. The indictment was filed on the 5th day of May, 1911. Defendant not being apprehended until the year 1915, he was then placed upon trial, which, after a lengthy hearing, resulted in a verdict of guilty being returned against him. It will be necessary to make a somewhat extended statement of the evidence heard at the trial, in order to give proper illustration to the argument of appellant and to the propositions which he advances and which he claims entitle him to have the judgment reversed. In this statement we shall refer most particularly to the testimony introduced on behalf of the prosecution. The attempt will be only to first furnish in narrative a history of the alleged crime, as the evidence for the people tended to prove it, and we will later consider the competency of the testimony as it is met by objections urged on behalf of the appellant.

In the year 1905, there existed in the United States an organization designated as the International Association of Bridge and Structural Ironworkers. It was an organization, as its name implies, made up of various suborganizations or labor unions scattered throughout the country. The objects, as declared by its constitution, were:

> "To cultivate feelings of friendship among the craft, to assist each other to secure employment, to reduce the hours of labor, to secure adequate pay for work, * * * and to elevate the moral, intellectual and social condition of all members, and to improve the trade."

The offices of the association were in Indiana, and a system was provided by which funds should be collected and disbursed. J. J. McNamara was the secretary and treasurer of the association during the time herein mentioned, and the association in 1905 declared a general strike against the American Bridge Company, which was a large contracting concern engaged in the erection of structures of iron and steel. One of the objects desired by the association was to compel all employers who were using nonunion labor to unionize their plants and employ only members of the recognized union. The American Bridge Company was one of the chief employers of nonunion labor, but was not the only concern carrying on business on the open-shop plan in the structural iron and steel line. J. J. McNamara, apparently without any authority given him by the constitution or members of the organization, unless that authority is deemed to be an implied one, encouraged persons to destroy various work being constructed under the open-shop plan. In 1908 and 1909, bridges, viaducts, and other structural work being done by nonunion employers, to the number of perhaps 20, were destroyed by dynamite or nitroglycerin. Most of these explosions were produced with the knowledge and active encouragement of J. J. McNamara, and funds of the association were used to pay the persons who destroyed the work. The evidence was sufficient to show that the purpose of J. J. McNamara and fellow officers of the association was to compel the employers of nonunion labor to accept the dictates of the association, and in order to do this the means apparently most ready and acceptable to their hands was the use of dynamite and other high explosives for the purpose of ruining work under construction and destroying the results of the labor of the nonunion employés. It was customary for the heads of local unions scattered about the country, when they desired assistance in protecting their cause in the particular locality, to request of the International Association funds and assistance. In 1910, the attention of J. J. McNamara and his fellow officers was directed to the state of California, and particularly to the city of Los Angeles, which was known to be to a considerable extent an "open-shop" city. One Clancy, a leader of an ironworkers' union in San Francisco, wrote to J. J. McNamara several times, asking that a certain man be sent to the west (this man being one Hockin, who had produced several explosions theretofore in the east). J. J. McNamara did not send Hockin, but did send his brother, J. B. McNamara. J. B. McNamara reached Seattle and was there visited by Clancy, and he then proceeded to San Francisco. The McNamaras had themselves concocted an infernal machine which had been used to produce the explosions on the nonunion work. This machine consisted of a "tatoo" clock attached to a board, to which board was also attached a dry battery. By a system of wiring, the clocks on the alarm dials could be set at any chosen hour, and, when that hour arrived and the bell-hammer commenced to vibrate, electrical connection would be made from the battery to a fulminating cap attached to dynamite or whatever explosive was used, and thus the results planned for would be accomplished. J. B. McNamara, in the office of the association in Indianapolis just before he left there for the coast, said, in the presence of his brother and one McManigal, that he was going out and give them "a damned good cleaning up." At the time J. B. McNamara arrived in San Francisco, a great effort was being made to unionize the city of Los Angeles in the ironworking trades, and a great deal of money was spent in that endeavor. The Los Angeles Times and the Merchants' & Manufacturers' Association of Los Angeles had both advocated the open-shop plan of labor employment and had been most active in work in opposition to the efforts of the unions to stamp out the open-shop policy. One Zehandelaar was the secretary of the Merchants' & Manufacturers' Association, and Harrison Gray Otis was president and manager of the Los Angeles Times. The defendant was a union worker who resided in San Francisco at and before the occurrence of the explosion which caused the death of Hagerty. He had been active in the work of attempting to unionize the city of Los Angeles and had visited that city immediately before meeting McNamara, in the interests of the unionist work. Immediately upon the arrival of J. B. McNamara in the city of San Francisco, he was visited by defendant frequently. On the 17th day of September, 1910, defendant wrote out (the evidence proved his handwriting) an advertisement which was published in two San Francisco newspapers, in the following form:

> "Wanted—By party of men, 16–24 foot launch for ten days; cruise around Bay and tributaries. Best of references."

Soon thereafter a launch was rented from a boat-furnishing concern. This launch was a power launch and was called the "Pastime." About the same time, a man appeared at the office of a company manufacturing high explosives, which office was located in the city of San Francisco. This man desired to purchase a very high explosive, asking for "90 per cent. nitroglycerin." Upon inquiry being made as to what work was to be done with it, the manufacturing company's representative was informed that it was desired to be used in blowing out stumps. The applicant was expostulated with by the manufacturer's agent and told that such a high percentage of explosive was not needed, but that a 40 per cent. grade would be sufficient. However, the high per cent. quality was insisted upon, with the result that an order was given by the agent to his company to have manufactured 500 pounds of 80 per cent. dynamite. The manufacturing plant of the powder company was located across the bay from San Francisco, and from that plant was later taken the explosive by defendant and two other persons. After securing the launch for a rental period, the men went to Oakland and procured some enameled letters which they placed over the name painted on the launch and changed it from "Pastime" to "Peerless." Schmidt was one of these men who appeared at the different places. One of the defendant's eyes was defective, and quite noticeably so to the ordinary observer. He was identified by storekeepers at Oakland, by a boathouseman at Sausalito, where the name of the launch was changed, and by the delivery agents of the powder manufacturing company at the latter's plant. He was identified by persons who were acquainted with his physical characteristics and who saw him at the numerous times when he visited McNamara during the latter's stay in San Francisco. It will be unnecessary to mention particularly the evidence which described the defendant as being a participant in the work of securing the dynamite. It is enough to say that there was ample evidence to authorize the jury to conclude that he was one of the persons so concerned. The dynamite having been secured, it was taken to the city of San Francisco and a large part of it stored in an empty house which was rented for the purpose. On the morning of October 1, 1910, an explosion occurred in the building in which the Los Angeles Times was published, and which was owned by the Times Publishing Corporation. The explosion occurred at 1 o'clock in the morning at a time when numerous of the employés were still at work, the journal published being a morning newspaper. The explosion occurred in a little alleyway which, on the ground floor, separated two portions of the building and which was closed overhead. The explosion was of such violence as to rend iron or steel beams and to force débris through the roof of the building and to a considerable height above. Fire immediately succeeded the explosion, and the building was almost entirely destroyed, 21 persons being killed, among them Charles Hagerty. One witness testified to having seen a man whom he believed to be J. B. McNamara in the lower building of the Times the night before the explosion occurred. On the morning of the 1st of October, a suit case was found near the residence of the president of the Times Company by police officers. One of the officers started to cut open the suit case, when a whirring noise was heard, and the men immediately got out of the way. When they reached a distance of 100 feet or more, there was an explosion which blew a large hole in the ground, tore the leaves from trees, and broke a number of windows in the neighborhood. At about the same time, a package was found close to the residence of Zehandelaar, the secretary of the Merchants' & Manufacturers' Association. This package was found to contain a number of sticks of dynamite and an infernal machine manufactured in exactly the way that the McNamaras had before fashioned those instruments of destruction. The dynamite found in this parcel was stamped with the name of the company which furnished the explosive to the defendant and McNamara in San Francisco, and upon being analyzed by a chemist, was found to be of the same composition as the lot procured from the company by Schmidt and McNamara. One witness testified that in the summer of 1910 he had a conversation in San Francisco with the defendant, and asked him at that time where he had been. The witness then said:

> "He said he had been down to Los Angeles, and so we got to talking further. He says, 'They are having an awful time down there,' he says. He says: 'They are beating up men down there. They won't give a union man any chance down there at all. It is a regular Otis town they are running. There is something going to happen to him pretty soon.'"

After the indictment of defendant, search being made for him, he was not to be found. It was shown in testimony that he had gone to New York and lived at the house of Emma Goldman a portion of the time under an alias. One witness testified that defendant told him that he had intended to go to London, England, but that he could not get away from New York on account of the war. Further, that he (Schmidt) said that if he had had the Los Angeles job alone he could have got out all right with it. The person McManigal, who has been before referred to herein, testified on behalf of the prosecution and gave evidence relating to the general destructive operations inaugurated and carried out under the direction of J. J. McNamara. The records and files found in the office of the association at Indianapolis, embracing correspondence had by McNamara with various persons concerned in producing explosions, were introduced in evidence.

[1] Taking the testimony all in all, and leaving out of consideration now the matter of its competency at this point, it must appear that the evidence was ample to show the active participation of the defendant in the crime which had been committed. To what has been stated, it may be added that there was evidence sufficient in quantity and competent to show that the explosion in the Times building was the result of exterior agency, or an explosive brought onto the premises and used in an unlawful way. The foregoing is a somewhat meager abstract of the evidence and presents its salient features only. The testimony given at the trial covers about 8,000 pages, and more than 600 exhibits were introduced before the jury.

The points relied upon by appellant as furnishing ground for his claim that the judgment and order in this case should be reversed will be considered in the order in which they are proposed by his brief.

The defendant upon being brought into court presented a motion in which numerous alleged grounds were set forth as reasons why the indictment should be quashed. One of the principal grounds asserted was that four of the grand jurors were disqualified by reason of bias and prejudice. Defendant, in his affidavit which was presented with the motion, set out many alleged facts which would tend to show that the grand jurors challenged had been, prior to their being sworn on the jury, active in securing information relative to the matter of the explosion which produced the death of Hagerty and the fellow employés. Under section 995 of the Penal Code, as that law existed at the time of the commission of the alleged homicide, and at the time the indictment was filed, a defendant accused by indictment was permitted, on his motion to set aside the indictment, to urge any ground good on challenge to a trial jury, either as to the panel or an individual juror. In 1911, before the indictment was filed, the Legislature by act amended section 995, Penal Code, and by that amendment took away the right to urge on such a motion the last-mentioned causes. This act became effective in the latter part of May of the same year, the indictment having been filed in that month of May, but prior to the taking effect of the law. An affidavit was made by the grand jurors challenged, setting forth in a general way that they had acted without prejudice in the consideration of the defendant's case and had been uninfluenced by reports or information received by them from outside of the grand jury room. As the defendant set forth specific facts tending strongly to show that the jurors challenged could scarcely avoid feeling a bias in his case, it is extremely questionable that this affidavit made on behalf of the jurors could have been considered as a complete answer to the motion, as to the particular ground mentioned. However, the defendant did ask leave to examine the jurors in open court, which leave was denied him, and this brings us directly to the important question to be considered, to wit, as to whether the law, in existence at the time the motion to quash the indictment was made, was applicable to the proceedings on that motion, or whether the law in force at the time of the commission of the alleged homicide and the filing of the indictment is the one under which the defendant's motion should have been determined. If the law applicable was the law in effect at the time of the commission of the homicide and the filing of the indictment, then the court committed error in denying the defendant's motion.

It is the contention of the appellant that the change in the law by which the ground of the bias and prejudice of the grand jurors as foundation for a motion to set aside the indictment was taken away, if made to apply to the motion when presented by him, would be ex post facto, and hence unconstitutional. The definition of an "ex post facto law" is given very full exposition by the Supreme Court of the United States in the leading case, which is entitled Kring v. State of Missouri, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506. In determining whether a law is ex post facto or not, the decisions sometimes declare that, where such law merely works a change in procedure or remedy, it is not amenable to objection as being unconstitutional on the ground stated. Such a definition is perhaps too narrow, as the court in the Kring Case takes occasion to declare. In the case cited, referring to Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648, the court approvingly adopts language in definition of the term ex post facto when it declares:

> "It defines four distinct classes of laws embraced by the clause: '(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. (2) Every law that aggravates the crime or makes it greater than it was when committed. (3) Every law that changes the punishment and inflicts a greater punishment than was annexed to the crime when committed. (4) Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender.'"

The statement of the writer of the opinion in Calder v. Bull is further quoted, where he says:

> "But I do not consider any law ex post facto, within the prohibition, that mollifies the rigor of the law; but only these that create or aggravate the crime, or increase the punishment, or change the rules of evidence, for the purpose of conviction."

The gist of the decision is that any substantial right which the law gave a defendant at the time to which his guilt relates cannot afterwards be taken away from him, even though such law does affect "procedure or remedy." The right referred to, however, must be, and such is the tenor of the decisions, a right material to the establishment of the defense of the defendant. Objections to the form of pleadings, not going to the extent of reaching a defect in the statement of facts showing the offense, generally and naturally must be held to fall within that class of law changes which do relate to procedure merely and to procedure not such as a defendant accused of crime may be said to have a vested right in. A law curtailing the number of peremptory challenges which a defendant may interpose to the trial jury is held not to be ex post facto. Harris v. United States, 4 Okl. Cr. 317, 111 Pac. 982, 31 L. R. A. (N. S.) 820, Ann. Cas. 1912B, 810. Laws which, in a statute passed after the commission of a crime and before the trial, make witnesses competent to testify who at the time of the commission of the offense were by law incompetent, are held not to deprive a defendant of a substantial right. Mrous v. State, 31 Tex. Cr. R. 597, 21 S. W. 764, 37 Am. St. Rep. 834; Hopt v. Utah, 110 U. S. 618, 4 Sup. Ct. 202, 28 L. Ed. 262. See, also, note to People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 23 L. R. A. 830, 37 Am. St. Rep. 572.

Our own Supreme Court, in the case of People v. Campbell, 59 Cal. 243, 43 Am. Rep. 257, has held that where a homicide was committed before the adoption of the Constitution of 1879 and at a time when the law required that the defendant be prosecuted by indictment of a grand jury, and by the Constitution before trial it was provided that the prosecution might be either by indictment by grand jury or information of the district attorney, a prosecution by information was not invalid and the law then in force was not open to the objection that it was ex post facto. In that case, the court adopted the language of Judge Cooley, as contained in his work on Constitutional Limitations (page 331), and which finds place repeatedly in decisions dealing with the subject under consideration, and quotes:

> "But so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the Legislature, and it would create endless confusion in legal proceedings, if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The Legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure, though it cannot lawfully, we think, in so doing, dispense with any of these substantial protections with which the existing law surrounds the person accused of crime. Statutes giving the government additional challenges, and others which authorized the amendment of indictments, have been sustained and applied to past transactions, as doubtless would be any similar statute, calculated simply to improve the remedy, and in its operation working no injustice to the defendant, and depriving him of no substantial right."

The court further says, referring to the text of Judge Cooley's work:

> "The following examples are given by him in a note to page 332: 'The defendant in any case must be proceeded against and prosecuted under the law in force when the proceeding is had. A law is not unconstitutional which precludes a defendant in a criminal case from taking advantage of remedies which do not prejudice him; nor one which reduces the number of the prisoner's peremptory challenges; nor one which, though passed after the commission of the offense, authorizes a change of venue to another county; nor one which modifies, simplifies, and reduces the essential allegations in a criminal indictment, retaining the charge of a distinct offense.' * * * It is not an uncommon practice to change the number of grand jurors required to investigate criminal charges, but we have never heard of the right of the Legislature to make such changes questioned, neither has it ever been claimed that the charge must be investigated by the precise number of grand jurors of which that body was composed, at the time the act was committed. * * * 'The Legislature may always alter the form of administering right and justice, and may transfer jurisdiction from one tribunal to another.' Mr. Bishop, in his work on Statutory Crimes, lays down the same doctrine. He says: 'There is no such thing as a vested right in any particular remedy.'"

See, also, People v. Mortimer, 46 Cal. 114.

[2] The time important to be taken into consideration in determining whether a law is ex post facto or not is the time (and the state of the law) at which the alleged offense was committed.

> "If the law complained of was passed before the commission of the act with which the prisoner is charged, it cannot, as to that offense, be an ex post facto law. If passed after the commission of the offense, it is as to that ex post facto, though whether of the class forbidden by the Constitution may depend on other matters. But so far as this depends on the time of its enactment, it has reference solely to the date at which the offense was committed to which the new law is sought to be applied. No other time or transaction but this has been in any adjudged case held to govern its ex post facto character." Kring v. Missouri, supra.

[3] It happened in this case that the law making the change in the statute was passed after the commission of the alleged offense and before the indictment was filed, but that it did not become operative until after the indictment was filed. It was in effect before the defendant was arrested and before he made his motion to quash the indictment. As this law in its changed form referred to the procedure under which the defendant might attack the indictment, it on its face was effective at the time the motion to quash was made and was the procedure to be looked to in governing the motion of the defendant. That it did not deprive him of a right substantial in his defense, we are also assured. A defendant under our law may be prosecuted by indictment or by information after commitment by a magistrate. There is no legal impediment at all, if the lawmakers so decide, in permitting a commitment to be made by a biased or prejudiced magistrate, or an indictment to be returned by a grand jury holding preconceived views as to the guilt of a defendant. The indictment surely must be made to state a public offense, for the defendant cannot be legally put upon trial upon one which is insufficient in that respect. The matter of the production of an indictment by grand jury or commitment by a magistrate neither presupposes the guilt of a defendant nor in any wise tends to create any presumption in that direction. It furnishes a procedure by which the defendant is brought into court, and, if this procedure on its face is formally regular, any special objections which are to be established by facts dehors the record must be viewed as not of the substance of things or material in influencing the conviction of a person accused of crime. "An indictment is but an accusatory paper." People v. Hatch, 13 Cal. App. 528, 109 Pac. 1097. Our Code by specific provision declares that, unless objections available to a defendant on a motion to quash an indictment or information are taken seasonably, they are waived; in other words, the indictment or information, because of any defects which might be pointed out upon the motion to quash, is not a void indictment, and the question of legal jurisdiction is not concerned therein. Pen. Code, § 950; Ex parte McConnell, 83 Cal. 558, 23 Pac. 1119; People v. Bawden, 90 Cal. 195, 27 Pac. 204; Ex parte Moan, 65 Cal. 216, 3 Pac. 644. We cite these cases and the Code law in illustration of the view we take that the amended section of the Penal Code in force at the time the defendant made his motion to quash the indictment, not only related to a matter of procedure, but to such matter of procedure as neither went to the question of

the guilt or innocence of the defendant or tended to deprive him of any substantial right theretofore secured to him in aid of a full defense.

[4, 5] In the motion to quash the indictment, it was also asserted by the defendant that persons other than those authorized by the law were permitted to be present during the proceedings taken before the grand jury, and that evidence of illegal, hearsay, and secondary character was permitted to be introduced and was considered. It is well settled, not only that a defendant on a motion to quash an indictment can only urge such grounds as are by section 995, Penal Code, permitted him, but that no inquiry can be made as to the sufficiency of the evidence or of the mode of examining the witnesses heard before the grand jury. In re Kennedy, 144 Cal. 634, 78 Pac. 34, 67 L. R. A. 406, 103 Am. St. Rep. 117, 1 Ann. Cas. 840. To the same effect is People v. Hatch, 13 Cal. App. 521, 109 Pac. 1097. In support of the ground that an unauthorized person was permitted to be present during the proceedings had before the grand jury, the defendant referred to Earl Rogers, Esq., who appeared in the capacity of a deputy district attorney of Los Angeles county. It was shown that said Rogers had been duly appointed as a deputy by the district attorney, but it is urged that, as all of the deputies permitted to be pointed under section 4230, Political Code, had theretofore been appointed, the appointment of Mr. Rogers was in excess of that number and he acquired no official capacity as a prosecutor in order to entitle him to be present himself before the grand jury. Section 4230 of the Political Code refers particularly to the salaries of officers and does designate the various deputies who shall be allowed, with pay, to each of the county officers in counties of the class to which Los Angeles belongs. That section is particularly designed to fix the compensation of county officers, and not to limit them in the employment of deputies. A county officer is entitled to appoint as many deputies as he chooses, with the proviso that if he appoints any in excess of those for which compensation is provided to be paid from the public treasury, he must pay such deputies at his own expense, if they are to receive compensation. Section 4024, Pol. Code.

The next complaint made by appellant is that the trial judge committed prejudicial error in disallowing certain challenges taken by the defendant as to 17 of the veniremen who were examined as to their qualifications to sit as jurors and try the defendant for the crime charged. The challenges interposed were all upon the ground of the actual bias of the veniremen. As was most natural to occur, after the destruction of the Times building, reports as to the cause thereof were widespread and became the subject of discussion between individuals, as well as furnishing material for various reports in the newspapers. Prior to the impanelment of the jury which sat at the trial of this defendant, the two McNamaras, jointly charged in the same indictment with defendant, had pleaded guilty and been sentenced, and this information had been heralded forth through like channels. Many of the veniremen called had read newspaper reports and heard street discussion regarding the explosion and its cause. The state of mind of each of the 17 veniremen, as developed by the lengthy examination of counsel, was in the main similar as to the matters constituting the alleged bias. A general statement of the answers brought forth, with little variation, was about as follows: The venireman had heard of the explosion in the Times building shortly after it occurred; he had read accounts thereof in the newspapers and had discussed with persons not concerned in the case the subject of the explosion; that these accounts assigned the cause of the wrecking of the Times building as being the explosion of dynamite unlawfully used; that, upon the McNamaras pleading guilty to the charge, venireman had read an account of the proceedings, and from all of these things had formed an opinion that the Times building had been blown up by dynamite unlawfully exploded with criminal intent; that the opinion was more or less fixed; and that evidence would be required to dislodge it. None of the veniremen, in any opinion or belief which they entertained, connected the defendant with the commission of the crime, save one, who stated in a general way that he held an opinion affecting the guilt of the defendant. Some of the veniremen had passed the scene of the explosion and had observed the wreckage, with twisted iron beams, and in some cases had observed that windows in an adjoining building had been shattered. In the course of their questioning, counsel for the defendant intimated that it was a part of their defense that the Times building was destroyed by a gas explosion accidentally, and not by dynamite with criminal intent. The argument in support of the challenge was that, as these veniremen had formed an opinion as to the facts establishing the corpus delicti, they were utterly disqualified, notwithstanding that they in no wise in their opinion otherwise connected the defendant with the commission of the crime. It satisfactorily appeared from the answers given by the veniremen that the foundation for any opinion entertained by them was that denominated in section 1076, Penal Code, as "public rumor, statements in public journals, and common notoriety"; and each of the persons examined declared that he had the ability to lay that opinion aside and to consider the case against the defendant fairly and impartially. This statement was brought forth by the examination of the district attorney in order to justify a denial of the challenges in accordance with the provisions of section 1076, Penal Code, which declare that where the opinion is of the class mentioned the person should not be disqualified as a juror, "provided it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him." As has been already suggested, it appeared that the explosion which destroyed the building of the newspaper was of such character as to occasion general discussion among the citizens of the community and much comment in the public journals. It would seem difficult indeed to have found any citizen of observing mind and fair intelligence who had not by some manner or means learned of the disaster and of the probable or possible cause thereof.

[6] It has been repeatedly declared by our Supreme Court that on challenges such as those here considered, in order to justify a reversal, the evidence given by the venireman upon his examination must be practically without conflict as to the vital points thereof, and be "so opposed to the decision of the trial court that the question becomes one of law." People v. Owens, 123 Cal. 482, 56 Pac. 251. And particularly pertinent to the situation which was presented in this case are the observations of Mr. Justice Henshaw in the case of People v. Scott, 123 Cal. 434, 56 Pac. 102, where he says:

> "A reading of the testimony taken upon voir dire discloses, as is usual, conflicting and contradictory statements by the jurors. They had formed opinions touching the guilt or innocence of the defendant. They would carry those opinions with them into the jury box. It would take evidence to remove them, nevertheless they could and would give to the defendant a fair and impartial trial. They could and would be governed by the law as delivered by the court, and by the evidence as received in court. It is the state of facts, commonly presented where upon the question of bias the evidence would have justified a finding either way. Under such circumstances, we are powerless to disturb the ruling of the trial court. Citing People v. Fredericks, 106 Cal. 554 [39 Pac. 944]. We recognize that with the increased facilities for the dissemination of news it is far more difficult than formerly it was to obtain a jury of men ignorant of the circumstances of the charge which they are called upon to try. * * * But, unless the testimony adduced upon voir dire is so clear upon the question of actual bias that this court can say as matter of law that the juror is disqualified for that reason, we cannot disturb the ruling of the trial court."

To like effect are many of the decisions, and we cite People v. Flannelly, 128 Cal. 84, 60 Pac. 670; People v. Ochoa, 142 Cal. 268, 75 Pac. 847; People v. Miller, 125 Cal. 44, 57 Pac. 770; People v. Brown, 148 Cal. 743, 84 Pac. 204.

[7] In so far as the examination of the jurors disclosed that their observation of the conditions at the wrecked building after the explosion contributed to the forming of the opinion they had, it appears that such observation only tended to convince them of the fact that there had been an explosion, and not as to the means employed. It seems to have been conceded, even in the questions of counsel propounded to the veniremen, that an explosion had in fact occurred. The denial of the challenges for actual bias cannot be said to have been improperly made.

We now come to a consideration of the kind and competency of the evidence which made up the proof offered by the prosecution. As a part of its case, the state, as we have before indicated, introduced testimony showing a series of unlawful acts which had been committed some time prior to the first appearance of the appellant Schmidt in his connection with the antiopen-shop campaign. This testimony included evidence of the fact that bridges had been blown up, material destroyed, and life threatened throughout a number of the eastern states as a result of the determination of the executive board of the International Association of Bridge and Structural Ironworkers to unionize work; that money had been paid to various persons for the purpose of compensating them in the unlawful and reprehensible enterprise. Conversations occurring between the persons so engaged, some of them referring to explosions which had already occurred, some of them referring to future plans in the same direction, were narrated. In fact, it is apparent that any and every act of the individuals concerned referring to the unlawful enterprise, wherever evidence thereof could be procured, was presented to the jury. The record of correspondence kept in the office of J. J. McNamara, the secretary-treasurer of the international association, was obtained and was also produced in evidence. This was correspondence passing between the office of McNamara and various persons concerned in the unlawful depredations undertaken by the executive board of the association, and it came and went to different cities scattered over the United States. The work of destruction of structures erected by open-shop contractors in the east was well under way before Clancy's appeal for help in California was received and heeded. As a result of that appeal, J. B. McNamara came west on his mission of destruction. Plainly, from the sketch we have made of the evidence, it was made to appear by overwhelming proof that a conspiracy was organized and the work thereof prosecuted to the end that at every place in the United States where the open-shop was in force it was planned to use the weapon of nitroglycerin or dynamite to intimidate those opposed to the demand of the executive board of the International Association. The evidence showed that this conspiracy, so gigantic in its scope, was a continuing one; that is, the only limit to its life seemed to be the exhaustion of the means available to the executive board, or the submission of the employers of non-union labor. And we think that counsel for appellant fails to apprehend the effect of the evidence to establish the conclusions just suggested, when he refers to the destructive work done in the East as work done in the "Eastern conspiracy." The distinction so sought to be impressed, and which we cannot allow, is made for the purpose of giving weight to the argument found in the brief of appellant that the appellant Schmidt, not being a party to the lawless acts committed in the East, was prejudiced because of evidence being introduced with reference to such acts. Conceding the correctness of his premise, we might well adopt the appellant's conclusion. But the basis for the argument is lacking in the proof.

[8] It is a fundamental rule long settled by decisions that in proving a conspiracy it is not necessary that proof be made that the parties met and actually agreed to undertake the performance of the unlawful act, and that a conspiracy may be shown by proof of facts and circumstances sufficient to satisfy the jury of the existence of the conspiracy, leaving the weight and sufficiency of the evidence to the triers of the questions of fact. People v. Donnolly, 143 Cal. 394, 77 Pac. 177; People v. Lawrence, 143 Cal. 148, 76 Pac. 893, 68 L. R. A. 193; People v. Eldridge, 147 Cal. 782, 82 Pac. 442. It is not denied that, after a conspiracy has been established and it has been established that a person is connected therewith as a conspirator, the latter may be prosecuted as for complicity in any unlawful act thereafter committed by any of the conspirators which is within the scope of the general design or plan. People v. Olsen, 80 Cal. 122, 22 Pac. 125. "Where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. * * * Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part" of the common design for which they combined. People v. Kauffman, 152 Cal. 331, 92 Pac. 861; People v. Creeks, 170 Cal. 369, 149 Pac. 821; The Anarchists' Case, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320. In People v. Collins, 64 Cal. 293, 30 Pac. 847, our Supreme Court says:

> "The law holds each party to it (the conspiracy) responsible for the acts of each coconspirator done in pursuance and furtherance of the common design, which extends to the consequences which might reasonably be expected to flow from carrying into effect the unlawful combination."

And again:

> "Evidence of the statements of a coconspirator, made during the life of the conspiracy, are admissible against the other conspirator." People v. Oldham, 111 Cal. 648, 44 Pac. 312.

An examination of the decision in the case of Ryan v. United States, decided by the Circuit Court of Appeals and reported in 216 Fed. at page 13, 132 C. C. A. 257, shows that a number of persons, 30 in all, they being connected with the same association hereinbefore referred to, were indicted for a conspiracy to commit the crime of transporting dynamite and nitroglycerin in interstate commerce in passenger trains; the facts of the case referring to the same occurrences and the same conspiracy as the prosecution here made proof of. It seems that practically the same testimony as to the various explosions produced, the means employed, the correspondence had, together with conversations between the participants in those crimes, were all offered and received in evidence. The court there declared that such evidence was competent, in that a continuing conspiracy was charged. If the evidence was admissible there to show a continuing conspiracy as charged, it may with as much propriety here be said that the evidence did establish that the conspiracy was of that nature.

[9] Being of that nature, it was proper to show, as the court there held, all of the acts, declarations, and correspondence had by the persons concerned which referred to the means and methods employed and to be employed in the furtherance of the common design. It matters not, if the evidence is sufficient to show such later connection, that Schmidt, the appellant here, for the first time took an active part in furnishing aid to the conspirators to effect their objects a considerable time after the Eastern explosions had been produced. The proof of all of the matters first adverted to was essential to show the existence of the conspiracy and to define its nature and scope. The necessity of showing appellant's connection with the conspiracy was a distinct and separate matter for proof. This requisite of the law we think was sufficiently covered in the instructions of the court, and the jury was fairly advised of the subjects to which the different varieties of evidence were properly applicable.

[10] For the reasons we have stated, validity cannot be granted to any one of the exceptions taken because of the introduction of declarations of any of the conspirators made after any particular of the explosions had been caused, as being declarations inadmissible because made subsequent to the completion or accomplishment of the object of the conspiracy. The conspiracy was still alive and in effect, and the ultimate results had not been attained, when J. B. McNamara came to the state of California for the purpose of assisting in the work. We have before sketched briefly the salient features of the testimony showing that Schmidt, upon McNamara's arrival in San Francisco, took an active part in securing dynamite for Mc-

Namara's use. All of the appellant's acts in that connection were performed as secretly as possible, under assumed names, and with every indication of appellant's complete and active co-operation and sympathy with the work of destruction theretofore done, then being planned, and which was thereafter executed. Schmidt, the appellant, immediately before the Times explosion, had been in the city of Los Angeles aiding in the attempt to close the open shops. That he knew for what purpose the dynamite was to be used is indicated when he said to a witness who testified in the case, in the summer of 1910, that:

> "They (in Los Angeles) won't give a union man no chance down there at all. It is a regular Otis town they are running. There is something going to happen to him pretty soon."

And immediately after the Times explosion Schmidt was not to be found and was not found until a long time thereafter, when he was discovered living at the house of Emma Goldman in New York, a portion of the time, under an assumed name. The length of this opinion would be extended to a greater limit than is warranted, were we to attempt to discuss in detail the testimony as it is shown in the 8,000 pages of the reporter's transcript. While there may be portions of the testimony received which in a detached way could properly have been excluded, the weight of the evidence was so overwhelming in its proof of the conspiracy and its objects as to enforce the conclusion that the defendant in the right secured to him under the Constitution did not suffer substantial prejudice.

[11] Rather unusual stress is laid in support of the claim for error in allowing one particular bit of evidence to come in. Several months after the explosion which occurred at the Times building, a suit case was found in the checking room at a ferry station in San Francisco. The suit case was identified by a Mrs. Ingersoll as being one which she had seen in the possession of J. B. McNamara before the 1st of October. The suit case carried a check label, and upon being opened was found to contain an alarm clock, a coil of black fuse, some blasting caps, a brass plate, some brass bars with screws, and copies of San Francisco newspapers dated October 1st. The newspapers contained accounts of the destruction of the Times building. These articles were all exhibited to the jury. We think the evidence was competent. The clock and brass pieces were of a similar kind to those used by the McNamaras in the manufacture of their infernal machines. As proof of the fact that an explosion had been produced as "bargained for," J. J. McNamara, the secretary-treasurer of the association, had always required his men to produce newspaper accounts showing that they had performed their work successfully. In a circumstantial way, these articles were all evidence tending to show the execution of the work of the conspirators and to show J. B. McNamara's connection therewith, and incidentally the connection of Schmidt with the same enterprise. The introduction of similar evidence was approved in The Anarchists' Case, supra.

The gravity of the offense and the serious consequences which it has entailed to this appellant is justification to counsel for having presented the very extensive argument which is found in the three volumes of appellant's briefs. Careful consideration has been given to each of the contentions therein set forth, the chief of which are made the subject of the foregoing discussion. Other matters urged as constituting error, such as alleged misconduct of the trial judge and the argument affecting the action of the court in giving or refusing to give certain of the instructions, we find without merit. We are satisfied that the defendant received a fair trial and that his conviction should be sustained.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

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33 Cal. App. 448

PEOPLE v. MARINO. (Cr. 666.)

(District Court of Appeal, First District, California. April 17, 1917. Rehearing Denied by Supreme Court June 14, 1917.)

1. Criminal Law 🔑371(9) — Statutory Rape—Evidence of Other Acts.

In a prosecution of a father for rape upon his 17 year old daughter, evidence of prior acts of intercourse was admissible in support of the charge upon which defendant was being tried upon the theory that it tended to show the lewd and lascivious tendencies and disposition of the prosecutrix and defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830, 831.]

2. Criminal Law 🔑370—Statutory Rape —Pregnancy.

In a prosecution of a father for rape upon his 17 year old daughter, evidence that prosecutrix when 14 years old became pregnant from an act of sexual intercourse with her father, and when she informed him of the interruption of her menstrual periods that he stated that he knew what was the matter with her—that she was in the family way—and that he took her to a doctor, who performed an abortion, was relevant for the purpose of showing that the defendant's conduct when informed of interruption of daughter's menstrual periods was tantamount to an admission that he knew she was pregnant, and that he was the cause thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 825–829.]

3. Criminal Law 🔑829(3) — "Rape" — Refusal of Instruction—Harmless Error— "Sexual Intercourse."

While refusal of a requested instruction to the effect that there could be no conviction unless the evidence showed to a moral certainty that defendant had penetrated sexual organs of prosecutrix was improper, it caused no detriment to defendant where the court in the charge given, in substantial accord with Pen. Code, § 261, defined the crime of rape to be "an act of sexual intercourse accomplished with a female not the wife of the defendant when the female is under the age of 18"; the phrase "sexual intercourse" as commonly understood implying actual penetration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.

For other definitions, see Words and Phrases, First and Second Series, Sexual Intercourse; Rape.]

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Vitale Marino was convicted of rape, and he appeals. Judgment and order appealed from affirmed.

W. H. Tully, of San Jose, for appellant. U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and Arthur M. Free, Dist. Atty., and Archer Bowden, Deputy Dist. Atty., both of San Jose, for the People.

LENNON, P. J. Upon this appeal from a judgment of final conviction after a verdict finding the defendant guilty of the crime of rape upon his 17 year old daughter, the sufficiency of the evidence to support the verdict is not challenged. A reversal of the judgment is urged because of the ruling of the trial court, which, over the objection of the defendant, permitted the prosecutrix to testify in substance that when she was about 14 years of age she became pregnant as the result of an act of sexual intercourse with her father. Upon that occasion she told her father, the defendant, that "she did not get her monthlies." The defendant replied, "I know what's the matter with you—you are in the family way." The defendant then left the house, and two or three hours later returned, whereupon he said to the prosecutrix, "Dress up and I will take you to a place where you will get over what you have." Defendant took the prosecutrix to the home of a Mr. Gibson, and while there told her in Italian to "tell Dr. Gibson" that she was "in a family way." She so told Gibson, who replied that he could help her, but that he "could not do it for nothing." Whereupon the defendant promised to pay Gibson the sum of $50. At this point in the testimony of the prosecutrix the trial court sustained an objection to a question which sought to elicit what Gibson did to her, but permitted her to say that she remained alone with Gibson for three or four hours, after which she was taken "to some place to get well," where she remained "very ill" for about a week. The defendant called there to see her in the evening of the day that she left Gibson's house, and said to her, "How are you? Are you better?"

[1, 2] We see no error in the ruling complained of which permitted the above narrated facts to go in evidence. The act of sexual intercourse referred to therein was one of a series of such acts which the prosecutrix testified had been committed with her by the defendant from the time that she was 14 years of age. Under the settled rule in this state the evidence of those prior acts was admissible in support of the charge upon which the defendant was being tried upon the theory that it tended to show the lewd and lascivious tendencies and disposition of the prosecutrix and defendant. People v. Castro, 133 Cal. 11, 65 Pac. 13. It is conceded that if the pregnancy of the prosecutrix and the abortion to which she testified had resulted from the act of intercourse which constituted the basis of the charge for which the defendant was convicted, proof thereof would be proper and pertinent for the purpose of establishing the corpus delicti. People v. Tarbox, 115 Cal. 57, 46 Pac. 896. While in the case of People v. Soto, 11 Cal. App. 431, 105 Pac. 420, the court said: "So far as we are aware" it has never been held that proof of the pregnancy of the prosecutrix under the age of consent is admissible except for the purpose of establishing the corpus delicti of the charge, on the other hand we know of no authority—and none has been cited to us—which holds that such proof of pregnancy, and evidence of an abortion performed upon the prosecutrix, as the result of one of a series of prior acts of sexual intercourse, are not admissible as tending to show the commission of that act. However that may be, the record shows that the proof pertaining to the pregnancy of the prosecutrix following the particular prior act in question, and the abortion performed upon her, was proffered and received primarily for the purpose of showing that the defendant's conduct when informed by his daughter of the interruption of her menstrual periods was tantamount to an admission that he knew she was pregnant, and that he was the cause thereof. Such we think was the fair inference to be drawn from such testimony, and consequently for that purpose, if for no other, it was admissible. The fact that it also tended to show the commission of two separate, independent, and outlawed crimes did not render it incompetent as evidence for the purpose for which it was offered. Being one of a series of prior acts of sexual intercourse, the remoteness of the particular act under discussion and of the incidental pregnancy and abortion from the time of the commission of the particular act forming the basis of the charge on trial may have lessened the weight of such evidence, but did not destroy its relevancy.

[3] The trial court refused a requested instruction to the effect that proof of penetration, however slight, was essential to the crime of rape, and that therefore the defendant should not be convicted unless it could be said, after a consideration of all of the evidence, to a moral certainty, etc., that the defendant had penetrated the sexual organs of the prosecutrix. While this instruction correctly stated the law, and should not perhaps have been refused, nevertheless the failure to give it caused no detriment to the defendant, for the reason that the trial court in its charge, in substantial accord with the

language of the statute (Pen. Code, § 261), defined the crime of rape to be "an act of sexual intercourse, accomplished with a female not the wife of the [defendant] * * * where the female is under the age of eighteen." The phrase "sexual intercourse," as employed in this definition of rape, is commonly understood, we think, to imply an actual penetration. This being so, it is evident that the charge of the court considered as a whole in effect required the jury to find the fact of penetration before they could find the defendant guilty.

The judgment and order appealed from are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(175 Cal. 212)

MOORE v. SAN VICENTE LUMBER CO.

(S. F. 7290.)

(Supreme Court of California. May 31, 1917. Rehearing Denied June 30, 1917.)

1. APPEAL AND ERROR 🔑1002—REVIEW—CONFLICTING EVIDENCE.

Where on the vital issues the evidence was in sharp conflict, the verdict is beyond the power of review by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937.]

2. JURY 🔑13(9)—RIGHT TO JURY TRIAL—ACTIONS FOR EQUITABLE RELIEF AND DAMAGES.

In an action to enjoin the maintenance of a pond as a nuisance and to recover damages for injuries occasioned by the pond and by the breaking of a dam, plaintiff was entitled to a trial by jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 43.]

3. APPEAL AND ERROR 🔑1065—HARMLESS ERROR—INSTRUCTIONS.

As in such action the jury's function was not merely advisory, plaintiff may question the soundness of instructions in so far as they bore on the legal issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219.]

4. APPEAL AND ERROR 🔑1079—REVIEW—INSUFFICIENT DISCUSSION OF QUESTIONS.

A contention in appellant's brief that the court erred in refusing and modifying instructions will not be considered where it is not supported by either argument or citation of authority.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4262.]

5. TRIAL 🔑296(8)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In an action to enjoin the maintenance of a pond and to recover damages for injuries caused by the pond and by the breaking of a dam, an instruction attacked as denying a recovery unless plaintiff proved both causes of action alleged in his complaint by a preponderance of the evidence, but which might be interpreted to mean that defendant was entitled to a verdict if plaintiff had failed on each count to prove his case, was not misleading, where the court gave other instructions telling the jury in plain terms that plaintiff was entitled to recover if he showed by a preponderance of evidence that he had suffered damage from any of the alleged wrongful or negligent acts charged in the complaint.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 711.]

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6. TRIAL ⚷295(5)—INSTRUCTIONS—READING AS A WHOLE.

In an action to enjoin the maintenance of a nuisance and for damages, an instruction that in order to find for plaintiff the jury must find that defendant was maintaining a nuisance was not erroneous, where it was part of an instruction dealing only with the subject of nuisance, and could not have been understood as limiting plaintiff's right to recover damages; as the charge must be read as a whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 708.]

7. WATERS AND WATER COURSES ⚷172 — BREAKING OF DAM—TEST OF LIABILITY.

In determining whether the breaking of a dam causing injury to land below the dam was due to negligence, the conduct of defendant in constructing and maintaining the dam must be viewed with reference to the caution which a prudent man would, under the circumstances, have observed, provided he owned the land below.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 233–236.]

Department 1. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Charles Moore against the San Vicente Lumber Company. From a judgment for defendant, plaintiff appeals. Affirmed.

John H. Leonard, of Santa Cruz, and Harry Rhys Davids, of Chico, for appellant. Charles M. Cassin, of San Jose, and Charles B. Younger, of Santa Cruz, for respondent.

SLOSS, J. The defendant, San Vicente Lumber Company, operates a sawmill upon land owned by it in the county of Santa Cruz. In connection with its mill it maintains a pond which it has created by the construction of a dam upon its land.

The plaintiff is the owner of adjoining lands, of which a part lie immediately below the dam. This action was brought to enjoin the maintenance of the pond, and to recover damages for injuries alleged to have been occasioned by it, and by a breaking of the dam, to plaintiff's land. Trial was had before a jury, which returned a verdict in favor of the defendant. The court adopted the verdict, and also made findings, upon which it entered judgment in favor of the defendant. The plaintiff appeals from the judgment.

The complaint was in two counts. The first alleges that the construction of the dam backed up the water and flooded a part of plaintiff's lands; that, owing to defective construction, the dam broke in the winter of 1911 and flooded the lower land of plaintiff, depositing thereon a quantity of débris and a number of logs; that, in the removal of the logs, the land was injured greatly; and that, by reason of these occurrences, plaintiff has been damaged in the sum of $10,000. The second count, after repeating many of the matters contained in the first, alleges that the pond became stagnant and caused stenches and poisonous vapors to arise therefrom, to the injury and annoyance of plaintiff and his wife, who resided near by. Damages in the sum of $10,000 were asked on this cause of action also.

[1] The answer denied all of the allegations of injury and of damage. The appellant refers, in his brief, to some testimony tending to support the allegations of his complaint. On the other hand, the respondent points to substantial evidence offered by it to show that plaintiff's land was not injured by the maintenance of the pond or by the breaking of the dam, and that the pond did not create the unwholesome and annoying conditions complained of in the second count. There is no occasion to set out the testimony in detail. It is enough to say that on these vital issues the evidence was in sharp conflict, and that the verdict of the jury is therefore beyond the power of review here.

[2, 3] The only other questions presented are those arising on the instructions to the jury. The suit was more than an equitable proceeding for the abatement of a nuisance, in which the jury's function would be advisory merely. The complaint also set up a legal claim for damages for past injuries, and the plaintiff was entitled to a trial by jury on the issues thus presented. Hughes v. Dunlap, 91 Cal. 385, 27 Pac. 642. He is therefore in a position to question the soundness of the instructions, in so far as they bear on the legal issues.

[4] In his brief the appellant first complains that four instructions requested by him should have been given. This contention is not supported by either argument or citation of authority; counsel contenting himself with the bare statement that "the instructions in question should have been given." We will not give any consideration to a point so presented. Gavin v. Gavin, 92 Cal. 292, 28 Pac. 567; Kyle v. Craig, 125 Cal. 107, 57 Pac. 791; Gray v. Walker, 157 Cal. 381, 108 Pac. 278. The same observation applies to the claim that the court erred in modifying an instruction requested by the appellant.

[5] It is argued, although in the briefest and most inadequate way, that three instructions requested by the defendant were improperly given. Of the first of these it is said that it directed the jury that the verdict must be for the defendant unless the plaintiff succeeded in proving both causes of action alleged in his complaint by a preponderance of the evidence. Such an instruction would, of course, be erroneous. Where a complaint contains two independent causes of action, plaintiff is entitled to recover if he establishes either. But it is by no means clear that the instruction should be given the meaning attributed to it. The language in which it is cast, while not happily chosen, may be interpreted to mean that the defendant is entitled to a verdict if the jury should find that plaintiff had failed, on each count, to prove his case. The court gave sev-

eral other instructions which told the jury in plain terms that plaintiff was entitled to recover if he showed, by a preponderance of evidence, that he has suffered damage from any of the alleged wrongful or negligent acts charged in his complaint. Under these circumstances the jury could not have been misled by the giving of the questionable instruction.

[6] It was not error to instruct the jury that in order to find for the plaintiff they must find that the defendant was maintaining a nuisance. This was part of an instruction dealing with the subject of nuisance alone, and could not have been understood as limiting the right of the plaintiff to recover damages for any injury not included under that head. It is impossible, of course, for a court to state the entire law in a single instruction. The charge must be read as a whole, and, so reading it in this case, we find no ground for complaint.

[7] The last instruction assailed told the jury that, in determining the issue whether the breaking of the dam was due to negligence, "the conduct of the defendant in constructing and maintaining the dam must be viewed with reference to the caution which a prudent man would, under the given circumstances, have observed, provided he owned the land below." This is a correct statement of the law, as laid down in Todd v. Cochell, 17 Cal. 97.

No other point is made.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

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175 Cal. 208

CLAUDIUS v. DAVIE, Mayor, et al.
(S. F. 8369.)

(Supreme Court of California. May 29, 1917.)

CONSTITUTIONAL LAW 🔑83(2)—SLAVERY—INVOLUNTARY SERVITUDE—SELECTIVE DRAFT FOR MILITARY SERVICE.

The act of Congress approved May 17, 1917, providing for the selective draft for military service, is not in violation of Const. Amend. U. S. art. 13, § 1, nor of California Const. art. 1, § 18, prohibiting slavery and involuntary servitude.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 151.]

In Bank. Application by Ferdinand Claudius for writ of prohibition against John L. Davie, as Mayor of the City of Oakland, and L. W. Cummings, as Clerk of the City of Oakland. Application denied.

W. R. Dunn, of Oakland, for petitioner.

PER CURIAM. Application for a writ of prohibition, based on the claim that the act of Congress approved May 17, 1917, providing for what is known as the selective draft for military service, is in violation of section 1, art. 13, of the federal Constitution and section 18, art. 1, of the Constitution of this state, prohibiting "slavery" and "involuntary servitude." The claim is utterly without merit.

The application is denied.

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175 Cal. 811

C. A. HOOPER & CO. v. RAILROAD COMMISSION OF CALIFORNIA.
(S. F. 8355.)

(Supreme Court of California. May 17, 1917.)

WATERS AND WATER COURSES 🔑217—STATE RAILROAD COMMISSION—CERTIORARI.

Writ of review will not lie to compel state Railroad Commission to determine priority of water consumers' rights, where the Commission itself does not consider it necessary to do so.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 306.]

In Bank. Application for writ of review by C. A. Hooper & Co. against the Railroad Commission of the State of California. Application denied.

Samuel Spring and Titus, Creed, Jones & Dall, of San Francisco, for petitioner.

PER CURIAM. In denying the application for a writ of review in this matter it is proper to say that the Railroad Commission has not denied the right of consumers in proper causes to priority in the use of water. On the contrary, it has in its opinion distinctly recognized the existence of such rights, and in its order denying a rehearing has expressly stated that "if petitioner has any such prior rights, they are not interfered with by the order of January 25, 1917." This is clearly true.

Petitioner here seeks by review to have us compel the Commission to determine such priority in a case where the Commission itself does not consider it necessary to do so. Doubtless when proper occasion arises the Commission will determine such priority in accordance with the law.

The application for a writ of review is denied.

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175 Cal. 235

SANTA et al. v. INDUSTRIAL ACC. COMMISSION et al. (S. F. 7908.)

(Supreme Court of California. June 1, 1917. Rehearing Denied June 30, 1917.)

1. MASTER AND SERVANT 🔑405(4)—WORKMEN'S COMPENSATION ACT—SUFFICIENCY OF EVIDENCE—CAUSE OF DEATH.

In proceedings under Workmen's Compensation Act (Acts 1913, p. 279), a pathologist's testimony connecting employé's injury with cause of death *held* sufficient to justify commission's finding that such injury caused employé's death.

2. MASTER AND SERVANT 🔑405(4)—WORKMEN'S COMPENSATION ACT—SUFFICIENCY OF EVIDENCE—CAUSE OF DEATH.

Absolute proof or mathematical demonstration is not required to connect an employé's injury with cause of his death, so as to justify award under Workmen's Compensation Act, in view of Code Civ. Proc. § 1826, providing that the law does not require such a degree of proof as, excluding possibility of error, produces absolute certainty, but that moral certainty only is required.

3. MASTER AND SERVANT 🔑417(7) — WORKMEN'S COMPENSATION ACT—FINDINGS OF INDUSTRIAL COMMISSION—REVIEW.

Findings of the Industrial Accident Commission cannot be disturbed where they are supported by evidence upon which a reasonable man would come to the conclusion which was reached, the commission being the final judge of the facts.

In Bank. Proceedings under Workmen's Compensation Act by Mabel Cordova to obtain compensation for death of her husband, Ferdinand Cordova. Opposed by D. Santa, employer, and Georgia Casualty Company, insurance carrier. Award of compensation by Industrial Accident Commission, and employer and insurance carrier bring certiorari. Award affirmed.

Redman & Alexander, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

SLOSS, J. Certiorari to review an award of the Industrial Accident Commission, awarding compensation to Mabel Cordova for the death of her husband, Ferdinand Cordova.

[1] Cordova, the decedent, was employed as a painter by the petitioner, Santa. In the course of his work, he fell from a ladder, sustaining a fracture of the pelvic bone. The accident occurred on October 30, 1915, and on November 14, 1915, Cordova died. The only point made in opposition to the award is that there was no evidence that the injury was the proximate cause of death.

It appeared that Cordova was 38 years of age, and had been in good health prior to the accident. After falling from the ladder, he was taken to a hospital, and the injured part was encased in a plaster cast. He remained in the hospital, confined to his bed, and was apparently making satisfactory progress toward recovery, until the 14th day of November, 1915, when he suddenly died. The ensuing autopsy disclosed, as the immediate cause of death, a small rupture of the right ventricle of the heart. The surgeon who performed the autopsy stated that the wall of the ventricle was unusually thin, but that in other respects the heart was in normal condition. He did not discover an embolus. He, as well as the attending physician, inclined to think that the facts did not indicate any causal connection between the injury and the subsequent heart rupture.

On the other hand, Dr. Ophuls, a pathologist, who had made a microscopic examination of the heart, testified, in effect, that while the wall of the ventricle was thin, it was not more so than in many cases of men in normal health; that, in the absence of any sudden or great exertion on the part of the deceased (of which there was no evidence), he would attribute the rupture to a sudden pressure of blood upon the wall of the ventricle, and that such pressure might well have been caused by the lodging of an embolus in an artery leading from the heart to the lungs. Such an embolus could have resulted from the pelvic fracture, and been carried from the point of its origin to the heart. Dr. Ophuls testified, further, that an embolus was easily lost or overlooked in the course of an autopsy, and that the failure to discover one did not necessarily indicate that it had not existed.

This was substantial testimony justifying the commission's inference and finding that the injury had been the proximate cause of Cordova's death. It is true that, on cross-examination, Dr. Ophuls said he could not state that, in fact, there had been an embolus, and that his explanation of the cause of death was "guesswork." But a reading of his entire testimony shows that he did not, by this, mean to say that he was indulging in mere conjecture or speculation. He was giving what, on the facts before him, and in the light of medical science, appeared to be the most probable explanation of the event. The theory that an embolus arising from the injury had caused the death was "guesswork" only in the sense that there was no direct evidence of the existence of such embolus. But, in Dr. Ophuls' view, other conceivable causes were excluded by the conditions which were shown, and the one which he advanced remained as the most probable one. This was a sufficient basis for the action of the commission.

[2] Absolute proof or mathematical demonstration is not required. Code Civ. Proc. § 1826.

[3] The commission is the final judge of the facts, and its findings cannot be overturned where they have the support of evidence upon which a reasonable man could come to the conclusion which was reached. There is such evidence here.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

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175 Cal. 226

BOAS v. KNEWING. (S. F. 7265.)

(Supreme Court of California. June 1, 1917.)

SALES 🔑479(1)—CONDITIONAL SALES—REMEDIES OF SELLER—ELECTION.

An agreement for the sale of an automobile provided that the four purchase-money notes were given in consideration of the seller's promise, upon payment at maturity, to sell and transfer the automobile, which was intrusted to the care of the buyer. In case any or all the notes remained unpaid at maturity, the buyer agreed to return the automobile to the seller. The notes were assigned to plaintiff, who, after maturity, notified the buyer that he would replevin the car if payment was not made by a given date. Before such date, the buyer left the car in the seller's garage, and so notified plaintiff. *Held*, that the seller's assignee, by threat to replevin, had elected to take the car instead of bringing suit for the price, and that the buyer was entitled to surrender the car under the terms of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418, 1419.]

Department 2. Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by J. Boas against F. T. Knewing. Judgment for defendant, and plaintiff appeals. Affirmed.

Samuel M. Samter, of San Francisco, for appellant. H. U. Brandenstein, of San Francisco, for respondent.

MELVIN, J. The plaintiff appeals from the judgment on the judgment roll.

The suit was by J. Boas upon three certain promissory notes, made payable to H. O. Harrison Company. Each of these notes was dated August 30, 1913, and bore interest at the rate of 6 per cent. per annum. The first one, which was for the principal sum of $500, was payable one month after date; the second, for $500, payable two months after date; and the third, for $1,000, payable four months after date. The defendant pleaded that the notes were of a series of four given for the purchase at a conditional sale of an automobile for the price of $2,500, in accordance with a certain written agreement, which was pleaded, and it was alleged that, following the terms of said contract, the defendant had restored the property, and that the consideration for the notes had thus ceased to have any existence.

The facts as disclosed by the findings are as follows:

By the written agreement of even date with the three notes pleaded and a fourth for $500 and interest payable five months after date, defendant promised to pay to the order of H. O. Harrison Company the sums represented by said notes. The contract recites that the notes are given upon the consideration that the Harrison Company has promised upon payment thereof, principal and interest, at maturity (time being of the essence of the contract), to sell and transfer to F. T. Knewing a certain described automobile, which was on the day of the execution of the contract and notes "intrusted to the care" of said Knewing. It is admitted and agreed by the terms of the contract that the said property so intrusted is the property of H. O. Harrison Company, to remain "in them until they shall make the aforesaid sale and transfer" after payment of the principal and interest of the notes. By this instrument Knewing agrees to return the automobile to H. O. Harrison Company in good order "in case any or all of the above-mentioned notes remain unpaid at maturity." On September 4, 1913, the plaintiff discounted the four notes and they with the contract were duly indorsed and assigned to him. At the time of the filing of this suit (January 3, 1914) the date of maturity of the fourth note had not arrived.

On maturity of the first note, Mr. Knewing, who had been notified of the transfer of the paper to plaintiff, called upon the latter and requested an extension of said note, which was granted, and on October 3, 1913, Mr. Boas wrote to Mr. Knewing, informing him that the time of payment of said note for $500 had been extended until the 10th day of October, 1913. On October 11th plaintiff notified defendant that unless the note was paid by the 14th of that month, at 10 o'clock a. m., he would replevin the car. On the latter date defendant called upon H. O. Harrison Company, requested a further extension, was told that the notes and contract were owned and controlled by plaintiff, and thereupon, before the hour of 10 o'clock a. m., defendant left the automobile in the garage at the rear of the office of H. O. Harrison Company, and separated from said office by a partition. On the following day, upon the discovery of the car in the garage, H. O. Harrison Company notified plaintiff that it was there. On the 15th of October plaintiff received a letter from defendant, dated the 14th, expressing regret that the latter was unable to meet the note and interest. The letter contained also these words:

> "As I wished to save you the trouble and myself the inconvenience of your replevining the car which I held under lease from Harrison Company, I this morning returned the car to them at their place of business at Van Ness avenue."

In his reply Mr. Boas called attention to the fact that the notes had been discounted and that the return of the car did not recover for him the money so paid. "Some settlement of these notes must be made by you at once," he wrote; "otherwise we will be compelled to hand them to our attorney for collection."

Upon the above facts, as found substantially by the court, the conclusions of law and judgment were that plaintiff take nothing and that defendant recover costs.

Appellant interprets that part of the contract of sale, providing for the return of the automobile in case any or all of the notes remain unpaid at maturity, as a provision inserted for the sole benefit of the vendor, and as being in lieu of the usual provision in similar contracts permitting the seller to retake the possession of the chattel which is the subject of a sale on default of the vendee. The vendor (according to appellant's argument) could either enforce or waive the return of the automobile and the buyer, he says, could not force on the seller an election to sue for the price or for the return of the chattel. But under such interpretation of the contract the vendor's assignee by threat to replevin had indicated his election to take the car on the vendee's default rather than to waive the right of resuming possession and to sue for the price. Since plaintiff had thus indicated his election, the vendee was not bound to await an action which could only result in the recaption of the subject of the conditional sale and the superadded burden of costs. He returned the automobile to H. O. Harrison Company just as he had agreed to do in case any or all of the notes should remain unpaid at maturity. This return was not repudiated by the vendor's assignee, and the automobile at the time of the commencement of the action was still in the garage belonging to the original vendor. It has been suggested that the retaking of the property under the terms of an agreement of conditional sale does not in and of itself terminate the contract. Liver v. Mills, 155 Cal. 459, 101 Pac. 299. But here there was default on the part of the vendee, followed by his voluntary surrender on demand, of the chattel. Before resuming custody of the property, the vendor could either sue to recover it or for the purchase price, but he was not entitled to the property and the price also. Parke & Lacy Co. v. White River Lumber Co., 101 Cal. 37, 35 Pac. 442; Holt Manufacturing Co. v. Ewing, 109 Cal. 353–356, 42 Pac. 435; Muncy v. Brain, 158 Cal. 301–305, 110 Pac. 945; Rayfield v. Van Meter, 120 Cal. 416–419, 52 Pac. 666; Van Allen v. Francis, 123 Cal. 474–480, 56 Pac. 339. It was not necessary that election should be manifested by suit. Indeed, in the Holt Case, the seller's election to surrender title and depend upon payment of the price agreed upon was manifested by the presentation of a claim against the estate of Ewing. So here the demand for the return of the automobile, when complied with, took away the right of Boas to sue for the purchase price.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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175 Cal. 208

WETZEL v. CALE et al. (S. F. 7275.)

(Supreme Court of California. May 31, 1917. Rehearing Denied June 30, 1917.)

1. BILLS AND NOTES 🔑164—NEGOTIABILITY —TIME OF PAYMENT.

Under Civ. Code, § 3088, requiring negotiable instruments to be without any condition not certain of fulfillment, etc., a note, authorizing the holder to accelerate the time for payment, is not negotiable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 411–414, 417.]

2. BILLS AND NOTES 🔑246—GUARANTOR.

A party, signing a note upon its back before delivery to the payee, is a guarantor.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 555–558.]

3. BILLS AND NOTES 🔑395—NECESSITY OF NOTICE—GUARANTOR.

Under the direct provisions of Civ. Code, § 2807, a guarantor upon a note is liable upon principal's default without demand and notice being given him.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 996–1021.]

4. BILLS AND NOTES 🔑446—ACCELERATING PAYMENT—EXERCISE OF OPTION.

Where a note authorized the holder to declare the entire amount payable on nonpayment of an installment, commencement of suit is a sufficient exercise of such option and notice thereof.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1302.]

5. BILLS AND NOTES 🔑446—ACCELERATING PAYMENT—TO WHOM AVAILABLE.

Where a note stated that the entire amount might be declared due under certain conditions at the election of the holder, the provision is not confined to the original payee, but extends also to subsequent holders.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1302.]

6. BILLS AND NOTES 🔑521—CONSIDERATION —SUFFICIENCY OF EVIDENCE.

Evidence *held* to sustain a finding that the note was given to discharge the maker's civil liability to payee, not to escape criminal prosecution.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1821.]

7. BILLS AND NOTES 🔑92(2)—CONSIDERATION—SUFFICIENCY.

A note given in compromise of a civil liability claim has a sufficient consideration, although payee might not have recovered as much by suit.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 173, 176, 185, 186.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Eva L. Wetzel against F. M. Cale, J. Jerome Smith, and others. Judgment for plaintiff, and defendant Smith appeals. Affirmed.

P. C. Boardman, of San Francisco, and L. D. Manning, of Oakland, for appellant. J. G. Reisner, of San Francisco, for respondent.

SLOSS, J. This is an action upon a note whereby F. M. Cale promised to pay to L. H. Honey or order the sum of $5,000, with interest, in four installments of $1,250 each. The instrument contained a provision that, in case any installment was not paid within five days after it became due, the whole of the principal and interest remaining unpaid should forthwith become due and payable at the election of the holder of the note. Before the delivery of the note by Cale to Honey, Mabel G. Cale and J. Jerome Smith indorsed the note by writing their names on the back of it. Honey indorsed the note and delivered it to the plaintiff. The complaint alleges that the first installment was not paid when due, that more than five days had elapsed since such installment became due, and that the whole of the note, with interest, is now due and payable. Judgment for $5,000, with interest and costs, was prayed. F. M. Cale and Mabel G. Cale defaulted. J. Jerome Smith answered, denying various allegations of the complaint, and setting up certain matters by way of affirmative defense. A jury trial was waived, and the court made its findings and entered judgment in favor of the plaintiff. From this judgment Smith appeals.

[1-3] The complaint contains allegations of presentment and notice of dishonor. These allegations were, however, immaterial. By reason of the provision allowing the holder, upon certain conditions, to accelerate the time for payment of the principal, the note was not a negotiable instrument. National Hardware Co. v. Sherwood, 165 Cal. 1, 130 Pac. 881; Smiley v. Watson, 23 Cal. App. 409, 138 Pac. 367; Civ. Code, § 3088. The appellant, who had written his name upon the back of it before delivery to the payee, was therefore a guarantor. First Nat. Bank v. Babcock, 94 Cal. 96, 29 Pac. 415, 28 Am. St. Rep. 94; Rogers v. Schulenburg, 111 Cal. 281, 43 Pac. 899. As such, he became liable upon the default of his principal, without any previous demand or notice. Civ. Code, § 2807; First Nat. Bank v. Babcock, supra; Pierce v. Merrill, 128 Cal. 464, 61 Pac. 64, 79 Am. St. Rep. 56.

[4, 5] It was not necessary for the plaintiff to allege, or for the court to find, that plaintiff had elected, after an installment had been five days overdue, to declare the entire sum payable. The complaint set forth the facts which authorized the holder to exercise this right, and the commencement of the action to recover the full amount is, in itself, an exercise of the option, and a sufficient notice thereof. Hewitt v. Dean, 91 Cal. 5, 27 Pac. 423; Bank of Commerce v. Scofield, 126 Cal. 156, 58 Pac. 451; Trinity County Bank v. Haas, 151 Cal. 553, 91 Pac. 385; Stalder v. Riverside, etc., Co., 167 Cal. 560, 140 Pac. 252. There is no merit in the contention that the provision for accelerating payments is available only to the original payee. The instrument is payable to L. H. Honey or order, and expressly provides that the right to declare the principal due for default in payment of an installment is to be exercised "at the election of the holder of this note."

[6, 7] The affirmative grounds of defense set up by Smith in his answer were that there was no consideration for the note, and that the same was obtained from Cale by means of threats of criminal prosecution. The appellant assails as unsupported the court's findings against these defenses. It appears that in October, 1911, John T. Cale, a brother of F. M. Cale, was the owner of six lots in the city of Richmond, Contra Costa county. In that month he conveyed said lots to one McCabe, the deed being executed by F. M. Cale as attorney in fact for John T. Cale. On February 3, 1912, McCabe conveyed the lots to Honey. Thereafter, in June, 1913, John T. Cale executed and delivered a deed conveying the same lots to J. C. Rohlfs, F. R. Cooper, and Fred J. T. Dawson. F. M. Cale took part in this transaction. Rohlfs, Cooper, and Dawson placed their deed on record. Neither the deed from Cale to McCabe, nor that from McCabe to Honey, had then been recorded. When Honey learned of the subsequent conveyance, which, apparently, divested his title (Civ. Code, § 1214), he addressed John T. Cale, demanding that he give the matter his attention. About the same time Honey called the facts to the attention of the district attorney of the city and county of San Francisco, and sought the issuance of a warrant charging John T. and F. M. Cale with a violation of section 533 of the Penal Code. Several interviews were had between F. M. Cale and Honey in the presence of their own attorneys and the district attorney. There is evidence that the district attorney expressed the opinion that there was no criminal intent on the part of either Cale, and that the matter was one that should be adjusted. Honey claimed that he had been damaged in the sum of over $5,000. Cale thought this demand excessive. But he and Honey finally entered into an agreement for the giving of the note in question, and Honey executed a writing in which, after reciting the preceding transactions, he released and discharged John T. and F. M. Cale from all claims for damages. The testimony of Cale was that he gave the note in order to avoid the threatened criminal prosecution. The finding of the court, however, was to the contrary, and the evidence amply supports the finding. Honey had a claim for damages against the Cales, and the court was warranted in believing that he was advancing it in good faith. The compromise of such claim, and his forbearance to sue upon it constituted a sufficient consideration for the note. Rohrbacher v. Aitken, 145 Cal. 485, 78 Pac. 1054; Union Collection Co. v. Buckman, 150 Cal. 159, 163, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609. The validity of the new promise does not depend on any subsequent inquiry into the legal sufficiency of the demand so compromised. Naglee v. Lyman, 14 Cal. 455; Rohrbacher v. Aitken, supra; Whelan v. Swain, 132 Cal. 389, 391, 64 Pac. 560. It is of no consequence, therefore, that Honey might not have succeeded in recovering as much as $5,000 if he had brought suit. This was the amount agreed upon in settlement of his demand, and the promisor cannot now repudiate his contract upon the ground that he agreed to give too much.

Complaint is made of the failure of the court to find on the allegations of the answer that the plaintiff was not a bona fide holder for value before maturity. But since, as plaintiff concedes, her rights as holder of a nonnegotiable instrument were no greater than those of the original payee, these allegations did not present a material issue.

We find no error in the record.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

175 Cal. 230

BERNARD v. RENARD et al. (S. F. 7024.)

(Supreme Court of California. June 1, 1917.)

1. Landlord and Tenant ⚷110(2)—Acceptance of Tenant's Abandonment.

Where premises are abandoned by the lessee, who denies liability under lease, and landlord assumes actual possession and absolute control of premises and releases them, or attempts to do so, without anything being done to indicate that he is acting for the lessee, the landlord cannot thereafter say that he has not accepted a surrender of the term, and it is immaterial that the lessee refused to accept possession at all, or that the lessor failed to obtain a permanent tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 367–369.]

2. Pleading ⚷127(2)—Answer—Admissions—Action for Rent—Abandonment.

In lessor's action for rents after lessee's abandonment, lessee's answer, alleging that lessor refused to cancel lease, did not show that the lessor had failed to accept the abandonment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 264, 267.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Nellie B. Bernard against L. Renard and others. Defendants appeal from judgment for plaintiff and from order denying motion for new trial. Reversed.

Joseph E. O'Donnell and Costello & Costello, all of San Francisco (E. R. Hoerchner, of San Francisco, of counsel), for appellants. Houghton & Houghton, of San Francisco, for respondent.

ANGELLOTTI, C. J. This is an action to recover a judgment for money alleged to be due as rent under the terms of a written lease, the defendants being the trustees of the creditors of the lessee corporation (a dissolved corporation), and the sureties on the bond given by the lessee for the payment of the stipulated rent and the observance of the other covenants of the lease. The cause was tried with a jury, which returned a verdict for plaintiff for $7,500. Defendants appeal from the judgment and from an order denying their motion for a new trial.

[1] The action was for rents at $900 per month for the period commencing November 14, 1908, and ending June 14, 1910. The lease was one dated March 6, 1907, of a lot of land and a building to be erected by the lessor thereon, for the term of 10 years; said term to begin when the building was completed and ready for occupancy, at $900 per month for the first five years, and $1,000 per month for the second five years. Before the completion of the building and in February, 1908, differences arose between the parties. During that month, a formal notice of rescission signed by the lessee was left on the premises and received by the lessor. It stated substantially that the lessee, by reason of the fact that it was induced to enter the lease by certain alleged false and fraudulent representations, and also because the building had not been completed as soon as promised, elected to rescind the lease, offered to restore all property in said building and premises, and demanded that the lease be rescinded and surrendered. The lessor on February 17, 1908, sent to the lessee the following notice, viz.:

"Your notice of rescission I have received and the only answer I have to make to it is that the rescission of a lease requires the action of all parties thereto or the judgment of a competent court. Your building will be ready for occupancy within the next forty days."

On May 14, 1908, the lessor notified the lessee that the building was completed and tendered possession thereof and demanded payment of the first month's rent, and the lessee refused to accept it or any portion thereof, or to pay any rent under the lease. This apparently ended the communications between the parties until the commencement of this action over four years later, November 14, 1912. The lessee never went into possession of the premises and never paid any rent.

Almost immediately after May 14, 1908, the plaintiff began efforts to secure a tenant for the property. She, however, secured no permanent tenant, although she endeavored to do so. It was put into the hands of various real estate agents for that purpose, and there were large signs "painted on the building, placed on it" for the purpose of attracting tenants. Various "To let" signs were placed on the building by plaintiff, the first as early any way as July, 1908. The premises were let by the lessor temporarily to various parties. They were first so let during the latter part of 1908 "for between a month or two months," $324 rental being received. In the spring of 1909, the premises were so let for about three months at $150 a month. Again they were so let to various tenants through a real estate agency, for "a trifle less than" $600. On July 10, 1910, according to the allegations of the complaint, plaintiff finally disposed of said building. During all of the time after June, 1908, plaintiff apparently treated the property as absolutely at her disposal for her own benefit, just as though the lease to the defendant lessee was not in existence. After the refusal of the lessee to accept the premises, no word, oral or written, was conveyed to it to the effect that plaintiff did not hold possession of the premises solely in her own right and for her own benefit and without regard to the lease. No suggestion was made to the lessee that she intended to let the premises for the benefit of the lessee, or at all, and no information was given as to the fact of any of the tenancies. And finally, in July, 1910, as we have seen, the building was permanently disposed of by plaintiff, apparently without any information as to the intention to dispose of it being given to the lessee.

Upon these facts, as to which there is no conflict, it seems clear to us that the doctrine of Welcome v. Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145, is applicable. It is true that the facts of this case differ in some particulars from those of Welcome v. Hess, supra; but they differ in no such way as to make the conclusion arrived at there inapplicable here. The real thing there decided was that where the premises are abandoned by the tenant, who avows his intention not to be bound by his lease, the assumption of actual possession and absolute control of the premises by the lessor, including efforts to let and the actual reletting thereof to others, without saying or doing anything to so qualify his acts as to indicate that he is not acting in his own right and for his own benefit as owner entitled to possession, without saying or doing anything to indicate that he is acting for the benefit of the lessee or reletting on the lessee's account and for his benefit, he will not be heard thereafter to say that he has not accepted a surrender of the term. This is the settled law in this state, although there are cases to the contrary in some other states. The discussion of the question in Welcome v. Hess, supra, was such as to make it unnecessary to consider the matter at length in this opinion. The law on this question was very clearly stated by the District Court of Appeal of the Second Appellate District in an opinion written by Presiding Justice Conrey in Rehkopf v. Wirz et al., 31 Cal. App. 695, 161 Pac. 285, as follows:

> "Where a tenant abandons the leased property and repudiates the lease, the landlord may accept possession of the property for the benefit of the tenant and relet the same, and thereupon may maintain an action for damages for the difference between what he was able in good faith to let the property for and the amount provided to be paid under the lease agreement. Bradbury v. Higginson, 162 Cal. 602 [123 Pac. 797]. But a lessor who chooses to follow that course must in some manner give the lessee information that he is accepting such possession for the benefit of the tenant and not in his own right and for his own benefit. If the lessor takes possession of property delivered to him by his tenant and does so unqualifiedly, he thereby releases the tenant. Baker v. Eilers Music Co., 26 Cal. App. 371 [146 Pac. 1056]; Welcome v. Hess, 90 Cal. 507 [27 Pac. 369, 25 Am. St. Rep. 145]. An unqualified taking of possession by the lessor and reletting of the premises by him as owner to new tenants is inconsistent with the continuing force of the original lease. If done without the consent of the tenant to such interference, it is an eviction, and the tenant will be released. If done pursuant to the tenant's attempted abandonment, it is an acceptance of the surrender and likewise releases the tenant."

It is clear that the mere fact that the lessee refused to accept possession at all and never went into possession does not present any material distinction, in view of the subsequent acts of the lessor. Nor does it materially affect the matter that the lessor, notwithstanding her efforts in that behalf, failed to obtain a permanent tenant for a term extending beyond the term prescribed by the lease to defendant corporation. Of course, such a letting without any act or word to qualify its effect would have very clearly shown an absolute acceptance of the surrender of the term, just as the permanent disposition by the lessor of the building in July, 1910, showed to a certainty that the lessor was then holding the premises solely in her own right and in no way for the benefit of the tenant. But her efforts to obtain a permanent tenant were just as potent in their effect as showing her attitude with regard to the premises in this connection, as would have been her actual letting in the event of finding such a tenant, and her conduct in this regard together with her conduct generally in relation to the premises from as early as July, 1908, bring the case within the rule we have referred to, notwithstanding her failure to obtain a permanent tenant. The refusal to accept the offer of rescission made in February, 1908, and the subsequent tender of the premises and demand for one month's rent in May, 1908, are also of no importance in so far as the question we are considering is concerned. These things, of course, showed the then attitude of the lessor in the matter and the desire that the lessee should accept the premises under the lease. But even then the lessor did not indicate that in the event of the lessee's refusal to accept possession she would nevertheless continue to regard the property as belonging to the tenant for the specified term. And, as we have seen, her subsequent conduct with regard thereto was a complete negation of any such attitude on her part.

[2] Some reliance is placed by plaintiff in this connection upon certain allegations in defendants' pleadings by way of further answer and defense and cross-complaint. In addition to their denials of the allegations of the complaint in this action commenced November 14, 1912, they sought a conclusion of rescission of the contract of lease on the ground of alleged false representations which induced the making thereof, and in this connection alleged the giving of the notice of rescission in February, 1908, to which we have referred, and that the plaintiff "refused and still refuses to rescind or cancel said lease." So far as the question of surrender that we have been discussing is concerned, the only force that can be attributed to this allegation in the connection in which it is used is, of course, by way of admission of the defendants that there never was any unqualified acceptance by the lessor of possession and control of the premises for her own exclusive benefit, notwithstanding the lease. We cannot read it as intended to have or as having in fact any such meaning, or as being of any importance in the solution of the question we have discussed.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

175 Cal. 258

BRACQUEE v. MOTTET CO. (S. F. 6957.)

(Supreme Court of California. June 1, 1917. Rehearing Denied June 30, 1917.)

1. MASTER AND SERVANT ⚷85—INJURIES TO SERVANT — LIABILITY OF MASTER — NEGLIGENCE.

For injuries received by a servant in the course of his employment prior to enactment of St. 1913, p. 279, the master was not liable in the absence of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 136, 139, 140.]

2. MASTER AND SERVANT ⚷278(1)—INJURY TO SERVANT—NEGLIGENCE OF MASTER—EVIDENCE.

In an action by a night clerk for injuries received while attempting to remove a boisterous man from the hotel, evidence *held* insufficient to show negligence of the master; instruction given clerk not to furnish the man with accommodations not being an order to assume new and perilous duties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 957.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Adolphus E. Graupner, Judge.

Action by John Bracquee against the Mottet Company, a corporation. From a judgment for plaintiff, defendant appeals. Reversed.

L. A. Redman and Redman & Alexander, all of San Francisco, for appellant. J. C. B. Hebbard and Hamilton A. Bauer, both of San Francisco, for respondent.

ANGELLOTTI, C. J. On account of personal injuries received in the course of his employment as night clerk of the Hotel Albany in San Francisco on April 26, 1913, plaintiff obtained a judgment for damages against defendant corporation, which owned and operated said hotel. We have here an appeal from such judgment.

[1] As will be noted, the injuries were received prior to the enactment of our law creating a liability on the part of an employer to an employé for compensation for injuries received in the course of and arising out of his employment without regard to negligence. Stats. 1913, p. 279. Hence the resort to an action in the superior court for the damages caused by the injury, wherein, of course, it was essential to a recovery by the employé that there should be alleged and proved some fault or negligence on the part of the employer proximately causing the injury. That in such an action the employer's liability at all is dependent upon some fault or negligence on his part is a proposition too thoroughly settled to require discussion.

[2] The complaint does not in terms allege any negligence on the part of the employer. It does allege that he, "while acting in the course of his employment as such clerk at said hotel, was ordered and directed by defendant not to permit a certain boisterous and objectionable man, who was then and there seeking a room in said hotel, to become a guest therein, and plaintiff was then and there ordered and directed by defendant to remove said man from said hotel," and that while he was attempting to obey said order, he was assaulted by said man, and beaten and thrown down a flight of stairs, thus receiving the injuries. If we assume that this sufficiently shows negligence on the part of the employer, it must be upon the theory that the employer by virtue of his orders to the employé required him to perform new and perilous duties without giving him proper warning of the danger involved. We do not deem it necessary to decide whether the complaint can be held to sufficiently state such a cause of action. The evidence does not measure up to the allegations of the complaint, and, we are satisfied, was insufficient to support the verdict. At the conclusion of the plaintiff's case a motion for a nonsuit was made and denied. It should have been granted. Defendant, however, subsequently introduced its evidence, but this evidence in no degree supplied the defects. At the close of the testimony defendant requested the court to instruct the jury to find for it. This request was denied. It should have been granted, and its denial is assigned as error.

Considering the evidence given in support of plaintiff in the light most favorable to him, it presented substantially this situation: Plaintiff, who was 72 years of age, was night clerk in the Hotel Albany, a rooming house at 187 Third street, San Francisco. He was on duty as such the night of April 26, 1913. The office was on the second floor of the building, across a little hall at the head of the stairway leading from the ground floor, which was occupied by stores. The stairway is broken about the middle by a landing, where it turns. Two men came to the office and asked for a room. One of these was apparently intoxicated and "nasty" and "boisterous." Plaintiff showed them to a room. He subsequently told the manager, who had a talk with this man, and finally the man gave up the key to the room and voluntarily left the house. A short time thereafter he came back and asked plaintiff to let him go to the room, and plaintiff said, "No, I can't let you in the room; you heard the manager; you have given up the key; I have no right to do that; I can't change that." The man then went away, but a short time thereafter returned again, with the same request, which was again denied, and he again left. Shortly thereafter the manager came to the office and plaintiff told him that this man had been annoying him by coming back and requesting to be given accommodations. The manager said, "He has given up the key; don't let him in." The manager then left and plaintiff remained alone in the office. Some time later the man again returned. Plaintiff was in the office, the window of which looked out upon the stairway. The man came to the window with the same request, which was again denied, and he was asked to go away and not annoy plaintiff longer. He did go down the stairs to the landing or the step above the landing, and plaintiff came out of the office and to the head of the stairway, and endeavored to persuade him to leave the building. Suddenly the man, who had not before shown any inclination to the use of force, in some way reached up and took hold of plaintiff, with the result that plaintiff was dragged or fell to the landing, receiving the injuries on account of which this action was brought.

It will be observed that there is nothing in all this to indicate that plaintiff had been given any order or instruction to remove the man from the premises, or any instruction involving the use of force by him. Substantially, he had been instructed simply not to furnish the man with accommodations, or, in the language of the complaint, "not to permit" him "to become a guest therein." The instruction meant no more than that plaintiff should not receive the man as a guest, entailing the performance of a duty necessarily devolving on clerks in hotels and rooming houses constantly, that of refusing accommodations to applicants. It is impossible to find in the instruction or conduct of the manager any basis for an inference of negligence on his part in the matter, any basis for an inference of the omission of any information which he was reasonably called upon to give the employé, or of the omission of any precaution he was reasonably called upon to make for his safety.

The testimony given for the defense added nothing of benefit to plaintiff. The manager testified that he and the Mottets were away from the hotel all the evening, returning about 1 o'clock, and this man was just being given a room; that the man was intoxicated, and some dispute ensued, resulting in the man threatening to leave, and he told him that was "up to him," and the man left; that he followed him to the head of the stairs and saw him go out, and that he then said to plaintiff that he did not want that man in the house, and "if he returns or refuses to leave the house, either call me or get an officer"; that after taking some coffee he then went to bed, and shortly thereafter heard shouts for help and rushed down the stairs and found plaintiff lying on the landing floor.

It may be conceded solely for the purposes of the decision that if plaintiff had been ordered to personally eject this man from the premises, and in attempting to do so was injured, it might be held under the circumstances that there was some basis for a finding of negligence. But there was nothing of that sort in the case, no setting of the employé to a dangerous task, no order to assume new and perilous duties. In the language of Kennedy v. Chase, 119 Cal. 637, 52 Pac. 33, 63 Am. St. Rep. 153, a case cited by plaintiff, "there cannot be neglect without the existence of a corresponding duty," and we look in vain at the evidence in this case to discover anything indicating the existence of any duty devolving on defendant to give any information to plaintiff or to take any additional precaution for the personal safety of plaintiff in this matter.

We are entirely at a loss to account for the verdict in this case upon any other theory than the one it is claimed by defendant was adopted in the trial court, viz. that if the injuries were received by plaintiff in the course of his employment, and arose out of his employment, the defendant was liable without regard to whether or not there was any negligence or fault on its part. Of course, this could not be in view of the law applicable to the case. That it was the theory adopted in the trial court appears to be borne out by an instruction given to the jury, as follows:

> "If you gentlemen of the jury believe from the evidence that the relation of master and servant existed between plaintiff and defendant at the time of the accident, and if you believe that in the careful discharge of his duty and in obedience to the instruction received by plaintiff from defendant or its agent or manager in charge of the Albany Hotel the plaintiff received the injuries he complains of, I charge you that the defendant is responsible and in damages liable for the results of that accident. I charge you that injuries received in the line of a servant's duty, or within the scope of his employment, make the master liable."

This manifestly was erroneous and probably accounts for the verdict.

Looking at the case in the light most favorable to plaintiff, it simply presents the case of an employé who was unfortunately injured in the course of his employment, without any fault or negligence on the part of the employer, at a time when we had no compulsory compensation law rendering an employer liable for injuries to his employés suffered in the course of and arising out of the employment, without regard to whether there was any fault or negligence on the employé's part. In such a case there can be, of course, no liability on the part of the employer on account of the injuries.

The judgment is reversed.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; HENSHAW, J.

175 Cal. 216

ARTHUR v. CITY OF PETALUMA et al.

(S. F. 8174.)

(Supreme Court of California. May 31, 1917.)

1. MUNICIPAL CORPORATIONS 🔑864(1)—INDEBTEDNESS—AMOUNT.

Where a city's current revenues were sufficient to pay a printing claim when it accrued, but not thereafter, when payment was demanded, claim reduced to judgment, and money to pay it raised by special tax levy pursuant to St. 1901, p. 794, payment thereof was prohibited by Const. art. 11, § 18, prohibiting cities from incurring indebtedness exceeding in any year the income and revenue provided for such year, unless otherwise authorized by special election.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1828.]

2. MUNICIPAL CORPORATIONS 🔑868(1)—INDEBTEDNESS—AMOUNT.

Where an indebtedness against a city was valid when incurred, a subsequent exhaustion of funds from which it could be paid only affects the remedy to obtain payment, and does not prevent a judgment being secured for the amount due.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1842.]

3. MUNICIPAL CORPORATIONS 🔑864(1)—INDEBTEDNESS—AMOUNT.

A printing bill incurred under Const. art. 11, § 8, authorizing certain cities to adopt a charter and providing for its publication, is a municipal indebtedness or liability within Const. art. 11, § 18, prohibiting cities from incurring any indebtedness or liability exceeding the current year's income, unless authorized to do so by a special election.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1828.]

In Bank. Application for writ of mandate against the City of Petaluma and others. Transfer made from the District Court of Appeals of the Third Appellate District because of the inability of the judges of that court to agree upon a judgment. Alternative writ discharged and proceeding dismissed.

Lippitt & Lippitt, of Petaluma, R. L. Thompson, of Santa Rosa, and Newton A. Johnson, of Petaluma, for petitioner. G. P. Hall, of Petaluma, and W. F. Cowan, of Santa Rosa (E. J. Dole, of Petaluma, of counsel), for respondents.

ANGELLOTTI, C. J. This is a proceeding in mandate to compel the allowance and payment of a claim of petitioner against the city of Petaluma. The proceeding was commenced in the District Court of Appeal of the Third Appellate District, and was ordered transferred to this court because of the inability of the judges of that court to agree upon a judgment.

Petitioner's claim was for printing done by him for the city during the fiscal year 1910–11, in his newspaper, the Petaluma Daily Courier, the contract for city printing for that year having been awarded to him as the lowest bidder for the work. The particular printing was the publication in said paper of a proposed freeholders' charter, which the trustees of the city had ordered published "in the manner provided by law." When the printing was done there was sufficient money in the city treasury of the revenue of that fiscal year to pay petitioner's claim. His demand in due form for the amount alleged to be due was filed with the city clerk on March 28, 1911, but at that time the revenues provided for the fiscal year had been entirely exhausted. The claim was disallowed. Petitioner brought his action against the city thereon, and in September, 1912, obtained a judgment for the full amount of his claim. That judgment was subsequently affirmed on appeal. Arthur v. City of Petaluma, 27 Cal. App. 782, 151 Pac. 183. It was substantially found therein that the claim was in all respects valid, and that at the time the claim was presented for payment the funds of the fiscal year had been exhausted by the payment of other claims incurred or attempted to be incurred subsequent to the claims of plaintiff. The judgment was an ordinary judgment against the city for the amount claimed. The county clerk of Sonoma county having certified this judgment to the auditor and municipal governing body of the city, in accord with the provisions of an act of the state Legislature providing for the payment of judgments against counties, cities, etc., approved March 23, 1901 (Stats. 1901, p. 794), the city council, as provided by the act, included in the tax levy for the fiscal year 1916–17 a sum expressly devoted to the payment of the judgment and sufficient to pay the same. This tax was collected, and is now in the treasury of the city expressly set aside for the payment of the judgment. Nevertheless the city now refuses to pay the claim or any part thereof. Hence this proceeding.

[1, 2] The claim of the city substantially is that section 18 of article 11 of the state Constitution precludes payment of this claim incurred in the fiscal year 1910–11 from any of the revenue resulting from the tax levy by the city council for the fiscal year 1916–17. Whatever might be our view in the absence of previous decisions of this court, we are satisfied that the construction given to this section of our Constitution by a long line of decisions is such as to compel us to sustain this claim of the city.

Section 18, art. 11, of the Constitution, so far as here applicable, reads to-day as it did when first adopted, in the year 1879. The language is:

> "No * * * city * * * shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose. * * * Any indebtedness or liability incurred contrary to this provision, * * * shall be void."

Certain amendments to this section made in the year 1900, permitting the city and county of San Francisco to pay unpaid claims of previous fiscal years out of the income and revenue of succeeding fiscal years, and the city of Vallejo to pay an existing indebtedness "whenever two-thirds of the electors thereof, voting at an election held for that purpose, shall so decide," if they have any bearing upon the question, would seem to be entirely in line with the previous construction given by the court to the section, and to support the proposition that the limitation of the constitutional provision can only be overcome by a two-thirds vote of the electors or by a constitutional amendment to meet the particular case.

The constitutional provision was first considered by this court in San Francisco Gas Co. v. Brickwedel, 62 Cal. 641, and was given a broad and liberal construction in view of the object it was desired thereby to attain. Under a strict construction it might possibly have been held that its only effect was to make void any indebtedness or liability incurred in excess of the income and revenue provided for the year, without the assent of two-thirds of the electors expressed at an election, leaving such indebtedness or liability as was not in excess of such income and revenue at the time of its creation unaffected by the provision, and a valid claim payable out of the revenue of succeeding years. But the court, through Mr. Justice Ross, said that it meant, not only that an indebtedness incurred contrary to its express provisions was absolutely void, but that "each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year." It was also said:

> "The system previously prevailing in some of the municipalities of the state, by which liabilities and indebtedness were incurred by them far in excess of their income and revenue for the year in which the same were contracted, thus creating a floating indebtedness which had to be paid out of the income and revenue of future years, and which, in turn, necessitated the carrying forward of other indebtedness, was a fruitful source of municipal extravagance. The evil consequences of that system had been felt by the people at home and witnessed elsewhere. It was to put a stop to all of that, that the constitutional provision in question was adopted. The change was eminently wise. A somewhat similar provision in the old Constitution with respect to state indebtedness saved the people of the state a vast amount of money. People v. Johnson, 6 Cal. 503; Nougues v. Douglass, 7 Cal. 65. We have neither the right nor the disposition, by judicial interpretation, to take away the wholesome restriction upon municipalities thus imposed by the Constitution. Of course, in giving effect to this radical change from the preexisting condition of things, it will not be strange if some shall be found to suffer. But it must be remembered that all are presumed to know the law, and that whoever deals with a municipality is bound to know the extent of its powers. Those who contract with it, or furnish it supplies, do so with reference to the law, and must see that the limit is not exceeded. With proper care on their part and on the part of the representatives of the municipality, there is no danger of loss."

In Shaw v. Statler, 74 Cal. 258, 15 Pac. 833, it was held that the statement that "no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year" was a correct statement as to the meaning of the section "at least so far as the revenue of any particular year is required for the expenses of that year," it not being necessary to go further in that case. But in Schwartz v. Wilson, 75 Cal. 502, 17 Pac. 449, where it was attempted to pay a claim absolutely valid in all respects, incurred in the fiscal year 1883-84, out of revenues for the fiscal year 1884-5, the statement in San Francisco, etc., Co. v. Brickwedel, 62 Cal. 641, was deemed to settle the proper construction of the section and forbid such payment. It has apparently never since been questioned that it is the construction that must be given the section, except for statements in one or two dissenting opinions. It was accepted as correct and followed in McGowan v. Ford, 107 Cal. 177, 40 Pac. 231; Smith v. Broderick, 107 Cal. 644, 40 Pac. 1033, 48 Am. St. Rep. 167; Weaver v. San Francisco, 111 Cal. 319, 43 Pac. 972; McBean v. Fresno, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191; Bradford v. San Francisco, 112 Cal. 545, 44 Pac. 912; Higgins v. San Diego, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; Montague v. English, 119 Cal. 225, 51 Pac. 327; Higgins v. San Diego, 131 Cal. 294, 63 Pac. 470; Fresno, etc., Co. v. McKenzie, 135 Cal. 497, 67 Pac. 900; and County of Tehama v. Sisson, 152 Cal. 167, 172, 92 Pac. 64. Under these decisions, lack of available money of the revenue of the fiscal year against which the claim constitutes a charge, from whatever cause, and entirely regardless of the absolute validity of the claim, is a complete answer to any attempt to enforce *payment* from what are styled, in some of the later of the cases cited, "the ordinary revenues" of the city for succeeding years. To this term we shall refer later. This is perhaps shown most emphatically and clearly by what is said in Weaver v. San Francisco, supra. The views there expressed have never been modified, except as to the proper form of judgment to be given the holder of a valid claim. Having a valid claim, one valid when the indebtedness was incurred, the subsequent exhaustion of funds from which the same could be paid before the claimant was able to obtain formal allowance and payment, does not make his claim bad, but only affects his remedy to obtain *payment*, and he is entitled to have his claim established by a judgment for the amount due. Weaver v. San Francisco, supra; Montague v. English, supra. In the Weaver Case it was declared and ordered that the judgment in terms should limit satisfaction of the judgment to the income and revenues provided for the fiscal year in which the liability was incurred. In the later case of Higgins v. San Diego, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670, it was finally held that such a limitation should not be inserted, but that the claimant should be given a general judgment. The court said in regard to this:

> "We have no desire to disturb the principle that no indebtedness or liability incurred in any one year should be paid out of the ordinary income or revenue of any future year, which principle has been declared by a long line of decisions, running from the case of San Francisco Gas Co. v. Brickwedel, 62 Cal. 641, to McBean v. Fresno, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191. Future provision might be made for the payment of a debt, although there might be no revenues of the fiscal year in which the debt was incurred out of which it could be satisfied—as, for instance, by the adoption by the people of a proposal to pay it, or by other methods that might possibly be suggested; and a direction in a judgment that it should be paid only out of the revenues of a certain year might be held to preclude its payment in any other way. Merely putting a demand in the form of a general judgment would not in any way take it out of the general rule that the ordinary revenues of a future year cannot be applied to the payment of a liability in a previous year, as held in Smith v. Broderick, 107 Cal. 644, 40 Pac. 1033, 48 Am. St. Rep. 167. We think, therefore, that in a case like the one at bar there should be a general judgment in the usual form, without any direction as to the method of its payment."

This is now the settled rule. It is clear that the whole effect of this is simply that the judgment should not be drawn in such a way as to preclude enforcement in the possible event that legal provision is subsequently made for the payment thereof. What that legal provision outside of the necessary two-thirds vote by the people might be, if any, the court did not consider or intimate. But we think it must be apparent that in using the words "the *ordinary* income or revenue of any future year" it was not intended to suggest that, consistently with the constitutional provision, the city authorities could include in their tax levy for a future year a special levy for the express purpose of paying such a claim and that the same might be paid from the tax collected thereon. The very case approvingly cited by the court in the portion quoted above (Smith v. Broderick, 107 Cal. 644, 40 Pac. 1033, 48 Am. St. Rep. 167) decided this very point. The court there said:

> "The collection in the subsequent fiscal year of a tax levied by the board of supervisors for the express purpose of paying this judgment did not give to the plaintiff any additional right to the payment of his claim, or any right to the money thus collected. The provision of the Constitution limiting the power of the municipality in incurring a liability to the income and revenue 'provided for it for such year' means that only the income and revenue that had been provided for the expenditures of the year prior to incurring the liability can be appropriated for the payment of such expenditures. To hold that any deficiency in the revenues of one year can be met from taxes collected in a subsequent year, under the guise that they had been collected for the express purpose of meeting such deficiency, would sweep away the entire restriction which the Constitution intended to place upon municipal extravagance."

Clearly the term "ordinary revenue," as used in the Higgins Case, was understood as including all revenue resulting from taxes levied by the city authorities. There is nothing in any of the decisions to suggest that any such claim can be paid from any fund other than the income and revenue of the particular fiscal year in which the indebtedness or liability was incurred, except by authorization of a two-thirds vote of the electors or constitutional amendment, and we are satisfied that the constitutional provision, as construed by the decisions we have referred to, precludes any other method. See Bradford v. San Francisco, 112 Cal. 545, 44 Pac. 912.

The fact that petitioner has obtained a judgment against the city for the amount of his claim in an action brought for that purpose does not avoid the application of this constitutional provision. The judgment, of course, conclusively determines the question of the validity of his claim, but it still remains that, by reason of that provision, it cannot be paid out of the revenues of a fiscal year other than the one in which the liability or indebtedness was created. In Smith v. Broderick, supra, the claim had been reduced to a judgment, and it was squarely held, after an exhaustive discussion, that the existence of the judgment did not preclude an investigation for the purpose of ascertaining what the nature of the original cause of action was. In Goldsmith v. San Francisco, 115 Cal. 36, 46 Pac. 816, a similar situation existed, and the rule applicable was concisely and correctly stated by Mr. Justice Henshaw for the court as follows:

> "The reduction of the original claim to a judgment does not increase its dignity so as to authorize plaintiff to demand payment of it from any fund not subject to the primary demand."

See, also, Higgins v. San Diego, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670.

If there be anything in Johnson v. Supervisors, 65 Cal. 481, 4 Pac. 463, in conflict with this view, it must be deemed overruled by the later cases that we have just cited. If at the time the liability to petitioner was incurred such liability was not in excess of the revenue and income for the fiscal year, he was entitled to his judgment, as held in numerous cases to which we have referred, notwithstanding that at the time of presentation of his claim, commencement of action, and judgment the funds for the year had been exhausted, and the interposition of these matters as a defense would have been unavailing.

The legislative act of March 23, 1901, has been referred to. It purports to require the payment by the treasurer of any county, city, etc., of any final judgment "now existing or that may be obtained hereafter against any county, * * * city," etc. By it the county clerk is required to file with the auditor of the city a list of judgments of record in his office against the city at least 15 days before the day on which the tax levy is to be made, the auditor is required to examine and audit the same and certify the list to the treasurer, and the governing body of the city is required "to include in the tax levy for the next fiscal year a rate sufficient to pay all final judgments existing against" such city. The proceeding in regard to this claim was apparently in accord with the provisions of this act. But it is obvious that this act cannot be held available to petitioner for the enforcement of his demand against the revenue and income of a fiscal year subsequent to that in which the liability on which his demand is based was incurred. To hold otherwise would be to effect a violation of the constitutional provision. The Constitution is as binding upon the Legislature as it is upon a city, and the Legislature cannot require or authorize a city to proceed in defiance of its terms.

The conclusions we have stated as to the various points discussed are the necessary result of the settled construction of section 18, art. 11, of the Constitution. This construction has now been accepted as settled beyond question for many years. We do not feel at liberty to depart from it. The fact that great hardships result in individual cases from an observance of the rule has been recognized in several of our decisions, but, as has been well said, "this fact cannot afford reason for subverting the law or frittering it away."

[3] It was held in Lewis v. Widber, 99 Cal. 412, 33 Pac. 1128, that the constitutional provision refers only "to an indebtedness or liability which one of the municipal bodies mentioned has itself incurred—that is, an indebtedness which the municipality has contracted, or a liability resulting, in whole or in part, from some act or conduct of such municipality"; and that consequently it has no application to the stated salary of a public officer fixed by state statute, that being a matter over which the municipality has no control and with respect to which it has no discretion. It appears here that the printing upon which petitioner's claim is based was the publication in his paper of a proposed freeholders' charter, proceedings for the adoption of which by the city of Petaluma were then pending in accord with the provisions of section 8 of article 11 of the Constitution. This section authorized such a city at its option to adopt such a charter and prescribed the procedure to be followed in order to accomplish such adoption. One of the conditions was that before the election at which the proposed charter is submitted to the people for ratification, it must be published for 20 days in a daily newspaper of the city. Petitioner, having been a bidder for the contract for city printing for the fiscal year, had been awarded the contract therefor, and a contract had been entered into between him and the city for such printing at specified rates. It was under this contract that petitioner made the publication of the proposed charter in his newspaper. It is claimed that under these facts the case is within the rule declared in Lewis v. Widber, supra, and that the constitutional provision has no application. We think it clear that there is no force in this contention. The indebtedness here is one incurred by the municipality, and it is the immediate result of a contract by the municipality. It would seem to be unnecessary in this connection to do more than to refer to the cases of Pacific Undertakers v. Widber, 113 Cal. 201, 45 Pac. 273, and Goldsmith v. San Francisco, 115 Cal. 36, 46 Pac. 816. It was there held that claims of a character not distinguishable in any material aspect from that here involved are within the constitutional provision. It was aptly said through Mr. Justice McFarland in the first of these cases:

> "If they are without that provision, then it is difficult to see how indebtedness incurred for any services or commodities necessary for the public welfare could be held to be within it, or how the constitutional limitation could be kept from being frittered entirely away."

There is no other point made that requires notice.

The alternative writ of mandate heretofore issued is discharged and the proceeding dismissed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

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175 Cal. 229

SAN JOAQUIN LIGHT & POWER CORP. v. CITY OF MADERA et al. (Sac. 2651.)

(Supreme Court of California. June 1, 1917.)

In Bank. Appeal from Superior Court, Madera County; Chas. O. Busick, Judge.

Mandamus proceedings by the San Joaquin Light & Power Corporation against the City of Madera and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Short & Sutherland, of Fresno (Carl E. Lindsay, of Fresno, of counsel), for appellant. F. A. Fee, of Madera, for respondents.

ANGELLOTTI, C. J. Mandamus to compel auditing and payment of a claim of plaintiff against the city of Madera. The superior court gave judgment for defendants, and on appeal by plaintiff to the District Court of Appeal of the Third Appellate District the justices of that court were unable to agree upon a judgment. The appeal was therefore transferred to this court for determination.

In all material aspects the case here presented is the same as that of Arthur v. City of Petaluma (No. 8174) 165 Pac. 698, decided May 31, 1917. It is sought to enforce payment against revenues of the fiscal year 1915–16 resulting from tax levies made by the board of trustees of the city, without any authorization by the electors, of a claim of $2,108.75 for electrical power and energy, lights and lighting, material and labor furnished the city during previous fiscal years. The claim has been reduced to judgment, and the proceedings were in accord with the act of March 23, 1901, referred to in the opinion in that case.

The decision in Arthur v. Petaluma, supra, controls here, and therefore the judgment of the superior court in favor of defendants must be held to be correct.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; VICTOR E. SHAW, Judge, pro tem.

175 Cal. 253

CROSS et al. v. BOUCK et al. (L. A. 3685.)

(Supreme Court of California. June 1, 1917. Rehearing Denied June 28, 1917.)

1. Landlord and Tenant 🔑79(1)—"Assignment" or "Sublease."

Where a tenant made a lease to another person upon different terms and conditions from the tenant's lease, it was a "sublease," and not an "assignment" of the original lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 235, 244–248.

For other definitions, see Words and Phrases, First and Second Series, Assignment; Second Series, Sublease.]

2. Landlord and Tenant 🔑76(2)—Subtenant's Right to Sublet.

Where a lease prohibited an assignment thereof, but not subletting of premises, a sublessee could assign sublease to a third party without violating provisions of original lease, where sublease did not prohibit assignment.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 228.]

3. Fraud 🔑11(1) — Misrepresentation — Fact or Opinion.

Representations regarding present condition and past earnings of an apartment house relate to matters of fact, and not of opinion.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 12.]

4. Fraud 🔑41—Action for Deceit—Sufficiency of Complaint.

Complaint alleging misrepresentations as to present condition and past earnings of an apartment house, knowingly made with intent to induce plaintiffs to trade real estate for lease, and that plaintiffs were deceived thereby, and, relying on such representations, transferred property worth $5,000 in consideration of the promised assignment of the lease which was not assigned to them, or, if assigned, had no value, *held* sufficient to state cause of action for deceit.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 36, 37.]

5. Fraud 🔑59(3)—Exchange of Property—Measure of Damages.

The measure of damages suffered by one who is fraudulently induced to exchange property is the difference between the actual value of that which he parts with and of that which he receives under the contract.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 62.]

6. Fraud 🔑58(1) — Evidence to Sustain Findings.

In action for deceit, a finding that plaintiffs received nothing of value from defendant *held* supported by evidence that lease which defendants proposed to assign had no value.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 55.]

7. Appeal and Error 🔑882(17)—Preservation of Objections—Pleading—Variance—Failure to Object.

Although complaint in action for deceit did not allege that lease which defendants proposed to assign was valueless, as stated in findings, where defendants treated the question as an issue in the case, and evidence bearing on the question was introduced on both sides without objection, on appeal defendants cannot urge that finding was outside of the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3607.]

8. Appeal and Error 🔑1011(1)—Review—Conclusiveness of Findings — Conflicting Evidence.

Findings based upon conflicting evidence are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988.]

9. Fraud 🔑50—Issues, Proof, and Variance.

In an action for deceit plaintiffs were not bound to establish the making and falsity of every misrepresentation alleged by them.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47.]

10. Fraud 🔑9—Action for Deceit—Sufficiency of Evidence.

A single material misrepresentation knowingly made with intent to induce another to enter into a contract and relied on by the other party, to his damage will support an action for deceit.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8.]

In Bank. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by Cora D. Cross and others against Cora D. Bouck and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Jos. W. Mowell, of Los Angeles, for appellants. John S. Cooper, W. R. Law, and Davis & Rush, all of Los Angeles, for respondents.

SLOSS, J. This action was brought to recover damages for deceit. The amended complaint alleges that on or about the 28th day of September, 1912, the plaintiffs were the owners of certain real property in the county of Los Angeles of the value of $5,000. On that day the defendants represented to the plaintiffs that they (defendants) were the owners of an unexpired lease for seven years of an apartment house known as the Navarro Apartment Hotel, in the city of Los Angeles, together with a lease for the same period of the furniture and equipment in said house. On said day, for the purpose of inducing plaintiffs to transfer and trade their real property described in the amended complaint to the defendants, in consideration for said leases, the defendants knowingly made certain false and fraudulent representations to plaintiffs, with intent to deceive and defraud plaintiffs, and to procure their property above described. The pleading then goes on to describe the alleged fraudulent representations. Two of these related to the ownership by the defendants of the lease of the apartment house and the furniture therein and their ability to assign such lease. The others, briefly stated, were that the apartment house was then paying in rentals more than the expenses of operation; that no apartment in the house was rented for less than $45 per month; that but seven apartments were then vacant; that the house, at all times theretofore paid expenses for the entire year, with the exception of one summer month; that when all the apartments were rented the apartment house would produce a profit of $700 per month; and that in each preceding year it had produced a net profit of over $2,000 per year. All of these representations are alleged to have been false, and known by the defendants to be so. Plaintiffs, relying upon the truth of said statements, were induced thereby to enter into an agreement for the transfer by them to defendants of all of the real property described in the complaint, in consideration of the transfer by defendants to them of the unexpired lease on the apartment house and the furniture and equipment therein. Plaintiffs did, pursuant to such agreement, transfer and assign to the defendants their said real property. Plaintiffs entered into "tentative possession" of the apartment house, and, upon discovering the falsity of the representations, relinquished the possession. It is further alleged that the defendants failed and refused to give the plaintiffs a good and valid lease to said apartment house and furniture. Damages were asked in the sum of $10,000, consisting of $5,000, the value of the property transferred to the defendants, and other items. Except with respect to the value of the property transferred to the defendants by plaintiffs, the court made findings in substantial accord with the averments of the complaint. The value of the property was found to be $2,800. Among the findings was one to the effect that the plaintiffs received nothing of value in consideration of their transfer of such property. The court entered judgment in favor of the plaintiffs for $2,800, and the defendants appeal from such judgment.

[1, 2] Much of the discussion in the briefs turns on the question whether the defendants made any misrepresentations regarding their ability to assign the lease of the apartment house and the furniture therein to the plaintiffs, and whether they did, in fact, make such assignment. An assignment was actually executed, but the theory of the plaintiffs seems to be that such assignment was invalid for want of the lessor's assent thereto. This theory is not sustained by the evidence. It appears that the owner of the apartment house had originally made a lease which contained a covenant against assigning, but none against subletting. The lease which was the subject of negotiation between the parties to this action was a new lease from the original tenant, upon different terms and conditions. On its face it was designated, and rightly designated, as a "sublease." Its execution was not a violation of the provision of the original lease against assignment. 24 Cyc. 974. The sublease itself contained no restriction upon the right of assignment. The defendants therefore had a right to assign their sublease without the consent of any one, and the findings based upon this phase of the case are without support.

[3-5] But the complaint alleged, and the court found, other grounds ample to make out a cause of action for damages for deceit. The representations regarding the present condition and the past earnings of the apartment house related to matters of fact, not of opinion. It is charged that these representations were false, and that they were knowingly made, with intent to induce the plaintiffs to enter into the contract; that plaintiffs were deceived thereby, and did in reliance upon these representations enter into the contract and transfer their real property. Here we have every allegation necessary to a complete cause of action for deceit. In Rockefeller v. Merritt, 76 Fed. 909, 22 C. C. A. 608, 35 L. R. A. 633, it is said:

> "The true measure of the damages suffered by one who is fraudulently induced to make a contract of * * * exchange of property is the difference between the actual value of that which he parts with and the actual value of that which he receives under the contract."

This rule is approved in Barbour v. Flick, 126 Cal. 628, 633, 59 Pac. 122. The complaint alleges, in effect, that the plaintiffs, relying upon the fraudulent representations, transferred property worth $5,000, in consideration of the promised assignment of a lease, and that the lease was not assigned to them. The complaint therefore stated a cause of action, and there is no merit in the claim that the demurrer of the defendants should have been sustained.

[6] It is true, as above stated, that the finding that the lease was not assigned to plaintiffs is not supported by the evidence, but we have the further finding that the plaintiffs received nothing of value from the defendants. This finding would be supported by evidence that the lease which the defendants proposed to assign had no value, and we find that the record contains substantial evidence to this effect.

[7] While it is true that the complaint did not allege that the lease was valueless, it appears that evidence bearing upon its value or want of value was introduced on both sides without objection. The appellants having treated this question as an issue in the case, they will not, on appeal, be heard to say that the finding must be disregarded as outside of the pleadings.

[8-10] The appellants attack the sufficiency of the evidence to support the findings relative to the misrepresentations alleged in the complaint. Undoubtedly there was a sharp conflict regarding these matters, but the trial court believed the testimony offered by the plaintiffs, and this determination is, under our well-settled rules, conclusive here. The plaintiffs were not bound to establish

the making and the falsity of every representation alleged by them.

> "A single material misstatement, knowingly made with intent to influence another into entering into a contract, will, if believed and relied on by that other, afford as complete ground for rescission as if it had been accompanied by a multitude of other false representations." Davis v. Butler, 154 Cal. 623, 626, 98 Pac. 1047, 1048.

A single material misrepresentation will likewise suffice to support an action for damages.

While a different conclusion might have been reached by the trial court, we are satisfied that the evidence was sufficient to warrant the finding that the plaintiffs believed the representations made by the defendants, and were induced by their belief and reliance upon such representations to enter into the contract. Here, again, we have simply the situation of a conflict in the evidence, in the face of which the finding of the trial court is binding.

We think no other point made is of sufficient importance to require special discussion, or to affect the conclusion already indicated.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

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34 Cal. App. 258

BRION v. CAHILL et al. (Civ. 1957.)

(District Court of Appeal, First District, California. July 6, 1917. Rehearing Denied by Supreme Court Sept. 4, 1917.)

1. BROKERS ⚷64(2) — COMPENSATION — DEFAULT OF PARTY PRODUCED BY BROKER.

Where in contract of exchange one of parties agrees to pay broker who is not party thereto commission, he may, if the deal is not consummated because the other cannot convey good title, rescind contract, and he is thereby relieved of liability to pay commission, since no acceptance of other party as able to consummate the exchange can be predicated on fact of entering into agreement conditional on his ability to convey good title.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 67, 97.]

2. EXCHANGE OF PROPERTY ⚷4—CONTRACT—CONSTRUCTION—PARTIES.

A broker is not a party to contract of exchange whereby one of parties agrees to pay him commission, where he is not named as party therein, and it was not executed by or delivered to him, but his name appears thereon only as witness to its execution.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 4.]

Appeal from Superior Court of Alameda County; E. N. Rector, Judge.

Action by P. A. Brion against Patrick Cahill and another. From judgment for plaintiff against defendant named, latter appeals. Reversed.

Wilder Wight, of Oakland, for appellant. Robinson, Gillis & Sizer, of Oakland, for respondent.

KERRIGAN, J. This is an action to recover the sum of $1,000 alleged to be due to plaintiff under a contract between one Sam Krummes and the defendant Patrick Cahill, embodying the terms of a proposed exchange of real estate. One of the provisions of this contract was that the defendant Patrick Cahill would pay to the plaintiff said amount for "services rendered"; the services referred to being evidently those rendered by the plaintiff in bringing about the proposed agreement of exchange. Judgment went in favor of plaintiff against Patrick Cahill and in favor of defendant Sumner Cahill against the plaintiff. Patrick Cahill appeals from that part of the judgment affecting him.

The facts material to a consideration of the appeal are briefly as follows:

One Sam Krummes listed with the plaintiff a ranch situated near Lodi for sale or exchange. The latter brought this property to the attention of Patrick Cahill, who owned property in Oakland that he also was desirous of selling or exchanging. They together visited the Lodi property. Cahill expressed his willingness to exchange his Oakland property for it; whereupon Krummes and the plaintiff visited Oakland and inspected appellant's property. At this point the appellant left the completion of the details and the entry into a contract of exchange to his son, the codefendant. The latter went to the property at Lodi, and there, on behalf of the appellant and as his attorney in fact, entered into the following contract, the plaintiff assisting in its preparation:

> "This agreement witnesseth that the undersigned, Sam Krummes, of Lodi, Cal., owner of the following described first piece of property: [Here follows description of property of Krummes]—which [I] desire to exchange for the following second piece of property: [Here follows description of appellant's property.] * * *
>
> "For one dollar in hand paid and other adequate and valuable considerations I hereby authorize P. A. Brion to act as my agent in negotiating an exchange, and I agree that if he shall secure an acceptance of the proposition to exchange the above-described property on the terms, that I will within ten days furnish a certificate of title or an abstract from a reliable abstract company, and a grant, bargain, and sale deed conveying title to the property first above described, and will allow five days for the furnishing of a certificate of title or abstract and a deed conveying title to the second above described piece of property.
>
> "And it is further agreed with the agent P. A. Brion that when he has secured an acceptance of the above proposition that I will then pay to said agent the sum of no dollars for services rendered, or a commission of 5 per cent. on the gross price at which my property is put in in the exchange for such services.
>
> "Dated at this 6th day of March, 1913.
>
> "[Signed] Sam Krummes.
>
> "Witness:
> "P. A. Brion.
> "Geo. Thumann.
>
> "This agreement witnesseth that the undersigned Patrick Cahill, owner of the second piece of property described within hereby accept the proposition of exchange therein and upon the

terms therein stated, and agree to furnish a certificate of title or abstract from a reliable abstract company within 5 days, showing said property vested in him, and then to furnish a deed conveying title to said property to Sam Krummes, or his assigns or representatives. And I further agree to pay to P. A. Brion as agent, the sum of $1,000 for services rendered, for such services.

"Dated at this 6th day of March, 1913.

"Sumner Cahill, Power of Attorney.

"Witness:

"P. A. Brion.

"Geo. Thumann."

The exchange was not consummated owing to the fact—which sufficiently appears from the record, although, on the objection of the respondent, most of the testimony offered in proof thereof was excluded—that Krummes had no title to the property he agreed to convey. The appellant attempted to prove a mutual rescission of the agreement of exchange, but this evidence also was excluded by the court, which adopted the theory of the respondent that, irrespective of the consummation of the exchange or the ability of either of the parties thereto to carry out the terms of the agreement, the plaintiff was entitled to receive from the appellant the amount of compensation provided therein to be paid to him.

In support of the judgment the respondent relies upon a line of authorities holding that a real estate broker employed to sell real property has earned his compensation when he has produced a purchaser able and willing to take the property on the terms proposed, or who has been accepted by his principal as such purchaser by entering into a contract with him. In the latter event those authorities hold that the ability of the purchaser to carry out his contract is immaterial to the right of the broker to receive compensation from his principal.

[1] It will be observed, however, that the principle there laid down is based entirely upon the fact that there exists a contract of employment between the principal and the broker; and the ratio decidendi of those cases evidently is that the broker, having performed what he was employed to do, is entitled to be paid without regard to the ultimate fate of the negotiations or contract between his principal and the purchaser produced by him. But it is equally apparent, we think, that the reasoning of those cases can have no application to a situation where there is no previous contract of employment, and where the claim of the broker is based upon a provision of a contract of exchange between his principal and the person produced by him to which he himself is not a party. In such a case his rights are those only which are conferred by such contract.

Nor can the fact that an agreement of exchange has been entered into by the owners of the respective properties, where the exchange is conditional upon the ability of the respective parties to convey good title, be given the same effect as is given in the authorities above referred to to an agreement of sale. In the latter case the principal is held, by thus entering into a contract with the proposed purchaser, to have accepted him as able to consummate the purchase; but no such acceptance, with the consequential right in the broker to his compensation, can be logically predicated upon the fact of entering into an agreement of exchange in which conveyance of good title by the person produced by the broker is expressly stipulated.

So far as the appellant here is concerned, those authorities can have no application. His contract was with Krummes. Its main purpose was to effect an exchange of his property for that of Krummes. His obligations under the contract were concurrent with those assumed by Krummes; and if he, tendering performance to Krummes, meets with a refusal on the part of the latter to perform, it is elementary that he immediately has the right of rescission, and upon rescinding is relieved of his obligations under the contract, one of which was his promise to Krummes to pay to the plaintiff a commission for his services in bringing about the abortive exchange. As was said by this court in the case of Jennings v. Jordan, 31 Cal. App. 335, 160 Pac. 576, a case almost identical in its facts to this one:

> "The plaintiff's right to recover, then, must depend entirely upon the terms of the contract entered into between Fletcher and Jordan, to which Eppinger was not a party. Up to that point, so far as the evidence discloses, there was no obligation upon them to pay him anything. The object of the contract actually entered into was to provide for an exchange of the properties of the parties thereto, each agreeing to convey title free of incumbrances, and the provision therein for the payment of a commission to Eppinger must be construed in its relation to the whole contract. Quite apart from the evidence of Jordan, one of the parties to it, that as to him it was not his intention that any commission should be paid unless the exchange of lands was actually effected, such would be the natural and logical construction of the instrument. Unless and until the exchange was consummated the parties would receive no benefit from Eppinger's efforts; and, as we have seen, there was no obligation existing to pay Eppinger anything except that arising from the written agreement under consideration. The provision relating to such payment is not separable from the remainder of the contract; and certainly as to Jordan, when the other party to it found himself unable to comply with its terms and consented to its cancellation (Jordan already having a right to rescind it) the whole contract fell, the provision relating to Eppinger's compensation with the rest. If the broker should suffer any hardship from such construction, it is one inherent in the form of the contract entered into, and which was the only means he chose for his protection."

[2] The respondent seeks to differentiate his case from that of Jennings v. Jordan, supra, and says in his brief:

> "We are suing upon a contract between Brion and Patrick Cahill, or more particularly what might be termed a nonnegotiable promissory

note by Patrick Cahill to pay to P. A. Brion for services rendered the sum of one thousand dollars."

It is, however, quite apparent that the contract sued upon is one to which the plaintiff was not a party; he was not named therein as a party; it was not executed by him nor was it ever delivered to him, and his name appears thereon as a witness to its execution.

From what we have said we think it clear that whatever rights the plaintiff may have had under the foregoing contract with regard to Krummes, under the facts proved—and especially under those sought to be proven by the appellant, but which evidence was erroneously excluded—he established no right of action against the appellant.

That part of the judgment, therefore, from which the appeal is taken must be reversed; and it is so ordered.

We concur: RICHARDS, J.; BEASLY, Judge pro tem.

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175 Cal. 250

OLSON v. SUPERIOR COURT OF MERCED COUNTY et al. (Sac. 2586.)

(Supreme Court of California. June 1, 1917.)

1. Mandamus ⟹51—Compelling Entry of Final Divorce Decree.

Mandate is an appropriate remedy to compel the entry of a final divorce decree, where the court's duty is plain, and unmixed with the exercise of discretionary powers.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 98–100.]

2. Divorce ⟹170—Final Decree—"May."

In Civ. Code, § 132, providing that, "when one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce," the word "may" means "must" only whenever facts are shown entitling the movant to such final decree; but facts arising subsequently to the interlocutory decree should have their influence in determining the right to a final decree.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 552, 553.

For other definitions, see Words and Phrases, First and Second Series, May.]

3. Divorce ⟹170—Interlocutory Decree.

The interlocutory decree merely fixes, at the time it is given, the right of the blameless spouse to a final decree after the expiration of one year, but does not itself sever the marital bonds; the delay of one year before absolute severance of the marriage ties furthering an important purpose of the law to give the spouses a chance to effect a reconciliation.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 552, 553.]

4. Divorce ⟹170—Right to Final Decree.

A divorced husband, securing, before entry of final decree, a reconciliation with and the return of his wife, and living with her thereafter continuously for five years, could not then cause final decree to be entered.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 552, 553.]

In Bank. Application for writ of mandate by Albert Olson against the Superior Court of the County of Merced and E. N. Rector, as judge thereof. Writ discharged.

Stephen P. Galvin, of Los Banos, Croop & Croop, of Merced, Adolf Michel, of Oakland, and John J. McDonough, for petitioner. Andrew R. Schottky, of Merced, for respondents.

HENSHAW, J. This hearing is under an original alternative writ of mandate issued by this court on the petition of Albert Olson, who seeks to compel the superior court of Merced county to enter a final decree of divorce; more than one year having elapsed since the interlocutory decree was made and given in favor of his wife, who was the plaintiff in the divorce suit. Chronologically, the following facts have a bearing on the consideration:

Josie L. Olson, wife of petitioner herein, sued and obtained an interlocutory decree of divorce against her husband, which decree was entered on May 13, 1910. Thereafter, and in February, 1911, before the expiration of the year after which the final decree could be entered, the wife at the solicitation of the husband became reconciled to him, returned to his house, and resumed marital relations with him. Together they thus lived as husband and wife for five continuous years. Then, on the 21st day of February, 1916, the husband secretly and without the knowledge of the wife caused a final decree of divorce to be entered in the action. This becoming known to the wife, upon her application and within the six months period of time limited by section 473, Code of Civil Procedure, the court vacated and annulled this final decree and declared in its order so doing that the defendant (the husband) "is not entitled to a final decree of divorce in the said action; the status of married persons having been restored between the parties by reason of their reconciliation, and the resumption of marital relations." No appeal was taken from this last-mentioned order. Thereafter the husband again petitioned for a final decree of divorce, and upon the court's refusal to enter it sued out this writ of mandate.

[1, 2] That mandate is an appropriate remedy to compel the entry of such a final decree, where the court's duty is plain and unmixed with the exercise of discretionary powers, does not admit of debate, and has, in fact, been decided. Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897. Petitioner's contention is that under the facts above narrated the trial court has no discretionary power by virtue of the mandatory provision of section 132 of the Civil Code. That section declares that:

> "When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce."

That the word "may," as thus employed in the statute, means "must," whenever the facts are shown entitling the movant to such final decree, requires no discussion. Petitioner's argument is based upon the proposition that, when one year has in fact elapsed, the right is absolutely final, and the trial court is without the slightest discretion in the matter of withholding the relief sought.

[3] The question is one of first impression in this state, but in our view is one exceedingly easy of solution. Under our divorce laws the interlocutory decree fixes the right of the blameless spouse to a decree of divorce as and of the time when the interlocutory decree itself is given. Barring the familiar equitable considerations of fraud or mistake in the procurement of this decree, all matters therein litigated have passed beyond the possibility of future litigation; but it is never to be forgotten that the interlocutory decree does not sever the marital bonds. It is merely a declaration that one of the spouses has at that time established a right to a final decree which will be entered at and after the expiration of one year. Estate of Dargie, 162 Cal. 51, 121 Pac. 320.

What ends has the law in view in enforcing the delay of one year before an absolute severance of the marriage ties? This question, too, has been answered by our decisions, and it is truly declared to be one of the important purposes of the law to give the spouses a chance to effect a reconciliation which the law always favors. Barron v. Barron, 7 Cal. Unrep. Cas. 347, 96 Pac. 273.

[4] The facts presented show that one of the great purposes of our law had been fulfilled. Before the time when the final decree could have been entered the wife condoned her husband's offense and they became reconciled. They lived together as husband and wife continuously for five years thereafter, at the end of which time the condonee, not the condoner, demands of the court the entry of the final decree severing the bonds of matrimony between himself and his wife with whom he had thus been living. From its very nature the interlocutory decree can only operate upon facts existing down to the time it is given. It is within the contemplation of the law that facts subsequently arising should have their influence in determining the right to a final decree. While in every proper case a trial court will, and if necessary by mandate will be compelled to, enter such a final decree, it would be a grave reproach to our jurisprudence to hold that our law ever contemplated that such a decree could be forced upon a blameless and nonconsenting wife after such a reconciliation. Our law demands no such thing. It never designed to make itself an instrument of such frauds. The similar law in the state of New York entitles either spouse to a final judgment after three months "unless for sufficient cause the court in the meantime shall have otherwise ordered," and under that statute the court refused a final decree where a reconciliation was effected such as is here shown. Cary v. Cary, 144 App. Div. 846, 129 N. Y. Supp. 444. But, in the absence from our statute of this express language found in that of New York, the power of our courts is no different. The New York statute but expressed the power which our courts in equity inherently possess. They have under our present statute and without express authorization the power to recognize condonations and reconciliations such as are here shown, and to do justice to the litigants as may be demanded by such events in their lives as have arisen subsequent to the entry of the interlocutory decree and before the expiration of the fixed period of one year.

It would in our view be superfluous to elaborate upon a proposition so plainly consonant with the principles of equity and the due administration of justice. Wherefore the writ is discharged.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.; SHAW, J.

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175 Cal. 238

In re EMART'S ESTATE. (S. F. 7521.)

(Supreme Court of California. June 1, 1917.)

WILLS ⚿123(5)—ATTESTATION—PRESENCE OF WITNESSES.

Civ. Code, § 1276, providing that every will must be executed and attested, and that the subscription must be made in the presence of the attesting witnesses or be acknowledged by the testator to them to have been made by him or by his authority, requires the subscription or the acknowledgment to be before the two witnesses present at the same time, and hence a will was not sufficiently attested where one witness attested the will in the forenoon of the day upon which it was executed, and the other in the afternoon; the two witnesses not signing in the presence of each other.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 326–331.]

Angellotti, C. J., and Sloss, J., dissenting.

In Bank. Appeal from Superior Court, Monterey County; J. A. Bardin and Geo. W. Buck, Judges.

In the matter of the estate of Nancy Jane Emart. Appeal from refusal of order to revoke the probate of the will. Reversed.

Arthur L. Levinsky, of Stockton, for appellants. Hudson, Martin & Jorgensen, of Monterey, for respondents.

HENSHAW, J. Contest after probate was instituted against the will of Nancy J. Emart, deceased. The court refused to revoke the probate of the will, and this appeal followed. The facts stipulated were:

"That one of the attesting witnesses to said will attested said will in the forenoon of the day upon which the same was executed, and that the other attesting witness to said will attested the same upon the afternoon of said day, and that the said attesting witnesses did not sign their names or attest the said will in the presence of each other."

Further:

That "the two attesting witnesses signed their names as witnesses at the end of the will at testatrix's request and in her presence."

Testatrix subscribed her will in the presence of one of the witnesses, and acknowledged the subscription to the other attesting witness, declaring that the instrument was her will.

The single question presented is whether, under this evidence, there was a legal compliance with our law touching the acknowledgment and publication by the testatrix of her will. That law is found in section 1276 of the Civil Code, and is as follows:

"Every will * * * must be executed and attested as follows: * * * 2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority."

The case is one of first impression, and the question by no means free from doubt. Properly to resolve it requires a brief consideration of this branch of the great statute of frauds. The fifth section of the statute of frauds (29 Car. II, c. 3) required that all devises and bequests of lands or tenements should be in writing and signed by the party so devising the same, and should be attested and subscribed in the presence of the devisor and of three or four credible witnesses. The construction put upon this statute was that it did not in terms require that the attestation and subscription should be made at the same time and in the presence of the assembled witnesses, and such continued to be the rule of English decision until the statute itself was changed. This construction, thus given at a very early day, was adhered to with great uniformity, though the judges frequently voiced their protests against the construction, as being unsound and as opening the door to the very frauds which the statute designed to prevent; it being said that in the requirement of acknowledgment before three or four witnesses it was manifestly designed that the acknowledgment should be of a quasi public character, and that there was less likelihood that fraud could be perpetrated under such solemn circumstances, and more likelihood of an accurate memory, than under the rule which permitted each witness to state that the testator at varying times and under varying circumstances had acknowledged to him and to him alone that the instrument was his will. In addition to this is the consideration that the execution of such a will is not fully complete until it is witnessed or attested. If the will is acknowledged to the one witness on one day and to the second witness months or even years thereafter, both witnesses will not be witnessing or attesting under the same state of facts that is to say, neither witness could declare that at the time the other witnessed it the testator was apparently free from duress, menace, or undue influence and was of sound and disposing mind.

Thus in New York, where by virtue of its language the judges held their statute to be an enactment of the English law, with the interpretation which had been put upon it, the learned Chancellor Walworth says in Jauncey v. Thorne, 2 Barb. Ch. 40, 45 Am. Dec. 424:

"It was also settled in England, at a very early date, that a will of real estate, attested by three witnesses, who, at several times, subscribed their names, in the presence of testator and at his request, was valid, although all the witnesses were never present at the same time. * * * It is at least doubtful whether the decisions upon either of these questions were in conformity with the intention of the framers of the provisions in the statute of Charles relative to the execution of wills of real estate. But they are in conformity with the letter of the statute, which only required that the will should be signed by the testator, but not that such signing should take place in the presence of the attesting witnesses. Nor did the statute, in terms, require the witnesses to attest the will at the same time, and in the presence of each other, but only that the will should be attested by three witnesses who should subscribe the same in the presence of the testator."

By force of these considerations the time came when the English Parliament believed this statute to require remodeling, and it was remodeled in the Wills Act. 1 Victoria, c. 26. That act prescribed:

"That no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

This became the law of England in 1837, and, with certain modifications not necessary here to consider, has continued to be the expression of the English law. In 1860, in Hoysradt v. Kingman, 22 N. Y. 372, the Court of Appeals of New York was called upon to determine whether or not a will had been duly executed under the provisions of the statutes of New York under the circumstances here presented; that is to say, the subscription and the publication or acknowledgment had been made before the witnesses at different times. Great pressure of argument was brought to bear upon the court, seeking to have it adopt a construction in consonance with the Wills Act, supra. The Court of Appeals said:

"Our statute, passed a few years earlier, does not contain the language which so plainly settles the question in the English act. It declares that every will shall be executed and attested in the following manner: '1. It shall be subscribed by the testator at the end of the will; 2. Such subscription shall be made by the testator in the presence of *each* of the attesting witnesses, or shall be acknowledged by him to have been so made to *each* of the attesting witnesses; 3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament; 4. There shall be at least two attesting witnesses, *each* of whom shall sign his name as a witness, at the end of the will, at the request of the testator.' 2 R. S. 63, sec. 40." (Some of these words have been placed in italics for convenient comparison with the language of our own statute.)

The court held that the language of the New York statute was in manifest harmony with the decisions governing the same matter under the earlier statute of Charles. It is perhaps unnecessary to add that in most of the older states the statute of frauds of Charles II was enacted as the state's own statute of frauds, either in precise terms or in all material substance. Therefore the decisions of those states, sound in themselves, will throw but little light upon this consideration, where the conclusion must be reached by an interpretation of the peculiar language of our own statute. But, to illustrate, the presence of the subscribing witnesses at the same time in the presence of the testator is not required in Tennessee under a law which simply declares that "the instrument must be subscribed by two witnesses, neither of whom are interested" (Simmons v. Leonard, 91 Tenn. 183, 18 S. W. 280, 30 Am. St. Rep. 875); nor in Connecticut, where the law requires that "the will shall be in writing, subscribed by testator and attested by three witnesses, all of them subscribing in his presence" (Gaylor's Appeal, 43 Conn. 82); nor in Indiana, where the law requires that "the will shall be 'attested and subscribed in the presence of testator and two or more competent witnesses'" (Johnson v. Johnson, 106 Ind. 475, 7 N. E. 201, 55 Am. Rep. 762); nor in Wisconsin, where the statute law is identical with that of Indiana (Will of Smith, 52 Wis. 543, 8 N. W. 616, 9 N. W. 665, 38 Am. Rep. 756); nor in Illinois, where the law requires that the will be "subscribed in his (testator's) presence and at his request by at least two witnesses" (Flinn v. Owen, 58 Ill. 111); nor in Georgia, where the requirement is that the will be "attested and subscribed in the presence of the testator by three or more competent witnesses" (Webb v. Fleming, 30 Ga. 808, 76 Am. Dec. 675). We need not multiply these instances. Enough have been given to show, as has been said, that they can afford us little of value in the present difficulty, and illustrate merely that the Legislatures of these states and their courts, in following the statutes, have in substance adopted the language of the statute of frauds of Charles II, and the interpretation which the English courts put upon that statute. In this connection perhaps it is proper to refer to one additional case, that of Green et al. v. Crain et al., decided in Virginia in 1855 (12 Grat. 252). The language of the Virginia statute taken from the Victorian Wills Act required a signing by the testator and that "the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses present at the same time." The facts were that the testator signed and acknowledged the instrument in the presence of one of the attesting witnesses, and subsequently acknowledged the instrument in the presence of the other attesting witness, the first attesting witness being also present. The case in its facts differs from the present case in that there both the witnesses were present at the time the acknowledgment was made to the second witness; while here the two witnesses were never at the same time in the presence of the testator for the purpose of receiving his acknowledgment. The court of Virginia reasoned that the requirement "that the relation of 'presence' shall exist between the testator and the witnesses does not require that the relation of 'presence' should exist between the witnesses themselves," and the court repudiates the decisions of the English courts holding the contrary construction of the Wills Act of Victoria. Of this case it need only be said that its reasoning is far from convincing. In conclusion upon this general discussion it will suffice to point out that the Legislatures of some, even of the older, states, have in their wisdom adopted the requirements of the Victorian Wills Act (Ludlow v. Ludlow, 36 N. J. Eq. 597; Roberts v. Welch, 46 Vt. 164; In re Claflin's Will, 75 Vt. 19, 52 Atl. 1053, 58 L. R. A. 261); while in Connecticut its Legislature enacted in 1875, a statute of wills in all essentials like the Victorian Act, and subsequently, in 1885, modified its law to read as above quoted (Lane's Appeal, 57 Conn. 182, 17 Atl. 926, 4 L. R. A. 45, 14 Am. St. Rep. 94).

With this brief review we may come to the history of our own wills law. It first appears upon the books in the statutes of 1850, p. 177. It is there declared (section 3) that:

> "No will * * * shall be valid, unless it be in writing, and signed by the testator * * * and attested by two or more competent witnesses subscribing their names to the will, in the presence of the testator."

Manifestly this language from the statute of 1850 is susceptible of and would be given the construction placed upon the statute of frauds of Charles II. In 1870 commissioners were appointed by authority of law to draft a complete system of Codes for this state. The work of the original commission, before the Codes were adopted, was subjected to revision and review by two other Code commissions, and as a result of their labors this significant fact appears: The first Code commissioners submitted as their statute of frauds touching the execution of wills a section which they numbered Civil Code, § 1276, and which section was in the identical language of the New York provision above quoted. More than that, the learned commissioners themselves recognized and expressed their indebtedness to the proposed New York Code, upon which they made heavy drafts. These codifiers announced that section 1276 had been taken from section 550 of the proposed New York Civil Code. But our Civil Code first prepared by Commissioners Charles Lindley, John C. Burch, and Creed Haymond was not adopted, as has been said, until it had been repeatedly revised by other men learned in the law, and amongst these men two who sat upon this bench, Hon. Stephen J. Field and Hon. Jackson Temple. Section 1276 of the Civil Code, as enacted in its present form, is the result of their review and their modification of the proposed section 1276. The proposed section 1276 was substantially a re-enactment of the statute of frauds of Charles II. If the Code revisionists had desired that the statute of frauds of Charles II should be declared to be our law, no doubt can be entertained but that they would have accepted section 1276 as originally proposed by the first commissioners. At this time (1871 to 1874) the Wills Act of Victoria was and for years had been in existence. These learned jurists well knew it, and it is not easy to avoid the conclusion that when they refused to accept section 1276 in its proposed form, and modified it to its present form, they did so in the belief that the Victorian Act was the wiser statute, and therefore the one which this state should adopt. The Legislature, concurring in their views, enacted the law in its present form. We have much internal evidence in the language of the statute itself that this view is correct. To illustrate: The phraseology of subsection 1 of section 1276, to the effect that the will "must be subscribed at the end thereof by the testator himself," is language taken bodily from the Victorian Act, and not found in the statute of Charles II.

From the language of our statute and this review of its history, we regard the conclusion as unescapable that our law requires the subscription or the acknowledgment to be before the two witnesses present at the same time. And while, as has been said, there is no direct adjudication in this state upon the question, every utterance of this court is in confirmation of this view. Thus in Estate of Toomes, 54 Cal. 509, 35 Am. Rep. 83, objection was made to the will that it was not duly executed under the provisions of section 1276 of the Civil Code, upon the ground, amongst others, that the subscription was not made in the presence of the attesting witnesses. This court, reviewing the evidence, declared:

> "Here we have the fact that the testatrix made her mark to the instrument, the declaration that it was her will and testament, made in the presence and hearing of the witnesses, and the fact that the witnesses subscribed the same at her request in her presence, and in the presence of each other. * * * We think this was sufficient."

In Estate of Cartery, 56 Cal. 470, amongst the interrogatories submitted to the jury was one:

> "Whether the subscribing witnesses signed the proposed will in the presence of the deceased and of each other and at his request."

The jury's answer being in the affirmative, the trial court upheld the execution of the will as in accordance with law, and this court declared that this and like interrogatories covered all the issues raised by the contestant. In Montana, whose statute is identical with ours, it is declared, quoting from the syllabus of In re Noyes' Estate, 40 Mont. 178, 105 Pac. 1013:

> "The statutory formalities of execution, such as the place of the testator's signature, or the fact that he signed or made acknowledgment in the presence of witnesses, or made publication, or that the witnesses properly signed in his presence, and in the presence of each other and at his request stand as of equal importance, and must be observed."

The answer to respondent's argument that courts should give a liberal construction to the statutory requirements for the due execution of a will is found in Estate of Walker, 110 Cal. 390, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104, and in Re Seaman's Estate, 146 Cal. 455, 80 Pac. 700, 106 Am. St. Rep. 53, 2 Ann. Cas. 726, and it is sufficient to rest the response upon the discussion of the matter found in those cases.

For the foregoing reasons, the judgment refusing to revoke probate of the will is reversed.

We concur: SHAW, J.; LORIGAN, J.; MELVIN, J.

SLOSS, J. I dissent. When the Legislature of this state enacted section 1276 of the Civil Code, it was not entering upon a new field of legislation. Statutes governing the making and attestation of wills had long existed in England and America, and these statutes had frequently been before the courts for interpretation. The enactments of the American states are based upon one or the other or both of the English acts referred to in the majority opinion, with such modifications as were deemed proper in the respective jurisdictions. As is stated in that opinion, it was the settled construction, under the statute of frauds (29 Car. II, c. 3, § 5), that the witnesses were not required to be present together at the signing or acknowledgment by the testator, or to attest in the presence of each other. Jauncey v. Thorne, 2 Barb. Ch. (N. Y.) 40, 45 Am. Dec. 424; Sullivan v. Sullivan, 3 L. R. Ir. 299; Westbeech v. Kennedy, 1 Ves. & B. 362; Ellis v. Smith, 1 Ves. Jun. 11. With the law thus established, there was enacted in 1837 the Wills Act (1 Vict. c. 26), which provides:

> "That no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time;

and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

The words "present at the same time" left no room for doubt that the witnesses must be jointly present when the testator makes or acknowledges his signature. One of the obvious purposes of the later statute was to change the old law, which, as I have just said, permitted the testator to acknowledge his signature to the different witnesses at different times. But the concluding clause, relating to the attestation by the witnesses, does not contain the words "at the same time." It merely prescribes that the witnesses shall attest and subscribe in the presence of the testator. Accordingly, even under the Wills Act, the requirement of joint presence of the witnesses was not carried beyond the time of the testator's signing or acknowledging. The prevailing opinion of English courts and text-writers has been that it is not necessary that the witnesses should attest and sign at the same time, or that both should be present during the attestation. The will having been signed or acknowledged in the presence of both, each might attest and sign during the absence of the other. The contrary view, expressed obiter by Lord Brougham in Casement v. Fulton, 5 Moo. P. C. C. 130, has not been followed. There have been several decisions that the witnesses need not sign in the presence of each other (Faulds v. Jackson, 6 Notes of Cas. Sup. 1; Webb's Case, 1 Deane, 1; Cooper v. Bockett, 3 Curt. 648; Sullivan v. Sullivan, supra), and the same construction of the statute has been approved by eminent law writers (1 Wms. Exrs. 93; 6 Sug. Real Prop. St. 342; 1 Jar. Wills, *85). The Virginia court, in giving the same effect to a statute like the Wills Act (Green v. Crain, 12 Grat. [Va.] 252), did not, as the majority opinion says, "repudiate the decisions of the English courts holding the contrary construction." To the contrary, it was in accord with the English courts.

It appears, therefore, that under both English statutes the provision that an act shall be done by two or more witnesses in the presence of the testator does not require that the witnesses do the act at the same time, or in the presence of each other. It is enough if each does the act and if the testator be present on each occasion. The same construction should, on like grounds, apply to a provision, like that of section 1276 of the Civil Code, that the testator perform some act, or make some declaration, "in the presence of" or "to" a given number of witnesses. The necessity for the joint presence of the witnesses during any part of the testamentary act exists only when the statute contains direct and explicit language to that effect, as the Wills Act does when it declares that the signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time.

The American statutes governing the making of wills have uniformly been interpreted in accordance with these views. The legislation in the several states has varied greatly, some of the statutes being modeled on the statute of frauds, others following the Wills Act, while some (like our own) embody certain features of each of the English acts, or make additional provisions, like that of declaration that the paper is a will. Where the statute simply provides that a will must be in writing and attested by two or more witnesses subscribing their names thereto in the presence of the testator, or that the will shall be signed or acknowledged in the presence of two witnesses, who shall subscribe the will in the presence of the testator, it has everywhere been held that the witnesses need not be together during the act of signing or acknowledgment on the part of the testator, or during their own attestation. Moore v. Spier, 80 Ala. 129; Gaylor's Appeal, 43 Conn. 82; In re Porter, 20 D. C. (9 Mackey) 493; Webb v. Fleming, 30 Ga. 808, 76 Am. Dec. 675; Flinn v. Owen, 58 Ill. 111; Hull v. Hull, 117 Iowa, 738, 89 N. W. 979; Grubbs v. Marshall (Ky.) 13 S. W. 447; Chase v. Kittredge, 11 Allen (Mass.) 49, 87 Am. Dec. 687; Cravens v. Faulconer, 28 Mo. 19; Welch v. Adams, 63 N. H. 344, 1 Atl. 1, 56 Am. Rep. 521; In re Clark's Will (N. J. Prerog.), 52 Atl. 222; Watson v. Hinson, 162 N. C. 72, 77 S. E. 1089, Ann. Cas. 1915A, 870; Simmons v. Leonard, 91 Tenn. 183, 18 S. W. 280, 30 Am. St. Rep. 875; Barker v. Hinton, 62 W. Va. 639, 59 S. E. 614, 13 Ann. Cas. 1150; In re Smith's Will, 52 Wis. 543, 8 N. W. 616, 9 N. W. 665, 38 Am. Rep. 756. Two states have or had statutes substantially identical with our own, so far as the question under consideration is concerned, with the single exception that subdivision 2 provides for signature or acknowledgment in the presence of or to "each of" the attesting witnesses. In both of these states it has been held that the witnesses are not required to be present at the same time. Rogers v. Diamond, 13 Ark. 474; Hoysradt v. Kingman, 22 N. Y. 372, 379. The prevailing opinion takes the position that our Code section is to be given a meaning different from that of the New York statute, for the reason that the provision in force in California does not embody the word "each." I think this argument gives entirely too much weight to what the New York Court of Appeals itself, in Hoysradt v. Kingman, terms a "verbal criticism." That court based its conclusion upon the fact that the Legislature, with the former statutes and the judgments of the courts upon them before it, drew an act which omitted the significant words of the Wills Act "present at the same time," thereby plainly indicating that it did not intend to adopt that requirement of the Wills Act. Our own statute also omits these words, and contains nothing of equivalent import. Nevertheless, the majority of this court reaches what seems to me the strange conclusion that our Legislature, with the earlier legislation on the subject before it, designed to adopt the rule of the Wills Act. If that was the purpose, it is difficult to see why the clear and unambiguous language of the Wills Act, requiring presence "at the same time," was not copied into our law.

No case is cited, and I have found none, holding that the witnesses must be present together, except where the statute explicitly calls for such unity, as in Connecticut, where it was provided that the will must be attested by three witnesses, "all of them subscribing in his presence and in the presence of each other" (Lane's Appeal, 57 Conn. 182, 17 Atl. 926, 4 L. R. A. 45, 14 Am. St. Rep. 94), or in Vermont, where the statute demanded attestation and subscription by "three or more credible witnesses in the presence of the testator, and of each other" (Adams v. Field, 21 Vt. 256), or in Virginia, under a statute containing the words "two competent witnesses present at the same time" (Green v. Crain, supra).

When the Legislature of this state enacted section 1276 of the Civil Code, it had before it the history of the earlier English and American legislation and the decisions interpreting that legislation. It adopted some of the provisions of the Wills Act not found in the statute of frauds. For example, it provided for the signing by the testator at the end of the will, and for a signing or acknowledgment in the presence of witnesses. But it omitted the clear and definite words of the Wills Act "present at the same time," which alone import into that statute the requirement for a joint presence of the attesting witnesses. As was said by the Court of Appeals of New York, the inference is irresistible that, if it had been intended to change the settled rule that the witnesses need not be present together at any part of the testamentary act, the change would have been made by incorporating the words which were used to accomplish such change in the legislation of England, or other words of like import. Hoysradt v. Kingman, 22 N. Y. 372, 379. The omission of any express requirement to this effect is convincing evidence that on this point the Legislature intended to adopt the rule of the statute of frauds, rather than that of the Wills Act.

Subdivision 2 of section 1276 provides that the subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him, or by his authority. It was so acknowledged in this case. The testatrix acknowledged to the two witnesses that the subscription to the will had been made by her. Subdivision 3 declares that the testator must at the time of subscription or acknowledgment declare to the attesting witnesses that the instrument is his will. Mrs. Emart did so declare to both of the subscribing witnesses. There is no more reason for reading into the provisions (subdivisions 2 and 3) referring to the subscription or acknowledgment, and to the declaration to the witnesses, a requirement that both witnesses must be present at the same time, than there was for reading such requirement into the provision of the Wills Act that the witnesses must sign in the presence of the testator.

The question before us is not one of policy; it is one of interpretation merely. There is no inherent or natural right to pass property by will. The privilege is conferred by statute, and the extent and the mode of its exercise are determined by the legislative provision. The courts have not the right to overlook the failure to comply with a single requirement of the statute, whatever their view of its wisdom or necessity. In re Walker, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104. But neither are they justified in reading into the law a demand for the performance of any act or formality not included within its terms. I think just that has been done in this case.

I concur: ANGELLOTTI, C. J.

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33 Cal. App. 463

LUFT v. ARAKELIAN et al. (Civ. 2036.)

(District Court of Appeal, First District, California. April 19, 1917. Rehearing Denied by Supreme Court June 18, 1917.)

1. SPECIFIC PERFORMANCE ⚷121(4)—EVIDENCE—SUFFICIENCY.

In a purchaser's suit to compel specific performance of a contract for the purchase and sale of real estate made by plaintiff with a third party, evidence *held* to show that the third person, when executing the contract, was acting for himself, and not as the agent of the defendant.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 391–393.]

2. PRINCIPAL AND AGENT ⚷145(3)—OSTENSIBLE AGENT.

Where a purchaser had no actual notice that his vendor was not the actual owner of the property and did not at any time during his dealings with the vendor believe, or have cause to believe, that the latter was acting or purporting to act as agent for the real owner, he could not charge the owner with the obligations arising under the contract on the theory of ostensible agency of the vendor for owner.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 515–517.]

3. PRINCIPAL AND AGENT ⚷171(7)—CONTRACT—RATIFICATION.

The fact that the owner of property, while repudiating the acts and conduct of a person who contracted to sell it, offered in one or two instances to assume some of the small obligations incurred by such person under similar contracts, did not constitute a ratification of the contract in question.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 651.]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Suit for specific performance by H. Luft against Krikor H. Arakelian and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Drew & Drew, of Fresno, for appellant. E. A. Williams, of Fresno, for respondents.

LENNON, P. J. In this action the plaintiff sought to compel the defendants to specifically perform a certain contract for the purchase and sale of real estate which had been entered into by the plaintiff with a third party named Klein, who, it appears, was doing business under the name of the "New York Real Estate & Building Company."

[1] The plaintiff's cause of action proceeded upon the theory that Klein was not the owner of the property purchased, but was the agent of the defendants in the transaction in suit. The trial court, however, found that Klein, when executing the contract in suit, was acting for himself and not as the agent of the defendants. This finding supports the judgment entered in favor of the defendants, which in turn finds ample support in the evidence adduced upon the whole case, which in substance is as follows: The defendants are husband and wife. The wife apparently had no relation to the contract in controversy, and was in no way interested in the property save as the wife of the defendant Krikor H. Arakelian. Therefore in this opinion we shall deal only with the husband, and shall refer to him as the defendant.

The real property which was the subject of the contract in suit stood of record in the name of the defendant. On January 6, 1914, the plaintiff entered into an oral agreement with Klein for the purchase of four residence lots at the price of $300 per lot, which lots were part of a tract of land situated in Fresno county, and known and designated upon an unrecorded map as "German Park." The record title to this tract at the time of the execution of the contract in suit stood in the name of the defendant. Incidentally, the New York Real Estate & Building Company contracted, at the time of the execution of this contract, with the plaintiff to erect a dwelling house on one of the purchased lots. By the terms of the sale, 10 per cent. of the purchase price was to be paid down and the balance in specified installments. The plaintiff, in accordance with the terms of the sale, paid to Klein the sum of $980, which left a balance of $100 due to Klein on the original agreement, but which it was stipulated was not to be paid to Klein until the dwelling house had been erected. When the sum of $980 had been paid to Klein, he absconded without completing his contract, and the plaintiff thereupon tendered the balance of $100 due to the wife of the defendant. At the time the contract was entered into, Klein, under the name of the "New York Real Estate & Building Company," was advertising the German Park property for sale, and the plaintiff never knew of the defendant's connection with the property and never had any dealings with him. The defendant, however, had knowledge of the fact that Klein was advertising the property for sale, and that he was doing so by reference to the unrecorded German Park map. But prior to the making of the contract of purchase and sale with the plaintiff Klein had entered into a conditional contract of purchase and sale with the defendant of the entire tract of land comprising the so-called German Park at the agreed price of $2,000 per acre, or $37,500, payable under certain conditions and in specified installments. This conditional contract of sale provided, among other things, that if, while complying with the conditions of the contract concerning the payment of the purchase price, Klein sold any lots in the tract, the defendant would execute to him a deed to said lots. This contract was not recorded at the time the plaintiff entered into his contract with Klein. When Klein absconded, the defendant procured other lands belonging to him and adjoining the tract conditionally sold to Klein, to be platted and added to the map known as German Park, and at the same time caused the name of the map to be changed to that of "Ara Park."

[2] Counsel for plaintiff concedes that the evidence as above outlined would not have supported a finding that the relation of principal and agent actually existed between Klein and the defendant, but earnestly contends that it would have supported and should have compelled a finding of ostensible agency in Klein. This contention we think is disposed of by the fact that the evidence shows affirmatively that the plaintiff had no actual notice of the defendant's relation to the property, and does not show nor tend to show that the plaintiff at any time during his dealings with Klein believed or had cause to believe that the latter was acting or purporting to act as the agent for the defendant; and it is well settled that he who seeks to charge a supposed principal with the obligations resulting from the acts and conduct of an alleged ostensible agent must show that he himself was cognizant of the facts which gave color to the alleged ostensible agency, and caused him to believe that the person he dealt with was acting in the capacity of an agent rather than as a principal. Civ. Code, § 2300; Harris v. San Diego Flume Co., 87 Cal. 526, 25 Pac. 758; Rodgers v. Peckham, 120 Cal. 238, 52 Pac. 483; Gosliner v. Grangers' Bank of California, 124 Cal. 225, 56 Pac. 1029.

[3] The fact that the defendant, while repudiating the acts and conduct of Klein, offered in one or two instances to assume some of the smaller and comparatively inconsequential obligations incurred by Klein under

similar contracts, did not constitute a ratification of the plaintiff's contract with Klein.

The judgment appealed from is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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33 Cal. App. 473

WORTHLEY v. WORTHLEY. (Civ. 1651.)

(District Court of Appeal, Second District, California. April 19, 1917.)

1. QUIETING TITLE ⚷47(2)—FINDINGS—CONSISTENCY—"EXECUTED."

In suit to quiet title, findings that plaintiff "executed her deed," etc., and that it was understood said deed should not be delivered until her last illness, are inconsistent, since the term "executed" includes delivery under the direct provisions of Code Civ. Proc. § 1933.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 97.

For other definitions, see Words and Phrases, First and Second Series, Execute.]

2. DEEDS ⚷211(3)—VALIDITY—FRAUD.

Plaintiff's testimony that she delivered a deed to her son because she was ill and afraid of him, her admission that he was to have the property after her death, and evidence that defendant son had contributed toward the property's purchase price, do not sustain a finding that the deed was procured by the son's false representations that plaintiff should have a life estate, and not lose her interest in the property.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 644, 645.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Suit to quiet title by Charlotte Worthley against H. E. Worthley. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

E. Hardesty, of San Francisco, for appellant. George S. Richardson, of Los Angeles, for respondent.

JAMES, J. Appeal by the defendant from a judgment in favor of the plaintiff, and from an order denying a motion for new trial. This is an action by plaintiff against the defendant, who is her son, by which a decree was sought quieting a fee title in the plaintiff as to a certain lot of land located in the city of Los Angeles. It was alleged that plaintiff, in March, 1911, made a deed whereby it was proposed to pass title to her son, but that it was understood that the deed was not to be delivered until the plaintiff's last sickness. It was further alleged that in October, 1912, the defendant demanded of the plaintiff that she deliver the deed to him, and that in order to induce her to make delivery he "offered and represented that she would have a life estate in said property, and that she would not lose her interest in said property." The further allegation appears to the effect that the representations made were false and fraudulent and made with the intent and for the purpose of defrauding the plaintiff; and that in June, 1913, contrary to the representations so made, the defendant ejected the plaintiff from the dwelling house on the premises and compelled her "to live in a shed on the rear of said premises"; "that said defendant now threatens to sell and transfer said property to another, and thereby deprive plaintiff of her right in said property." The court made findings in accordance with the allegations of the complaint as to the circumstances under which the delivery of the deed was made, and further determined that the plaintiff held a life estate in the property.

[1] The finding, which follows one of the allegations of the complaint, that in the month of March, 1911, the plaintiff "executed her deed in the above-described property to the defendant H. E. Worthley," is inconsistent with the further finding, which also agrees with the allegation in that portion of the complaint referred to, "that it was understood and agreed between said parties that the said deed should not be delivered until plaintiff's last sickness." The term "executed" includes delivery. Section 1933, Code Civ. Proc.

[2] There was no testimony given by the plaintiff which is sufficient to support the finding that the deed was obtained by reason of the alleged false representations and promises. The plaintiff testified that, at the time she delivered the deed (which had been prepared some time prior thereto), the defendant, her son, demanded the deed of her, said that he would have it, that she was ill at the time and afraid of him, and that when she delivered it she was "afraid" that she would not have her home left to her. The trial judge, as shown by the reporter's transcript, appreciated this condition of the evidence, when he said, addressing plaintiff's counsel:

> "* * * She says she was afraid of him. If she had confidence in him, she would never be afraid of him."

Under the evidence, it was quite clear that a considerable part of the purchase price of the lot had been contributed by the defendant, although the title to same had been taken in the name of his mother. The mother admitted that the intention was that her son should have the property at her demise, but that she was to have "a home" while she lived. The circumstances of the case were hardly such as would indicate that the mother was making a gift of the entire estate to her son, and we think the circumstances were not such as to impress upon the transaction the presumption of fraud. Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910. The chief obstacle which we find in the way of affirming the judgment is that the evidence, as addressed to the main charge of fraud relied upon, does not support the allegations in the complaint nor the findings made by the court.

We have not had the aid of any briefs from either party, but from an examination of the record we are convinced that a new trial should be had.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

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33 Cal. App. 493

PEOPLE v. NOLAN. (Cr. 378.)

(District Court of Appeal, Third District, California. April 21, 1917.)

STIPULATIONS ⟹14(4)—CONSTRUCTION.

In prosecution for selling alcoholic liquor, a stipulation that the territory involved "is no-license territory" refers to the date charged in the information, in view of conversation between court and counsel, although the trial court mentioned another date as that covered by the stipulation.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 27.]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

M. D. Nolan was convicted of selling liquor in no-license territory, and he appeals. Affirmed.

J. C. Hurley, of Albion, and Lilburn I. Gibson, of Ukiah, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was convicted of the crime of selling alcoholic liquor in no-license territory, upon indictment found by the grand jury of Mendocino county. He appeals from the judgment of conviction and from the order denying his motion for a new trial. The charging part of the indictment is that defendant, "within the boundaries of the Fourth supervisor district of the said county of Mendocino, and outside the corporate limits of any city or town," at the hour of 8 o'clock p. m. on April 17, 1916, "did then and there willfully and unlawfully sell, furnish and distribute alcoholic liquor to one Emil Baroni, said supervisor district being then and there no-license territory under the law of the state of California, contrary," etc.

The prosecution introduced several witnesses whose testimony tended to establish the truth of the charge and, when about to close for the people, the following appears in the record:

> "Mr. McCowen (after consulting with attorneys for defendant): It is stipulated that Mendocino City is in the Fourth supervisor district, that it is not an incorporated town, and that the Fourth supervisor district is no-license territory. Mr. Gibson (attorney for defendant): Yes."

The only point now made on the appeal is that there is no evidence showing that the said district was no-license territory on April 17, 1916, the date of the alleged sale of liquor as charged in the indictment. The indictment was found on May 6, 1916, and the trial took place October 10, 1916, at which time the above stipulation was made.

Defendant cites People v. Cavallini, 29 Cal. App. 526, 156 Pac. 73. In that case the point was raised on demurrer to the information that it failed to allege the existence of the ordinance at the time the selling of the liquor was alleged to have occurred.

In his opening statement to the jury the district attorney, addressing himself to defendant's attorney, said:

> "I suppose, Mr. Schino, you will admit that the Fourth supervisor district on the date alleged in the information was 'dry territory'? Mr. Schino: No, sir; if your honor please, we desire to make a formal objection in that respect."

After a colloquy between the district attorney, defendant's attorney, and the judge, the following appears:

> "The Court: Then, gentlemen of the jury, it is stipulated by and between respective counsel representing the people and the defendant that the Fourth supervisor district of Madera county is 'no-license' territory. That will be taken by you as a fact in the case. Mr. Schino: That is, on the 30th day of September, 1914. The Court: Yes, I have no reference to anything else except as to the date of this information, that is, on the 30th of September, 1914, the Fourth supervisor district of the county of Madera was in 'no-license territory.'"

It was in view of this state of the record that the following was said by the court in reviewing the case:

> "The stipulation went no further than an admission that, on September 30, 1914, the district was 'no-license territory,' and this admission was subject to defendant's objection that evidence showing a violation of the local option law was not admissible, for the reason that the information failed to state a public offense."

It was held, correctly, we still think, that it was necessary to allege in the information that at the time the offense was committed the district was "no-license" territory. The averment in the present indictment meets that requirement.

The only question, then, is: Can we say that the stipulation was intended to refer to the averment in the indictment that at the time the offense was committed the district mentioned was "no-license territory"?

We must assume that the district attorney knew that it was necessary to establish the truth of the material averments of the indictment and that one of such averments was the existence of the no-license ordinance at the time of the alleged offense. He made his proofs as to the alleged violation of the ordinance by defendant, and then turned to defendant's attorney to counsel with him as to proving the remaining facts and was met by the stipulation.

> "The rules applicable to the construction of contracts generally govern the courts in their interpretation of stipulations, and thus stipulations will receive a reasonable construction with a view to effecting the intent of the parties." 36 Cyc. p. 1291.

"A construction will be placed upon the stipulation which will render it reasonable and just to both parties rather than unreasonable and unjust; and a construction will be avoided, if possible, which will make the stipulation frivolous or ineffectual." 20 Am. & Eng. Ency. Plead. p. 658.

The stipulation, as interpreted by defendant, might not make it frivolous, but would make it wholly ineffectual for any purpose.

> "Where the language of one party may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the other party." Id., p. 660.

And this is the rule stated in section 1649 of the Civil Code. It is also stated, among other rules, that the stipulation is to be interpreted with reference to its subject-matter, in the light of the surrounding circumstances, including the state of the pleadings, the allegations therein, and the attitude of the parties in respect of the issues. 20 Am. & Eng. Ency. of Plead. p. 659. There were but two principal issues presented: First, did defendant sell intoxicating liquor in the Fourth supervisor district of said county as charged? Second, was the district at that time no-license territory? Proof was made of the first issue, and we think it reasonable to assume that the parties understood the stipulation to cover the second issue. It can hardly be doubted that the district attorney had reason to suppose it was so understood by defendant's attorney.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(33 Cal. App. 482)

FRANCIS v. INDEPENDENT ELECTRICAL SUPPLY CO. (Civ. 1914.)

(District Court of Appeal, Second District, California. April 20, 1917.)

1. APPEAL AND ERROR 🔑918(2)—RECORD—PRESUMPTION—DISCRETION—AMENDMENT OF PLEADING.

Application at close of plaintiff's case for leave to amend answer, to allege payment, without showing of fact excusing absence of the allegation, not being accompanied by affidavits or other matter of record from which reasonable probability of sustaining the defense can be inferred, it will be presumed that the court in denying it properly exercised its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3711.]

2. CORPORATIONS 🔑432(12)—AUTHORITY OF AGENT—ASSIGNMENT OF NOTE—EVIDENCE.

Testimony of the person who assigned to plaintiff defendant's note to a corporation that he was its sales agent, and as such had control and possession of its books of account and evidences of indebtedness and all other matters in connection with its business in the southern end of the state, supports the inference that he was authorized to make the assignment, though it appears another was president and general manager.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1737, 1743, 1762.]

3. CORPORATIONS 🔑398(1)—AUTHORITY OF AGENTS—GENERAL MANAGER AND DEPARTMENT MANAGER.

A corporation, though having a general manager, can vest in another agent the powers of a general manager representing it in the conduct of some department of its business; he standing in the same relation to the matters of his department as does the general manager to its general affairs.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1588, 1602, 1605.]

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Ira J. Francis against the Independent Electrical Supply Company. From an adverse judgment and order, defendant appeals. Affirmed.

Hyman Schwartz, of Los Angeles (Isaac Pacht, of Los Angeles, of counsel), for appellant. Oscar C. Mueller and Alfred Wright, both of Los Angeles (Wm. W. Lovett, Jr., of Los Angeles, of counsel), for respondent.

CONREY, P. J. Appeal by the defendant from the judgment and from an order denying its motion for a new trial.

[1] The action is upon a promissory note made by the defendant to a corporation; the complaint alleging that before the commencement of the action the note was assigned by the payee to the plaintiff. The answer to the complaint did not deny that the note was unpaid. After all of the plaintiff's evidence had been introduced, the defendant for the first time applied for permission to allege payment. This request was denied. It is now claimed that the court's refusal to allow the proposed amendment was an abuse of discretion by reason whereof the defendant is entitled to a new trial. No facts were shown excusing the defendant's failure to put an allegation of payment into its original answer. The application for leave to amend was not accompanied by affidavits nor by any other matter of record from which one can infer a reasonable probability that the defense could have been sustained. Therefore we will presume that the court properly exercised its discretion in that matter.

[2, 3] The only other ground of appeal urged on behalf of appellant is that the evidence is insufficient to support the finding that the note had been assigned and transferred to the plaintiff. The point made is that the evidence failed to show that the assignment was made by a person who had been given the authority or had been in the habit of signing contracts on behalf of his company or indorsing and assigning its negotiable paper. The testimony of the agent who made the assignment on behalf of the corporation was as follows:

> "I am sales agent of John A. Roeblings' Sons Company of California, and as sales agent have control of and possession of all books of account and the evidences of indebtedness and all other

matters in connection with the business of that corporation in the southern end of California."

It further appeared that another person was president and general manager of the corporation. We think that this evidence was sufficient to support the inference that the agent was authorized to make the assignment. The fact that a corporation has a general manager, whose supervision extends to all of its business, does not exclude its right to vest in another agent the powers of a general manager representing the corporation in the conduct of some department of its business. The superintendent or manager of such department stands in the same relation to the matters pertaining to his department as does the general superintendent or general manager to the general affairs of the company. For authorities to this effect, see note in 38 L. R. A. (N. S.) 1135.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

33 Cal. App. 467

PEOPLE v. STOCKTON. (Cr. 537.)

(District Court of Appeal, Second District, California. April 19, 1917. Rehearing Denied by Supreme Court June 18, 1917.)

1. HOMICIDE 🔑234(1) — EVIDENCE — SUFFICIENCY.

In a homicide case, evidence *held* to warrant a conviction.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 482.]

2. CRIMINAL LAW 🔑1169(12)—APPEAL—HARMLESS ERROR.

In a homicide case, error in the admission over defendant's objection of a purported confession made by the defendant to the district attorney was cured, when the defendant voluntarily became a witness in his own behalf, and as such witness testified that he had heard his confession read to the court, and that the facts were therein truly stated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3138.]

3. HOMICIDE 🔑234(8) — EVIDENCE—WEIGHT.

In a homicide case, the fact that when defendant was arrested, soon after the shooting took place, he had on his person a revolver in which two of the cartridges had been discharged, although corroborative evidence of defendant's testimony that he fired only two shots, is not necessarily conclusive of the question.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 489.]

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

R. L. Stockton was convicted of murder in the first degree, and from the judgment, and order denying his motion for a new trial, he appeals. Affirmed.

W. C. Dorris, of Bakersfield, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

CONREY, P. J. Defendant was convicted of the crime of murder in the first degree and sentenced to imprisonment for life. He appeals from the judgment and from an order denying his motion for a new trial.

The defendant, having had a quarrel with one Brown, purchased a revolver and went out to look for Brown, whom he found in a saloon in the city of Bakersfield. One Leland Mull was standing at the bar next to Brown. The defendant fired in their direction, intending to hit Brown, but instead thereof hit and killed Mull.

[1] It is urged by defendant's counsel in support of the appeal that the evidence in this case was not sufficient to warrant a conviction, because (1) the defendant shot twice, while there is evidence that at least four shots were fired; (2) when he was shot, the deceased fell in the direction opposite to that in which he would have fallen, had the defendant fired the fatal shot. There is evidence from which the jury might have believed that at the time of the killing four shots were fired; but there is no testimony that at that time and place any shooting was done by any person other than the defendant. The evidence clearly and convincingly tends to show that Mull was killed by the first shot. The evidence does not conclusively show that the deceased fell in a direction opposite to that in which he would have fallen had the defendant fired the fatal shot. A reading of the entire testimony convinces us that the evidence is amply sufficient to warrant the conviction.

[2] The next point urged is that the court erred in admitting over defendant's objection a purported confession made by the defendant; also that the purported confession contained statements of facts not in the nature of a confession of guilt, and that the defendant was compelled to be a witness against himself. The so-called confession consisted of questions propounded by the district attorney and answers made by the defendant. James Price, a court reporter, was present and took down the statements in shorthand and afterwards transcribed his notes. At the trial he testified to these facts and identified the document, stating that it was a correct transcript of the statement as made by the defendant, but did not directly testify to the contents thereof. It was then read to the jury by the district attorney. It is unnecessary to discuss the legal propositions presented by counsel, or the authorities in support thereof, under which he claims that this evidence was wrongfully received. The defendant voluntarily became a witness in his own behalf, and as such witness testified that he had heard his confession read to the court, and that the facts were therein truly stated. Assuming, without deciding, that there was error in the court's original ruling upon the objections, it is, as to any claim of prejudicial error, fully cured by this testimony of the defendant. We fail to find any-

thing in the record to support the claim that defendant was compelled to testify against himself.

[3] Finally, it is claimed that the court erred in refusing to allow testimony to prove that shots were fired, other than two which were fired by the defendant. This point relates to questions asked of certain witnesses for the purpose of showing that a shot fired by the defendant after he stepped out of the saloon did not go through the door, but struck against a baseboard next to the bootblack stand on the outside of the building. There was no witness who saw the shooting that was done outside of the building, other than the defendant himself. He testified that he fired one shot while in the saloon, and that after he backed out of the door of the saloon he shot again, but not towards the saloon. "Q. Where did you shoot when you were outside, Mr. Stockton? A. Well, sir; I shot on the sidewalk, or near the bootblack stand." No testimony was introduced directly contradicting the statement that defendant fired a shot toward the bootblack stand. In accordance with a request made by the defendant, the jury was permitted to view the entire premises, both inside and outside of the saloon. They examined the bullet hole in the door, which according to the prosecution's theory was caused by a shot fired by the defendant after he backed out of the saloon, and which according to the defendant's theory was caused by a shot fired by some other person. They also examined the place where the defendant claimed that the second shot fired by him struck the bootblack stand. When the defendant was arrested, soon after the shooting took place, he had on his person a revolver in which two of the cartridges had been discharged. While this fact may be taken as corroboration of the defendant's testimony that he fired only two shots, it is not necessarily conclusive of the question. Neither is this matter of prime importance in determining the case against the defendant, in view of the fact, to which we have referred, that the direct testimony points most strongly to the fact that Mull was killed by the first of the shots that were fired.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

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34 Cal. App. 506

HILLYER et al. v. HYNES. (Civ. 2037.)

(District Court of Appeal, First District, California. April 24, 1917.)

1. TRUSTS 🔑96 — CONSTRUCTIVE TRUST — WHAT CONSTITUTES.

A husband's promise, upon receiving a deed from his dying wife, that he would in turn execute a similar deed to her niece to be delivered upon his death, impresses the property with a constructive trust in favor of the niece.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 148.]

2. LIMITATION OF ACTIONS 🔑102(8)—COMPUTATION—WHEN STATUTE RUNS.

Code Civ. Proc. § 343, providing a four-year limitation period for actions not otherwise provided for, and applying to constructive trusts, does not run until the beneficiary received notice of the trust's creation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 502.]

3. LIMITATION OF ACTIONS 🔑19(1)—RECOVERY OF REAL PROPERTY.

An action to enforce a husband's promise, made upon receiving a deed from his dying wife, to execute a similar deed to her niece to be delivered upon his death, is one to recover real property governed by the five-year limitation period prescribed by Code Civ. Proc. § 318.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 73, 80, 84, 85.]

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Annie Hillyer and others against W. J. Hynes, as administrator of Henry Romoser, deceased. From a judgment for defendant and an order denying a new trial, plaintiffs appeal. Reversed.

Stafford & Stafford, of San Francisco, and W. M. Stafford, for appellants. Cullinan & Hickey, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal by the plaintiffs from a judgment in favor of the defendant and from an order denying their motion for a new trial.

The complaint alleges that on the 27th day of September, 1909, Anna Flanigan Romoser was the owner of the real property here in controversy; that shortly before that date, being severely ill and not expecting to live, she entered into an arrangement with her husband, Henry Romoser, whereby she was to execute and deliver to him a deed of gift of said real property, and he in turn was to execute a like deed conveying the property to Catherine Meyers, a niece of Mrs. Romoser's former husband, and place the same in escrow, to be delivered upon his death; that accordingly Mrs. Romoser executed her deed to Henry Romoser, and that he continued to own the property to the time of his death; that, while he made and signed the promised deed of gift to said niece, he never actually delivered it to her nor in escrow for her, without, however, ever repudiating his agreement so to do. This failure of Romoser to keep his agreement is charged in the complaint as fraudulent; and it then proceeds to allege that he died intestate on January 24, 1914, and that the defendant is the administrator of his estate; that Catherine Meyers died intestate on December 28, 1910, leaving as her only heirs the plaintiffs. The prayer of the complaint in part is that the defendant be declared to hold the property in trust for plantiffs, and that he be required to convey the property to them, and that their title be quieted as against said defendant, administrator of the estate of Henry Romoser.

All the material allegations of the complaint are denied in the answer; and in addition the defendant alleges that the plaintiffs' cause of action is barred by subdivision 4 of section 338 of the Code of Civil Procedure, by subdivision 1 of section 339, and by section 343 of said Code.

In addition to finding generally for the defendant, the trial court also found that plaintiffs' cause of action was barred by the provisions of subdivision 4 of section 338, Code of Civil Procedure, as pleaded.

From the evidence it appears without dispute that Mrs. Romoser died in March, 1910; that on September 27, 1909, being very ill, she sent for her attorney, and informed him that she desired to make a conveyance of the property in controversy; that, as she had acquired it from her first husband, Lawrence Flanigan, she thought it only fair to give the same to Mrs. Catherine Meyers, a niece and only living relative of said Lawrence Flanigan; but that she also believed it was her duty to her present husband, who was old and without income, to reserve for him a life estate in the property. She directed her attorney to draw a deed which would carry into effect these desires. It was accordingly drawn, and when presented to her for execution it transpired that since giving the above instructions she had been advised by one Father Casey that it would be better for her to make a deed of gift of the property to Henry Romoser, and have him make a like deed to Mrs. Meyers, placing the latter in escrow with Father Casey, to be delivered to the grantee upon Henry Romoser's death. Her attorney expressed his disapproval of this method of carrying out her desires; nevertheless when she learned that it was legally unobjectionable she instructed him to pursue it. Accordingly a deed of gift conveying the property from Mrs. Romoser to her husband was made and delivered to him with the distinct understanding and promise by Henry Romoser that he would make a deed to the property in favor of Mrs. Meyers. At the same time the attorney requested Romoser to call at his office for the purpose of executing this deed. This he did about a month later, but no delivery of it was made either to the grantee or in escrow for her, and the record does not disclose what became of it.

Henry Romoser died on January 2, 1914, predeceased by Mrs. Meyers, without having delivered, either to her or in escrow for her, the promised deed.

[1] Being husband and wife, Henry Romoser and Anna Flanigan Romoser occupied a confidential relation towards each other; and, whatever may have been his intention at the time Mrs. Romoser made said conveyance of property to him, he received it upon his express oral promise that he would in turn execute a deed to Mrs. Meyers and place the same in escrow. His failure to do so was a betrayal of her confidence; it was a violation of trust, and, under the authorities in this state, impressed the property with a constructive trust in favor of Catherine Meyers or her heirs which a court of equity will enforce. Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Dimond v. Sanderson, 103 Cal. 97, 102, 37 Pac. 189.

In the former case the court decided two propositions: (a) If a party, by means of a parol promise made without any intention of performing it, obtains an absolute deed without consideration, it is a case of actual fraud; (b) if a party by means of such parol promise to reconvey obtains an absolute deed to real property without consideration from one who stands in a confidential relation, the violation of the promise is constructive fraud, even if at the time it was made there was an intention to perform it.

In the case of Jones v. Jones, 140 Cal. 587, 590, 74 Pac. 143, 144, the court said:

> "Where a grantee and grantor of land stand in fiduciary relations to each other—as husband and wife, for example—and the deed is executed without consideration other than the promise, express or implied, of the grantee to hold the land for the purpose of carrying out an express trust in favor of the grantor, which is not put in writing, and is therefore invalid as an express trust in land, the confidence which induced the transaction having * * * presumably arisen from the fiduciary relations, the violation by the trustee of the terms of the parol agreement as to the express trust constitutes a constructive fraud, makes the grantee an involuntary trustee of the land for the use of the grantor, and gives the grantor the right to have the deed declared void and to a decree that the land is the property of the grantor, notwithstanding the execution of the deed."

In the case of Cooney v. Glynn, 157 Cal. 583, 108 Pac. 506, it is said:

> "It has been established by a number of decisions in this state that, where confidential relations exist between two parties, and one of them executes a conveyance of real estate to the other, upon a parol promise by the other that he will hold it for the benefit of the grantor, or for the benefit of some third person in whom the grantor is interested, there being no other consideration for the conveyance, a trust arises by operation of law in favor of the grantor, or in favor of the third person, for whom the property is to be held. It is the violation of the parol promise which constitutes the fraud upon which the trust arises."

The evidence in the case at bar is not only uncontradicted, but it is clear and convincing that Henry Romoser accepted the conveyance of the property from his wife with the distinct oral agreement that he would in turn make a conveyance of the same to Catherine Meyers and place the deed in escrow, to be delivered to her upon his death, and the finding to the contrary therefore cannot be sustained.

The only other point in the case worthy of more than passing notice is the one as to the statute of limitations. As before stated, this action was commenced within five years, but after the expiration of four years, after the deed was made and delivered by Mrs. Romoser to her husband, at which time the latter ought to have taken steps to carry out his part of the agreement by which he acquired an interest in the property. The plaintiffs neither in the complaint nor in the evidence introduced by them attempted to bring their case within the provisions of subdivision 4 of section 338, Code of Civil Procedure, which provides that an action grounded in fraud or mistake must be brought within three years after the discovery by the aggrieved party of the facts constituting the fraud or mistake.

[2] And, assuming that this is an action to declare and enforce a constructive trust (Jones v. Jones, 140 Cal. 590, 74 Pac. 143), and that it is consequently, as to the period within which it may be brought, governed by section 343 of said Code (Norton v. Bassett, 154 Cal. 411, 97 Pac. 894, 129 Am. St. Rep. 162), to the effect that an action for relief not otherwise provided for must be commenced within four years after the cause of action shall have accrued, still we think that the statute has not operated in this case, for the reason that the time could not be held to have commenced to run until Catherine Meyers had notice of the transaction, and it appears from the record that she had no such notice until about March 4, 1910, just after the death of Mrs. Romoser, at which time the surviving husband in effect recognized the trust, and stated that upon his death the property was to go to her.

[3] We think, however, that while the main ground of the action is constructive fraud, and that one of its purposes is to enforce a trust, in its final purpose it is an action to recover the title and possession of real property, and is therefore subject to the provisions of section 318, Code of Civil Procedure. Accordingly the five-year period prescribed by that section is the only limitation which can be applied in bar of plaintiffs' cause of action. Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820; Bradley Bros. v. Bradley, 20 Cal. App. 1, 6, 127 Pac. 1044; 25 Cyc. 1026. That section provides that no action for the recovery of real property or for the recovery of the possession thereof can be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question within five years before the commencement of the action; and while it appears that neither the plaintiffs nor any grantor or ancestor of theirs was ever seised or possessed of the property, we think that under the circumstances of this case Henry Romoser may well be considered as the predecessor of the plaintiffs within the meaning of the section, since, if he had carried out the terms of the understanding by virtue of which he acquired an estate in the property, he would have conveyed it to the plaintiffs or their intestate, and thus have been literally their predecessor in interest. It is the estate which in equity passed to the plaintiffs upon the death of Henry Romoser which they seek by this action to recover.

There is nothing in the point that the heirs of Henry Romoser should have been joined as parties defendant to the action; for it appears that he had no heirs.

The judgment and order are reversed.

We concur: LENNON, P. J.; RICHARDS, J.

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33 Cal. App. 454

PEOPLE v. WAKAO et al. (Cr. 300.)

(District Court of Appeal, Third District, California. April 18, 1917.)

1. LIBEL AND SLANDER 🔑152(1)—CRIMINAL PROSECUTION — INFORMATION—JURISDICTION —CONSTITUTIONAL PROVISION—"VENUE."

Under Const. art. 1, § 9, providing that in all criminal prosecutions for libels, indictments found or information laid, shall be tried in the county where such newspapers have their publication office or in the county where the party alleged to be libeled resided at the time of the alleged publication, etc., in a prosecution for libel, an information laid in Sacramento county charging libel of the prosecuting witness in a newspaper printed and published in Fresno county which failed to allege that the prosecuting witness resided in Sacramento county was insufficient to give the court jurisdiction of the action, since, as "venue" means place of trial, and "place of trial" means the jurisdiction of the court, which in the instant case is limited by the Constitution to one of the two counties mentioned, it is essential that the particular facts upon which it depends should be alleged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 417, 420, 423.

For other definitions, see Words and Phrases, First and Second Series, Venue.]

2. LIBEL AND SLANDER 🔑151—EVIDENCE—PRESUMPTIONS.

In a prosecution for criminal libel, the district attorney is presumed to know the residence of the complaining witness, and the defendant is not charged with such knowledge.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 415.]

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

E. K. Wakao and M. Ishihashi were convicted of criminal libel, and from the judgment and from an order denying their motion for a new trial, they appeal. Reversed.

R. P. Henshall, of San Francisco, and R. B. McMillan, of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. This is an action in which defendants were accused, by information laid in Sacramento county, of the crime of libel, as follows:

"That the said E. K. Wakao and M. Ishihashi on the —— day of December, 1915, in the county of Sacramento, in the said state of California, and before the filing of this information, did then and there willfully, unlawfully, and maliciously and with intent thereby to injury (injure?) and defame one Risaburo Hattori and to impeach his honesty and integrity and virtue and reputation and to expose him, the said Risaburo Hattori, to public hatred and contempt and ridicule, did compose, print, and publish in a certain newspaper called the Central California

Times, printed and published in the county of Fresno, state of California, and circulated therein and which said newspaper was then and there circulated and published in the county of Sacramento, state of California, certain false, scandalous, malicious, defamatory, and libelous words of and concerning the said Risaburo Hattori, in the Japanese language, as follows, to-wit: [Then follows a photographic copy of the newspaper article and its alleged translation.] Contrary to the form, force, and effect of the statute," etc.

The jury returned a verdict of guilty as charged. Defendants moved for a new trial on statutory grounds, and also moved in arrest of judgment on the ground that the court "has not and never had any jurisdiction of the offense charged in the information." The motions were denied, whereupon defendants were sentenced to imprisonment for the period of one year each in the county jail. They appeal from the judgment and order denying their motion for a new trial.

[1] The principal point now urged for a reversal of the judgment is that the court was without jurisdiction, and the contention is based upon the failure of the information to allege that Hattori, the person alleged to have been libeled, resided in Sacramento county at the time said newspaper was circulated therein.

Section 9, art. 1, of the Constitution of the state, provides:

> That in all criminal prosecutions for libels, "indictments found, or information laid, for publications in newspapers, shall be tried in the county where such newspapers have their publication office or in the county where the party alleged to be libeled resided at the time of the alleged publication, unless the place of trial shall be changed for good cause."

The interpretation put upon this provision of the Constitution by the Attorney General is that "it was intended to give defendant a defense in the event the offense was prosecuted in any other county than Fresno or Sacramento"; that it "does not prescribe a rule of pleading, but merely shows a rule of defense," and hence it was not necessary to allege in the information that Hattori, the person libeled, was at the time the libel was circulated in Sacramento county a resident therein. If this be true, it would be equally true that, had the information been laid in Fresno county, it would not have been necessary to allege that the newspaper mentioned had its "publication office" in that county. That is to say, the information, charging the publication of the offensive article to have been made in a newspaper in the county where the information is laid, need not state that the newspaper had its publication office in that county; nor, if the information is laid in another county, need it state that the complainant resided in such county. We cannot assent that an information constructed on such interpretation of the Constitution would be sufficient.

Under the Constitution of 1849 such prosecutions could be made in any county in the state where the newspaper was circulated. It was said in Older v. Superior Court, 157 Cal. 770, 109 Pac. 478:

> "The prior evil especially intended to be remedied was the danger of prosecution in any county where the libel was circulated, with power to select any judge in the state. This evil was remedied by limiting the venue to two counties only, that of the place of publication and that of the residence of the complainant."

Venue means place of trial, and place of trial means the jurisdiction of the court, which in the present case is limited by the Constitution to one of the two counties mentioned therein. The libelous article may be circulated in every other county in the state, but the superior court has no jurisdiction to bring the offender to trial in any of these counties, for the reason that the Constitution has declared that jurisdiction resides only in the two counties specified. It seems to us that to confer this jurisdiction it is essential that the particular facts upon which it depends should be alleged.

It is a well-settled principle of law that the information or indictment must allege that the offense was committed within the jurisdiction of the court (People v. Wang, 92 Cal. 277, 281, 28 Pac. 270); and this is the Code rule (Pen. Code, § 959). That is, the information must allege facts from which jurisdiction will be made to appear. In the present case the jurisdiction depended upon the fact that the party libeled resided in Sacramento county, and this fact should have been alleged in the information.

In Henderson v. Palmer Oil Co., 29 Cal. App. 451, 159 Pac. 65, it was held that jurisdiction to appoint a receiver, under section 565 of the Code of Civil Procedure, upon the dissolution of a corporation, resides alone in the county where the corporation carries on its business, or has its principal place of business, and that where an application based upon a verified complaint which failed to show that the county in which the action was brought was the county in which the corporation had its principal place of business or carried on its business, the court was without jurisdiction to make the appointment.

The rule of pleading in criminal law should not be less exacting. It was held in People v. Cohen, 118 Cal. 74, 50 Pac. 20, that in an indictment for perjury it must be shown therein that the violated oath was administered by competent authority. In that case it was alleged that the oath was taken before a judge of the superior court sitting as a magistrate, and was administered by the acting deputy county clerk. The judgment of conviction was reversed on the ground that the indictment failed to show competent authority to administer the oath for the reason that the judge sitting as a magistrate alone had such authority. The court said:

> "But, assuming that the magistrate may competently employ a clerk or other officer to perform this function, it is obvious that it should, to show authority in such officer, be alleged that the act was done at the direction of the magistrate. There is no such averment here except

it be by mere inference or legal conclusion, and that is not sufficient. The fact being material, it must be directly averred to satisfy the rules of pleading, even in a civil action, and a fortiori in a criminal pleading."

In People v. Terrill, 127 Cal. 99, 100, 59 Pac. 836, 837, the court said:

> "It is an elementary principal of criminal law that the indictment or information must state that a crime has been committed, either by direct and positive averment in the language of the statute, or its equivalent, or by stating facts which show that such crime has been committed. In no case can the indictment be aided by imagination or presumption. The presumptions are all in favor of innocence, and if the facts stated may or may not constitute a crime the presumption is that no crime is charged."

The rule was much discussed in People v. Schmitz, 7 Cal. App. 330, 365, 94 Pac. 407, 419, 15 L. R. A. (N. S.) 717, and see opinion of supreme court on petition for hearing in that court. Not only is it essential that a crime be charged, but it must also appear that the court has jurisdiction to hear and determine the case.

There are three cases reported in which the prosecution was at the residence of the complainant (In re Kowalsky, 73 Cal. 124, 14 Pac. 399; People v. Miller, 122 Cal. 84, 54 Pac. 523; Older v. Superior Court, 157 Cal. 770, 109 Pac. 478); and in each case the residence of the party libeled was directly alleged to be in the county where the information was laid. The question at bar therefore was not involved. The Kowalsky and Older Cases are cited by the Attorney General, but we find nothing in them to support his contention.

According to the theory of the prosecution, the information would be sufficient if silent as to the residence of the prosecuting witness, or the place where the newspaper has its publication office. Suppose an information thus framed were laid in a county where the publication office was not situated and where the complainant did not reside. Upon habeas corpus the defendant could not find relief against the warrant of arrest, since, on the Attorney General's theory, the information would be sufficient on its face. Defendant would be compelled to appear and answer or demur. His demurrer would not avail him for the same reason that his discharge on habeas corpus must be denied. To do the only thing open to him he must plead not guilty. Obviously, to make out a case where the information is laid in a county other than that in which the newspaper has its publication office, the prosecution must prove that the complainant resided in such county at the time the alleged newspaper article was circulated therein. It is not for the defendant to make negative proof otherwise than to controvert such fact. The fact is to be established by the prosecution as an essential element of the power of the court to try the case. Otherwise the newspaper publisher is thrown back into the midst of the evil from the consequences of which the Constitution was intended to protect him. True, he could not, in the case supposed, be legally convicted, but he could be put to the expense and annoyance of submitting to compulsory appearance in a county remote from the place of publication or remote from the residence of the complainant, whereas, if defendants' position be sound, as we think it is, he can have present and speedy relief by habeas corpus, and the prosecution would be forced to seek the forum which the Constitution has provided.

[2] The district attorney is presumed to know the residence of the complaining witness. The defendant is not charged with such knowledge. The fact, as we have said, is essential to jurisdiction. Upon every principle of pleading this jurisdictional fact should be stated in the information.

Other questions are presented by the record, but, as they may not arise, should there be a new trial, we refrain from noticing them.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

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33 Cal. App. 530

PEOPLE v. LOPEZ. (Cr. 540.)

(District Court of Appeal, Second District, California. April 26, 1917.)

1. Criminal Law 🔑1153(2)—Witnesses 🔑40(2)—Determination as to Competency—Review.

In determining competency of child witnesses, the trial court has a wide discretion which will rarely be interfered with on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3062; Witnesses, Cent. Dig. § 98.]

2. Witnesses 🔑40(2)—Determination as to Competency—Review.

Evidence *held* not to show abuse of discretion of trial judge in excluding testimony of a child witness on the ground of incapacity.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 98.]

3. Rape 🔑48(1)—Evidence—Admissibility—Complaint.

Witness could testify that prosecutrix complained of the rape to him, though not what she said, though she was under the age of consent, and want of consent was immaterial.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 67.]

4. Rape 🔑51(5) — Infant Prosecutrix—Outcry.

One accused of rape of a girl under the age of consent may be convicted without evidence that prosecutrix made an outcry.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 75.]

5. Criminal Law 🔑807(1)—Instructions—Argument.

Accused is not entitled to instructions argumentative in character.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960.]

6. CRIMINAL LAW ⚷829(1)—INSTRUCTIONS—DUPLICATION.

Refusal of requested instructions covered so far as pertinent by those given is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

7. CRIMINAL LAW ⚷829(16)—INSTRUCTIONS.

In prosecution for rape, where the court fully charged on reasonable doubt, refusal of instruction on facility of charging rape to satisfy malice was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Rehino Lopez was convicted of rape, and he appeals. Affirmed

Albert D. Trujillo and Ralph E. Swing, both of San Bernardino, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of rape. The crime charged was alleged in the information to have been committed with a daughter of the defendant aged 17 years. By the judgment of the court defendant is required to serve a term of 25 years' imprisonment. The appeal is from the judgment.

Counsel for appellant very correctly say that there was very little evidence, aside from that given by the prosecutrix herself, to be looked to in support of the conviction. However that may be, the only function this court is permitted to exercise is to determine whether there is any substantial evidence in support of the verdict, and whether errors appear by which the defendant was prejudiced in his right to a fair trial. It appears that in about June, 1916, defendant went to reside at Chino, in the county of San Bernardino, with his five children, three girls and two boys, the prosecutrix being the oldest of the girls. Defendant and his wife prior to that time had separated, and the former had the care and custody of the children, whom it appears he in a general way was educating and reasonably providing for. Lizzie Lopez, the complainant, testified that the house in which they lived at Chino contained four rooms, that her father and her sister Jennie slept in one bed in one of the rooms, and that she and her young sister Ida, aged 9, occupied a couch in another room. She testified that her father commenced to pay visits to her bed shortly after the family moved to Chino, and that this continued, once or twice a month, up to September of the same year, at about which time defendant was arrested and charged with the crime of rape. Lizzie testified that she would be asleep when her father came, and that she did not cry out, but attempted at different times to awaken her sister Ida by "pinching" the latter; that Ida was never awakened so as to observe the father in his unlawful act. She also testified that finally she had gone to the witness Dillon and complained to him of her father's conduct. On cross-examination she was asked as to whether she complained to anybody else, and she replied that she had told other people, among them a young man named Cisneros; that she had written him a letter and told him about it. Referring to the times when the defendant would visit her, she said that on those occasions she would be asleep. The following questions were asked, and these answers given in that connection:

"Q. And did you know what was going on? A. I knew afterwards. Q. You didn't know at the time though? A. Yes, sir; I knew, but after it had all happened. Q. You didn't say anything when it was happening, did you? A. Yes, sir. Q. Who did you say it to? A. To him. Q. Well, did you say anything to your sister? A. I tried to wake her up, but I never succeeded. Q. Never succeeded at any of these times? A. No, sir. Q. Would you try each time to wake her? A. Yes, sir. Q. What would you do, get hold of her and shake her? A. I pinched her. Q. You never woke her up at any time? A. No, sir."

The theory of the defense, as developed by the testimony, was that the young man Cisneros had been in the habit of calling upon the complainant during her father's absence, and that the father objected to this, and both remonstrated with the daughter and administered corporal punishment because of the visits of the young man. One of the sons, a brother of complainant, testified that upon returning home he had frequently found his sister closeted with Cisneros; that at times the doors leading to the apartment where they were, were fastened; that he had peered through a window and observed the two lying together upon a couch in a position which, according to the descriptive terms used by the witness, was a compromising one. In substance the same testimony was given by the defendant, who denied ever having had intercourse with his daughter. The mother of Lizzie Lopez, being called as a witness, gave testimony indicating that in her opinion the girl was not of truthful mind. On the other hand, several witnesses, apparently reputable people who had resided in the same community with the defendant prior to his moving to Chino, testified that they knew appellant's general reputation for honesty and integrity, and that such reputation was bad. There was some testimony from which the jury might have inferred that children of the defendant who gave testimony favorable to him had been coached by an aunt and instructed what to say, although this was denied both by these witnesses and the aunt referred to. The girl Ida was the young daughter who, according to complainant's testimony, at all times occupied her bed with her. This young girl was called to the witness stand by the defendant, but the court indicated that he did not consider that she was competent to testify. We quote in full the examination of this witness and the remarks of the court:

"The Court: What is your name? A. Ida Lopez. Q. How old are you, Ida? A. Nine. Q. Do you go to school? A. Yes, sir. Q. What grade are you in? A. Third. Q. Where do you live? A. In Juvenile. Q. Do you know what it is to testify in court? Do you know what it is to hold up your hand? A. Yes, sir. Q. What do they do that for? A. To tell the truth. Q. If you do that, and don't tell the truth, what do they do to you? A. Put you in jail. Q. Anything else? Have you ever been a witness in court before? A. No, sir. The Court: I think this witness is too young to understand the nature of an oath that she takes or the testimony that she gives. Mr. Swing (counsel for defendant): Very well then."

[1] Counsel for appellant insist that the court committed prejudicial error in refusing to allow the young girl to testify in the case. If we were permitted to judge of the competency of this witness from the printed record before us, we would perhaps find it difficult to say that she was not possessed of sufficient mentality and understanding to entitle her to testify. However, in matters of this kind the court has the duty in the exercise of sound discretion to determine that question, and it would be a rare case, indeed, where such determination would be interfered with upon appeal. People v. Craig, 111 Cal. 460, 44 Pac. 186.

[2] In this case we cannot say that the court, from his observation of the young girl as she appeared upon the witness stand and the manner in which she gave her answers, did not properly determine that the child was too young to testify understandingly and with full appreciation of the obligation of a witness' oath. It may be further observed that counsel for appellant appear to have acquiesced, without objection, in the court's suggestion, and made no request to be allowed to further examine the witness to test her competency.

[3] It is next complained that the court erred in permitting the witness Dillon to relate the substance of a conversation that he had with the complaining witness prior to the arrest of the defendant. This testimony was to show the fact that the complainant did complain about the conduct of the defendant, under the rule which permits such complaints to be offered in corroboration of the charge of the prosecutrix and to show want of consent. People v. Wilmot, 139 Cal. 103, 72 Pac. 838. The question of the consent of the prosecutrix on account of her youth becomes immaterial in this case, but it is said in the case of People v. Wilmot, supra, the fact of "complaint of injury on the part of one under the age of legal consent would in most cases be competent, and this court has in this respect made no distinction between cases where there was actual resistance and those where resistance and nonconsent were conclusively inferred by the law." We fail to find in the testimony given by Dillon any such recitation of forbidden details as would make it appear that the admission of that testimony constituted prejudicial error. The court cautioned the witness that he could only tell what the "complaint" was, and not the detail of it, and the witness replied that she came to his office in the middle of September crying, and said, "I don't want to live with my father." The court then struck out this statement, and instructed the jury to disregard it, and the witness was asked again as to what complaint was made, and replied "that she had had sexual intercourse with her father." Undoubtedly it was competent for the witness to tell what complainant complained about—that is, what the subject of her complaint was—and whether he phrased it as that she complained of a rape, or that she said, as he stated, that she had had sexual intercourse with the defendant, is not material. The one would mean no more than the other. The defendant on cross-examination was not content with the statement of the complainant of the fact of the complaint made to Dillon, but asked her directly, as we have before mentioned, as to other persons she had complained to. It was proper for the district attorney to follow this examination and bring out more fully the matter of other complaints, if any were indicated to have been made. No prejudicial misconduct can be charged to the prosecuting officer.

[4] Complaint is made because the court refused to give certain instructions offered by the defendant. Instruction No. 9 was to advise the jury that:

> If "the defendant [prosecutrix is evidently intended] made no outcry at the time of the alleged offense and did not immediately complain to others and that when she did complain she had some motive other than the prosecution of the defendant for the alleged offense, it is your duty to take all of these things into consideration in arriving at a verdict, and unless and in spite of these facts you are convinced to a moral certainty and beyond a reasonable doubt that the defendant did commit the alleged offense, you should return a verdict of not guilty."

This instruction cannot be said to be clearly phrased, and there was no error in refusing it. The prosecuting witness was under age, and the matter of her consent or nonconsent was not material, and the defendant might well have been convicted without any evidence at all being offered as to any complaint or outcry being made by her.

[5] Instruction No. 11 offered and refused was merely argumentative, and the defendant as a matter of right was not entitled to have it read to the jury. As to instruction No. 12, the same observation may be made; and the same may be said of instruction No. 15.

[6] Instruction No. 17 which was to advise the jury that, if they believed the testimony of the prosecuting witness was inherently improbable or "possibly untrue," it was their duty to find a verdict of not guilty, in so far as it contained suggestion of pertinent instruction, was completely covered in the instruction on reasonable doubt and other instructions given by the court.

[7] Instruction No. 18, offered and refused, was an instruction warning the jury as to the

danger of prosecutions for rape being used to satisfy malice or private vengeance, and proceeded to declare that in such case "the accused is almost defenseless, in view of the facility with which charges of this character may be invented and maintained." We do not consider that the refusal to give this instruction amounted to prejudicial error. It may be observed that the court very fully and carefully instructed the jury as to the necessity that it should find in fact the truth of the charge to be beyond a reasonable doubt, and that the testimony of the prosecutrix should be carefully scanned, that neither the gravity of the charge nor the fact that the defendant was the father of the prosecuting witness was to bias the judgment of the jurors in any manner, and that he was presumed to be innocent until his guilt had been established beyond a reasonable doubt. The defendant was allowed to show very fully the alleged conduct of the prosecutrix with the young man Cisneros, in the furtherance of his contention that the prosecution arose through the ill will of the complainant because of his interference with and objections to the visits of Cisneros. As we have before stated by way of preface to this opinion, to our minds the corroborating evidence did not make out, as the record shows it, a strong case. There was no testimony by physicians or other competent persons showing that as a result of any physical examination it had been ascertained that the young girl had been tampered with. It is true that by way of rebuttal the district attorney did offer as a witness a physician and started to examine him as to some examination made of the young girl, when he was stopped by an objection that the testimony was not rebuttal, which objection was very properly sustained by the trial judge. However, the responsibility rested with the jury to determine the truth of the facts charged. It determined them in favor of the guilt of the defendant, and he must endure the penalty visited upon him.

The judgment is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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33 Cal. App. 470

HAMILTON v. MALLARD, City Assessor, et al. (Civ. 2323.)

(District Court of Appeal, Second District, California. April 19, 1917. Rehearing Denied by Supreme Court June 18, 1917.)

1. Mandamus 🔑66—Who Entitled to Relief—Taxpayer.

A city taxpayer cannot maintain mandamus to have an alleged de jure city assessor perform his duties, where a de facto officer is performing the duties of such office, since the taxpayer's rights are as well protected by the de facto as by the de jure officer, and the question should be directly litigated between the interested parties.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 131.]

2. Officers 🔑41—De Facto Officer—City Assessor.

A county assessor, performing all duties of the city assessor, claiming to do so under color of right and with the consent of the city council, and the alleged city assessor de jure, is a de facto officer.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 63.]

3. Mandamus 🔑1—Nature of Writ.

Mandamus does not issue as a matter of absolute right.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 1-3.]

Petition for writ of mandate by William R. Hamilton against Walter Mallard, City Assessor of the city of Los Angeles, and others. Writ denied.

J. R. Scott and James, Smith & McCarthy, all of Los Angeles, for petitioner. Albert Lee Stephens, City Atty., and C. B. Penn, Deputy City Atty., both of Los Angeles, for respondents.

SHAW, J. This is an original proceeding, instituted by petitioner as the owner of property in the city of Los Angeles, for a writ of mandate to be directed to Walter Mallard, as city assessor of the city of Los Angeles, and to the other respondents, as members of the council of said city, requiring the latter to furnish Mallard, as such assessor, certain stationery and supplies mentioned in the petition, alleged to be necessary for his use in the performance of his duties as such assessor, and for which he had made requisition, and commanding respondent Walter Mallard, as such assessor, to perform the duties of assessor of said city.

The proceeding grows out of the fact that, under and by virtue of an amendment to the charter of the city of Los Angeles purporting to authorize such action, the city council adopted an ordinance whereby it was provided that, beginning on the 5th day of March, 1917, the functions of the city of Los Angeles relating to the assessment of property for taxation should be transferred to, assumed, and discharged by the officer of Los Angeles county performing similar functions in such county, except as therein provided, and that the office of city assessor be vacated and abolished; the effect of which was to transfer the functions of city assessor to the county assessor of Los Angeles county for performance. Thereafter the board of supervisors of Los Angeles county adopted a resolution approving such transfer and assuming for and on behalf of said county the discharge and performance of such functions by the proper officer of the county, which officer, since the contrary is not made to appear, we must assume, by virtue of such transfer and the assumption of such duties, has entered upon, and is now engaged in the discharge thereof.

The theory upon which petitioner bases his claim to the issuance of the writ is the invalidity of the proceedings whereby the functions of the office of city assessor were transferred to the county assessor for performance, and the office abolished. In view of our conclusion that upon the facts stated in the petition, to which a general demurrer was interposed, the writ of mandate prayed for should not issue, it will be unnecessary to discusss the several grounds upon which petitioner's attack is made upon the validity of the amendment to the charter pursuant to which the proceedings of the council in effecting the transfer were had and taken. If the office was abolished, then clearly, since Mallard could not be the incumbent of an office that had no existence, the writ would not lie. On the other hand, assuming the existence of the office as claimed by petitioner, and that Mallard is the de jure city assessor, who, as alleged, refuses to perform the functions of the office, which are in fact being exercised by another under color of right so to do, is petitioner entitled to the writ? The answer to the question depends upon whether such performance of duties by the county assessor constitutes him the de facto incumbent of the office. If such fact be made to appear, then petitioner, since the law, "for grave reasons of public policy, holds valid the acts of such an officer" (Morton v. Broderick, 118 Cal. 480, 50 Pac. 644), is not concerned with the question as to the right of such county assessor to assess city property. "The lawful acts of an officer de facto, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified for the office, and in full possession of it." Town of Susanville v. Long, 144 Cal. 362, 77 Pac. 987.

[1-3] While the writ will issue to compel the performance of official duty, it cannot, where there is a valid performance of such duty, be invoked to determine the disputed question as to which of two persons is entitled as of right to perform the duty. Fowler v. Brooks et al., 188 Mass. 64, 74 N. E. 291, 3 Ann. Cas. 173. That it will lie in a proper case at the suit of a taxpayer to compel the assessor to assess lands admits of no doubt. People v. Shearer, 30 Cal. 645; Hyatt v. Allen, 54 Cal. 353. But where, as here, it appears that the duty of assessing property is being performed by one whose acts, if he be such de facto officer, are of the same validity as though exercised by the assessor de jure, how can a taxpayer be an aggrieved party, or said to have any beneficial interest in the subject which can be affected? The sole inquiry, then, is not whether the proceedings which purport to abolish the office of city assessor and transfer its functions to the county assessor are valid, but, conceding them invalid, are the facts such as to constitute the person filling the office of county assessor the de facto city assessor? That he is such de facto officer, we think, necessarily follows from his possession of the indicia of office and the fact that he is actually engaged in performing all the functions thereof, claiming so to do under color of right, with the acquiescence of the city council and the city assessor de jure. True, he does not hold himself out as being city assessor; but this, to our minds, is immaterial. It is the exercise of the functions of the office, not of right, but under claim and color of right, that gives the position of the county assessor its de facto character, rather than the name by which the office is designated.

Conceding petitioner's right as a taxpayer to have a valid assessment made of all city property, nevertheless, since it appears such valid assessment is being made, he is in no position to insist upon the issuance of a writ of mandate to determine the legality of the proceedings under which the county assessor is engaged in the performance of the functions of the office. He is not concerned with the question of which of two persons purporting to act officially performs an act which, in either case, is equally free from objection. To issue the writ under such circumstances would be tantamount to permitting its use for the purpose of determining as between two adverse parties, the right and title to the office, for which purpose another proceeding is provided by statute. True, where the party is entitled to the relief sought, the writ will not be withheld in a proper case because of the fact that title to the office is incidentally involved. Morton v. Broderick, supra; McKannay v. Horton, 151 Cal. 711, 91 Pac. 598, 13 L. R. A. (N. S.) 661, 121 Am. St. Rep. 146. No facts are here disclosed, however, which bring the case within the exception to the general rule announced in those cases. Moreover, the writ of mandate does not issue as a matter of absolute right (People v. Lieb, 85 Ill. 484), and in the case at bar consideration should be given to the probable demoralization and disaster in the administration of the fiscal affairs of the city which might follow the granting of the application. If the proceedings for the transfer of the functions of the office are, as claimed, invalid, such question should be litigated in a direct proceeding, final as to parties directly interested, and not in a suit at the instance of a third party, who, as it appears to us, has no beneficial interest in the matter.

The writ is denied.

We concur: CONREY, P. J.; JAMES, J.

33 Cal. App. 479

CANER v. OWNERS' REALTY CO.

(Civ. 2042.)

(District Court of Appeal, First District, California. April 20, 1917.)

1. Contracts 🔑277(1)—Performance—Necessity of Demand.

Where no time is specified for the performance of a contract other than for the payment of money, a demand for performance is necessary in order to put the promisor in default.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1217–1227.]

2. Contracts 🔑336—Action for Breach—Complaint—Sufficiency.

In an action for breach of contract to grade streets, in which time was of the essence, but no time for performance fixed, a complaint failing to allege a demand upon the defendant for performance is fatally defective.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1677–1681.]

3. Limitation of Actions 🔑66(6)—Computation of Period of Limitation—Breach of Contract—Demand for Performance.

Where demand for performance was essential to the creation of a cause of action for breach of contract, it was necessary to toll the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 359.]

4. Contracts 🔑212(2)—Indefinite Time.

Where, under a contract, the time within which an act is to be performed is either indefinite or not specified, it must be performed within a reasonable time.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 947–951.]

5. Limitation of Actions 🔑46(3)—Accrual of Contract—Demand for Performance.

Where, in a contract, the time within which an act is to be performed is either indefinite or not specified, the statute of limitations commences to run against an action for a failure to perform such an obligation at the expiration of a reasonable time.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 242.]

6. Limitation of Actions 🔑66(15) — Demand for Performance — Time for Making.

Where demand for performance of a contract is essential to the creation of a cause of action, it must be made within a reasonable time, which is the period of time prescribed by the statute of limitations for the outlawry of such action; so that, where contracts for the grading of streets did not specify a time for performance, and no demand for performance was made within the period of four years prescribed by Code Civ. Proc. § 337, within which an action upon a contract in writing must be brought, an action for damages for breach of such contracts was barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 373, 374.]

Appeal from Superior Court, City and County of San Francisco; A. E. Graupner, Judge.

Action by Petronella Caner against the Owners' Realty Company. Judgment for defendant, and plaintiff appeals. Affirmed.

J. A. Olson, of San Francisco, for appellant. Jordan & Brann, of San Francisco, for respondent.

LENNON, P. J. Upon this appeal from a judgment entered in favor of the defendant following an order of the trial court sustaining a demurrer to the plaintiff's first amended complaint, it appears from said complaint that the plaintiff individually and as the assignee of 22 other persons sought in 23 separately stated causes of action to recover damages from the defendant for the alleged breach of covenant of a contract to grade streets in a certain tract of land in San Mateo county known as the "Ocean Shore tract," in which plaintiff and her assignors had purchased lots. The complaint also purported to plead 23 causes of action upon the same covenant for specific performance. To all of these causes of action the defendant demurred upon the ground that none of them stated facts sufficient to constitute a cause of action, and that each of them was barred by the provisions of sections 337 and 343 of the Code of Civil Procedure. Upon the oral argument it was conceded by counsel for plaintiff that the demurrer was well taken in so far as it was directed against the several causes of action attempted to be pleaded for specific perfomance.

The covenant of the contract pleaded and relied upon to support the plaintiff's claim of damages for its breach is as follows:

> "The sellers [defendant] guarantee to grade all the streets in the Ocean Shore tract at their expense. Time is acknowledged to be of the essence of this contract. These covenants shall be binding on the parties to this contract, their heirs, successors, and assigns."

It affirmatively appears upon the face of the complaint that the several contracts in suit were not made within four years prior to the institution of the action; it is alleged that each and all of them were made at different times, varying from five to seven years, before the complaint was filed. It will be noted that the covenant in question does not specify, and the plaintiff's complaint does not allege, nor attempt to allege, the time within which the defendant was to grade the streets in the tract wherein plaintiff and her assignors had purchased lots. Furthermore, the complaint is devoid of an allegation that the plaintiff or her assignors ever demanded that the defendant perform the said covenant.

[1-3] Where no time is specified for the doing of an act, other than the payment of money, it is the rule of law that a demand for performance is necessary in order to put the promisor in default. 9 Am. & Eng. Ency. of Law, 200, 201. The reason for the rule in this behalf is to give the promisor an opportunity to perform before being subjected to the inconvenience and expense of litigation. 1 Corp. Jur. 979. No time having been fixed by the covenant under consideration for the performance of the obligation thereof, and the complaint failing to allege a demand upon the defendant for performance, it is

clear that the complaint, in so far as the several causes of action for damages are concerned, is fatally defective—when measured by the foregoing rule. Moreover, such a demand, in addition to being essential to the creation of a cause of action, was necessary to toll the statute of limitations.

[4-6] In this behalf it is the rule, well settled we think, that where in a contract the time within which an act is to be performed is either indefinite or not specified, it may and must be performed within a reasonable time; and ordinarily the statute of limitations commences to run against an action for a failure to perform such an obligation at the expiration of a reasonable time. Williams v. Bergin, 116 Cal. 56, 47 Pac. 877. And again, where, as in the present case, a demand for performance is essential to the creation of a cause of action it must be made within a reasonable time, which, it has been held, is the period of time prescribed by the statute of limitations for the outlawry of the action. Meherin v. San Francisco Produce Exchange, 117 Cal. 215, 48 Pac. 1074.

An action upon any written contract founded upon an instrument in writing executed within the state is barred within four years (Code Civ. Proc. § 337); and, as no demand was made within four years after the contracts in suit were executed, all of the causes of action arising therefrom and pleaded in the plaintiff's complaint were under the rule last above stated barred by the statute of limitations.

It follows, from what we have said, that the demurrer to the plaintiff's complaint was well taken and rightly sustained. The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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33 Cal. App. 476

DOOLITTLE v. SAVAGE TIRE CO.

(Civ. 1899.)

(District Court of Appeal, Second District, California. April 19, 1917.)

1. CONTRACTS 🔑247—TERMINATION—SUFFICIENCY OF EVIDENCE.

In action against an employer to recover for use of an automobile plaintiff employé's testimony that a new arrangement was made concerning the machine's use on a certain date does not establish that the previously existing agreement regarding compensation was thereby terminated.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1139, 1787.]

2. CORPORATIONS 🔑432(9)—EVIDENCE OF AUTHORITY—BY-LAWS.

In employé's action against his employer for use of an automobile defendant's by-law requiring compensation of its employés to be fixed by its directors or executive committee is inadmissible, at least where the plaintiff was not a stockholder when he made his contract with defendant's general manager and had no notice of such by-law.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1734, 1743, 1762.]

Appeal from Superior Court, Los Angeles County; J. W. Curtis, Judge.

Action by M. G. Doolittle against the Savage Tire Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Gibson, Dunn & Crutcher, of Los Angeles, and Titus & Davin, of San Diego (Jas. A. Gibson, Jr., of Los Angeles, of counsel), for appellant. Earl Curtis Peck, of Los Angeles, for respondent.

CONREY, P. J. The judgment awarded to the plaintiff the sum of $1,000 as compensation for the use of an automobile pursuant to an alleged agreement between plaintiff and defendant. The defendant appeals from the judgment.

The principal grounds upon which appellant claims a reversal are that the evidence is insufficient to sustain the following findings: (1) That the plaintiff used his automobile in the business of the defendant pursuant to the agreement sued on, from on or about the 1st day of July, 1913, to and including the 31st day of August, 1914; (2) that the reasonable value of the use of the automobile was the sum of $1,000.

The plaintiff was a salesman employed in selling tires for the defendant, and was the owner of an automobile. At a date not exactly established, but which was between the 1st and middle of August, 1913, the sales manager of the defendant made an oral agreement in its behalf with the plaintiff which in substance was that the plaintiff should use his automobile in connection with his work as a salesman, and that the defendant would pay the reasonable value of such use. The plaintiff did use his automobile exclusively in the business of the defendant from that time until about the end of August, 1914. There is evidence tending to establish the fact that this arrangement between the sales manager and the plaintiff was made known to and was approved by the president and general manager of the defendant. The evidence further shows that the reasonable value of the use of the automobile, if plaintiff paid for the gasoline used by him, was $100 per month; if the defendant paid for the gasoline, it was at least $75 per month. The plaintiff did pay for his own gasoline until March 1, 1914. Thereafter the gasoline expense was paid by the defendant.

Fairly construed, the brief for appellant concedes that the plaintiff is entitled to compensation under the contract sued on for the time from the middle of August, 1913, until March 1, 1914. This would justify the judgment at least to the extent of $650. Appellant contends, however, that the contract was terminated on March 1, 1914, and therefore that the recovery cannot include compensation for the use of the automobile after that date.

[1] Evidence was received concerning an

agreement said to have been made about March 1, 1914, between plaintiff and defendant whereby the defendant purchased the plaintiff's automobile, and that thereafter it was used as the defendant's machine. But all of this evidence was afterwards stricken from the record by consent of the parties. Notwithstanding such stipulation, appellant relies upon a general statement made by the plaintiff in his testimony that on March 1st a new arrangement was made concerning the use of this automobile, and argues therefrom that the contract made in August was thereby terminated. In our opinion, such conclusion does not follow. As the record stands, we do not know what were the terms of the supposed new arrangement, and we cannot say that they were sufficient to put an end to the existing contract. The fact that the plaintiff continued in the employ of the defendant as salesman and continued to use his automobile in that business as he had used it before, with the single exception that from that time the defendant paid for the gasoline used, tends to support plaintiff's claim that he was continuing to use the automobile in that business under the agreement that he should be paid the reasonable value of such use. At the rate of $75 per month this would have amounted to $450. It follows that the evidence is sufficient to support the court's finding that the reasonable value of the use of the machine for the entire period included in the findings amounted to $1,000.

[2] Appellant further complains that the court erred in excluding from the evidence a by-law of the defendant which limited the manner in which the compensation of employés should be fixed. This by-law stated that:

> "The compensation for all employés may be fixed by the executive committee or by the general manager, but no employment for a longer period than one month shall be valid unless agreed upon in writing and approved by the directors or the executive committee."

We think that the by-law was properly excluded. The compensation of the plaintiff as an employé was his salary, about which there appears to have been no dispute. At least it is not involved in this case. The contract for the use of plaintiff's automobile stands on the same foundation as if it had been made with any automobile owner to obtain the use of such machine in the company's business. Appellant claims that the by-law was admissible for the additional reason that the plaintiff was a stockholder of the defendant corporation, and therefore bound to take notice of its by-laws. In fact, the evidence shows that the plaintiff was a stockholder of the defendant corporation at the time when this action was tried in the superior court, but not that he was such stockholder when the contract was made. Since the contract related to a matter connected with the ordinary course of business of the corporation and was made by or with the consent of the general manager, and the corporation received the benefit of the contract thus made, it should not be permitted to take advantage of a limitation (if such there was) of the general manager's authority, without evidence that the plaintiff knew or had notice thereof.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

33 Cal. App. 511

PEOPLE v. WILBUR. (Cr. 385.)

(District Court of Appeal, Third District, California. April 24, 1917.)

1. CRIMINAL LAW 🔑966—MOTION IN ARREST—NATURE.

A motion in arrest of judgment challenges the sufficiency of the indictment or information to state a public offense and is neither more nor less than a demurrer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2423–2468.]

2. BANKS AND BANKING 🔑21—INFORMATION—SUFFICIENCY—CHECKING AGAINST INSUFFICIENT FUNDS.

Under Pen. Code, § 476a, as to checking against insufficient funds, where defendant wrote a check payable to himself and gave it to a third party without indorsing it, the offense was complete; the gist thereof being the intent to defraud.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 25.]

3. BANKS AND BANKING 🔑21—"CHECKING AGAINST INSUFFICIENT FUNDS"—ELEMENTS OF OFFENSE.

To establish the offense under Pen. Code, § 476a, of "checking against insufficient funds," it is necessary that, with intent to defraud, a party has made and drawn a check or draft upon some bank for the payment of money and delivered the same to another knowing at the time that he has not at the time sufficient funds or credit with the bank to meet the check in full.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 25.]

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

A. H. Wilbur was convicted of an offense, and he appeals. Affirmed.

Henry L. Ford, of Eureka, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. By an information duly filed, the district attorney of Humboldt county charged the defendant with the crime of drawing a bank check without funds in bank, as follows:

> That the said defendant did, on the 31st day of October, 1916, at and in the county of Humboldt, "willfully, unlawfully, feloniously, fraudulently, knowingly and with intent to defraud H. A. King, make, draw, utter and deliver to H. A. King a certain check and draft upon a certain bank, banker and depositary, to wit, The First National Bank of Eureka, a banking corporation duly organized for the purpose of

doing a banking business under and by virtue of the laws of the United States of America and doing business in the said county of Humboldt. That said check and draft was then and there for the payment of money and was then and there in the words and figures following, to wit: 'Eureka, Cal., October 31, 1916. The First National Bank of Eureka (90–147). Pay to A. H. Wilbur, or order thirty-five dollars ($35.00). [Signed] A. H. Wilbur.' That he the said defendant had not then and there sufficient funds in or credit with the said The First National Bank of Eureka, a banking corporation as aforesaid, to meet said check and draft in full upon its presentation, as he the said defendant then and there well knew, contrary to the form, force and effect of the statute," etc.

The defendant, upon his arraignment upon said information on the 10th day of November, 1916, entered a plea of guilty thereto, and "waived the statutory time for the pronouncing of judgment herein," whereupon the court postponed the pronouncing of judgment to the following day, November 11, 1916, at 9:30 a. m. On the last-named date, the cause having been called for the pronouncing of judgment, the attorney for the accused filed and pressed a motion in arrest of judgment. The motion was based upon a number of grounds, among which were the following: (1) That the facts stated do not constitute a public offense; (2) that the information does not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code; (3) that the said information contains matters which, if true, would constitute a legal justification or excuse of the offense charged. Pen. Code, §§ 1004, 1185. The motion was disallowed and judgment of imprisonment thereupon pronounced. This appeal is by the defendant from said judgment.

The point upon which the defendant relies for a reversal of the judgment is that the check, as delivered to King, having been drawn by the defendant and made payable to himself or order, and not having been indorsed on the back thereof by the latter, was worthless in the hands of King; that is to say, since the check, as drawn, did not bear upon its back the indorsement of the defendant, King could not have succeeded in passing or cashing the check or securing payment thereof. It is argued that the check, never having been legally transferred to King, amounted to nothing more than a piece of waste paper, that it was worthless for any purpose, and of the mere act of delivering the paper to King no charge of crime could be predicated and sustained.

[1] We cannot agree to that contention. A motion in arrest of judgment challenges the sufficiency of the indictment or information to state a public offense. The office of such a motion is neither more nor less than that of a demurrer. It is practically a demurrer interposed to an accusatory pleading after conviction. Necessarily, then, the question the solution of which is here submitted to us is whether the facts stated in the information constitute a public offense.

[2] The charge laid in the information is founded on section 476a of the Penal Code, which provides:

> "Every person who, willfully, with intent to defraud, makes or draws, or utters, or delivers to another person, any check or draft on a bank, banker or depositary for the payment of money, knowing at the time of such making, drawing, uttering or delivery, that he has not sufficient funds in, or credit with, such bank, banker or depositary, to meet such check or draft in full upon its presentation, is punishable by imprisonment in the county jail for not more than one year or in the state prison for not more than fourteen years. The word 'credit' as used herein shall be construed to be an arrangement or understanding with the bank or depositary for the payment of such check or draft."

The elaborate discussion in the briefs, pro and con, upon the question whether there may be a legal transfer of a check by delivery under a parol or verbal agreement, or, in other words, without a written agreement or indorsement, is of no consequence in the decision of the point made by the defendant. The element of intent which enters into the commission of the acts constituting, with such intent, the crime charged—that is, the expression, "intent to defraud"—can hardly be said to mean an intent to defraud the bank, but refers (as the information here alleges) to an intent to defraud the person to whom the check is delivered, for, quite obviously, there could be but little, if any, chance or opportunity for defrauding the bank in such case, since, if the drawer had no assets therein or credit therewith sufficient to satisfy the draft, the bank could and would promptly repudiate and dishonor the check. And the fact that the check may be "a worthless piece of paper" in the hands of the person to whom it was delivered, because it has not been properly indorsed, does not enter as an element into the crime defined by the section upon which the information is based. The check in this case, even if indorsed by the defendant, could be no less a "worthless piece of paper," if, at the time of its presentation for payment, the drawer had no money in or credit with the bank sufficient to satisfy it. We can therefore conceive of no reason for saying that it is material or necessary to the statement or consummation of the offense to show or prove that the check or draft so drawn and delivered is in such form as would make it legally binding upon the bank to pay it upon presentation, if the drawer then had adequate funds in, or credit with, the bank to satisfy it.

[3] To ascertain what are the essentials or elements constituting a crime, we must look to the statute itself defining the crime, and, thus guided in this case, we find that the gist of the offense charged in the information is in the fraudulent intent with which the check or draft is drawn and delivered and knowledge by the drawer and deliverer, at the time of such drawing and delivery, that he was then without assets of any kind or character in the bank upon which it was drawn to satisfy or meet it. Hence, all that

need be pleaded or proved to show or establish the fact of the commission of the offense denounced in said section is that, with intent to defraud, a party has made and drawn a check or draft upon some bank for the payment of money and delivered the same to another, knowing at the time such check was made, drawn and delivered that he has not sufficient funds in, or credit with such bank to meet such check or draft in full upon its presentation.

The information in this case, as will be observed from an examination of it, follows, substantially, the language of the section under which it was drawn, and, among other things, directly charges that the defendant delivered the check to one H. A. King with intent to defraud him. Thus the offense defined by said section is clearly and concisely stated, and this is all that is required to render the information impregnable against successful attack, in whatever form the attack may or might be made, upon the ground that it does not state a public offense. And, we may add, the information is equally unobjectionable as against any other ground of demurrer or of a motion in arrest of judgment.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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33 Cal. App. 484

BROOKE v. QUIGLEY. (Civ. 1635.)

(District Court of Appeal, Third District, California. April 21, 1917.)

1. PRINCIPAL AND AGENT 🔑48—DUTIES OF AGENT.

The constant and undivided fidelity of the agent to the interest of the principal is demanded.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 78.]

2. APPEAL AND ERROR 🔑1039(2)—HARMLESS ERROR—PLEADINGS—INCONSISTENCY.

Complaint showing agreement for agent's commission and performance of the agent's contract and alleging that "thereafter, in accordance with said negotiations carried on on the part of plaintiff in accordance with said agreement, a deed of grant was executed" not in the terms agreed upon, was not prejudicially inconsistent owing to the presence of the words "in accordance with said agreement."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4075.]

3. SPECIFIC PERFORMANCE 🔑114(2) — RIGHT TO REMEDY.

In an agent's action attempting to establish a trust and seeking to have an interest in himself declared in the property involved in the trade, though the complaint contained no allegation that the consideration was equitable and adequate, where such issue was tendered by the answer, and was found in plaintiff's favor, it was immaterial whether the action be regarded as one for specific performance or to enforce a trust.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 357–361.]

4. SPECIFIC PERFORMANCE 🔑126(1)—DECREE.

When an agent consummated a trade under an agreement that he should have a one-sixth interest in the tract conveyed, he was not entitled to a decree in his suit for specific performance or to have a trust declared for the whole interest in the one-sixth of the land or any portion thereof, but could only have decreed for a one-sixth undivided interest of the whole.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 55, 401–405.]

5. PRINCIPAL AND AGENT 🔑78(1)—INTEREST OF—EVIDENCE—SUFFICIENCY.

Evidence *held* to require an accounting between an agent and his principal arising out of a real estate trade wherein the agent was to receive an undivided one-sixth interest in the land involved.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 162–165, 176.]

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Morris Brooke against T. L. Quigley. Judgment for plaintiff, and defendant appeals. Reversed.

Butler & Swisler, of Sacramento, and M. E. Sanborn, of Yuba City, for appellant. W. H. Carlin, of Marysville, for respondent.

BURNETT, J. The suit was for the recovery of a certain interest in real property which was alleged to be held in trust by the defendant for the plaintiff. The cause of action is based upon a contract between the parties whereby respondent acted as the agent for appellant in the purchase of a tract of land from one Edward A. Noyes under an agreement that he should receive as his commission a one-sixth interest in said real property. The contract is set out in the complaint, and it is further alleged that in accordance therewith respondent secured the sale, and the deed was made to appellant as the sole grantee, that subsequently appellant sold a portion of said real estate, and that said portion was of the value of one-half of the whole tract. The prayer was for judgment decreeing respondent to be the owner of an undivided one-third interest in the part remaining unsold, and that appellant held it in trust for respondent, and that he be required to perform specifically his contract and execute a deed to respondent of the one-third interest. The answer set up a failure on plaintiff's part to perform his contract, concealment of knowledge, and information from defendant by plaintiff, and also misrepresentations by the agent to the principal, constituting a violation of his duties and obligations as such agent. It was also alleged that the contract was not sufficiently specific, comprehensive, or definite to admit of specific performance, and that the alleged services did not constitute a fair, just, and adequate consideration or any consideration whatever for plaintiff's demand. By counterclaim and cross-complaint defendant also sought to recover the sum of $2,167.60 which he had paid to plaintiff before he had discovered the said violation of his duties as agent and the failure to render the services contracted for. It may be stated that this payment was made by reason of a certain reduction in the cash payment required of appellant at the time of the execution of the deed to him. The court's conclusion harmonized with the view of plaintiff, and its judgment determined and decreed:

> "That plaintiff is the owner in fee and entitled to the possession of an undivided $^{25333}/_{114795}$ interest in and to those certain tracts or parcels of land situate and being in the county of Sutter [describing them], subject, however, to the payment by plaintiff of the sum of $21,166.66 on or before the 1st day of January, 1921, with interest thereon from the date of the entry of this decree at 6 per cent. per annum, the same being a portion of the last payment required to be made in and by that certain promissory note executed by defendant T. L. Quigley to E. A. Noyes and secured by a mortgage of record."

Then follows a copy of said note, and the judgment continues:

> "It is further here ordered, adjudged, and decreed that within ten days from the date of the rendition and entry of this decree the defendant, T. L. Quigley, execute his said trust by the execution and delivery to plaintiff of a good and sufficient deed of grant, granting and transferring to him said $^{25333}/_{114795}$ interest in and to said lands and premises hereinbefore described subject to the payment of said sum of $21,166.66 on or before the 1st day of January, 1921, with interest from the date of the rendition and entry of this decree at 6 per cent. per annum as hereinbefore set forth, and that in the event of the failure or refusal of said defendant, T. L. Quigley, to execute said deed within the time and in the form and substance as herein directed, the sheriff of the county of Sutter, state of California, is hereby appointed for such purpose and directed to make, acknowledge, execute, and deliver said deed in the place and stead of said defendant, T. L. Quigley."

We now proceed to the consideration of the principal contentions of appellant for a reversal of the judgment.

While appellant presents various points for our determination, he declares in his brief that the primary reason why appellant resists the demands of respondent is because of the knowledge obtained by appellant that respondent, while pretending otherwise, in fact failed to render the services as broker which in law and good conscience he was bound to render before he could rightfully claim compensation. In fact, appellant testified to the agreement substantially as did respondent, and declared that he intended to execute it until he learned "that he had not delivered or given me the service I expected, that I was paying for." The particular remissness of the agent is designated as "fraudulent concealment," "nonperformance and delay," "positive acts of fraud," and "misrepresentations." Under the first are specified:

> "(a) He did not inform appellant that he had knowledge of the Phipps-Beere option; (b) he did not inform appellant of the terms of that option or the price thereunder at which the land could be purchased, viz. $28 per acre; (c) he did not inform appellant during the time he was pretending to act as the confidential agent of appellant, that he at the same time was acting as the agent for Noyes and endeavoring to obtain for the land the highest possible price," and that he advised Noyes to insist upon a cash payment of $25,000 instead of $12,500 which Noyes had consented to accept until a flaw in the title was removed.

In the second category are enumerated his omission to avail himself of the opportunity to purchase the land at the price of $28 per acre, through said Phipps-Beere option, and his failure to submit to Noyes the various offers for the land made by appellant. The "positive acts of fraud" are covered by the foregoing, and the "misrepresentations" relate to a letter and telegram sent by respondent to appellant on December 29, 1912, to the effect that the net price for the land was $30 per acre, and that it had never been offered for less.

[1] The constant and undivided fidelity of the agent to the interest of the principal is, of course, demanded by the provisions of the statute, the decisions of the courts, and the recognized principles of honorable dealing, and if we had to accept the recital of appellant as embodying the established facts of the case, we should not hesitate to say that respondent was recreant to his trust and was not entitled to any consideration in a court of justice. But the foundation of appellant's claim is found in the testimony offered in his own behalf. It may be admitted that from the record his showing appears to be not destitute of persuasive force, but the apparently inculpatory circumstances are negatived by the denials and explanations of the plaintiff himself. As far as it was inconsistent with the evidence of appellant, the court undoubtedly accepted and acted upon the testimony of respondent, and we can do no less under the familiar rule. In view of the insistent assertions of appellant as to these important circumstances, we have been at pains to read carefully the entire transcript, and we find therein legal justification for the conclusion of the trial court that respondent acted in good faith in his dealings with appellant. We need not quote from the record, but we deem it sufficient to say that respondent testified that he knew of said option and told Quigley about it, but was informed that it called for $30 per acre; that he was told by Noyes that the land had never been offered for less; that he did not advise Noyes to insist upon a payment of $25,000 instead of $12,500; that he did submit to Noyes the various offers made by appellant; and that he did not know at any time while acting as the agent of appellant that the land could be bought for less than what it was purchased for. As to any effort made to sell the property to another party, he gave an explanation capable of reconciliation with an honest attitude toward appellant. He declared that Mr. Quigley said to him:

> "I may do business down here, but if you have any other prospect of selling that property and doing business with Mr. Noyes go ahead and do business."

Respondent testified that he had an arrangement with Mr. Quigley to that effect, and he did the best he could for him, but he had the privilege of disposing of the property elsewhere if the opportunity was offered. It seems that by agreement with Noyes the price for any other purchaser was $175,000, but the owner and respondent were anxious to favor appellant, and if a sale were made to him it would be for about $25,000 less. Respondent gives his reasons for believing that this scheme was in the interest of Quigley, and we cannot say that his conduct was inconsistent with good faith. He was, no doubt, anxious to obtain a commission, but in that respect he was probably like the average individual, and it cannot be said that he was not justified in what he did. Mr. Quigley was himself a real estate agent, and had, no doubt, a fellow feeling for the craft, and he was willing to give Mr. Brooks as much leeway as possible. Indeed, appellant seemed to rely entirely upon his own judgment as to the value of the land, he determined what he would pay for it, and his engagement was with Brooks that the latter would endeavor to secure it for him at that price, but with the privilege of selling it for more to another purchaser.

[2] It is contended with much learning that the theory of a trust upon which respondent relies is utterly untenable. The criticism begins with the complaint itself. After setting out the agreement between the parties, as we have hereinbefore stated, and the negotiations culminating in a sale, carried on by plaintiff with Mr. Noyes, the complaint proceeds:

> "And thereafter in accordance with said negotiations carried on on the part of plaintiff in accordance with said agreement a deed of grant, bargain, and sale was on or about the 5th day of December, 1913, executed by said Edward A. Noyes to said defendant, T. L. Quigley, granting and transferring to said Quigley the above-described lands and premises. Shortly before the execution and delivery of said deed, plaintiff learned that the deed was to be executed by said Noyes, and he requested and demanded of said defendant, Quigley, that in the execution of said deed plaintiff should be named as a grantee therein to the extent of an undivided one-sixth interest, and said defendant, Quigley, as grantee therein to the extent of the remaining five-sixths interest therein in accordance with said agreement as aforesaid; that, however, defendant, Quigley, refused to permit plaintiff to be named in said deed," etc.

It is declared that the complaint is thus inconsistent and self-destructive. The particular point is that in one breath plaintiff claims that the conveyance to Quigley was in accordance with the agreement between the parties, and in the next that it was in violation of said agreement. In other words, assuming that a trust existed, it is alleged both that it was and that it was not executed. We think, however, that this criticism involves rather a matter of uncertainty than of vital infirmity. Respondent admits that the complaint was hurriedly and somewhat carelessly drawn, and it is contended that what was meant is that the sale was secured through the efforts of plaintiff in accordance with the agreement of plaintiff and defendant, but that the deed was executed contrary to said agreement in the respect indicated. There was no special demurrer, and the case was tried upon the theory that the cause of action was properly set forth, and defendant certainly suffered no prejudice by reason of said defective phraseology.

Appellant, however, with more confidence, apparently, urges the objection that the evidence fails to disclose any trust at all that can be legally enforced. There is an interesting discussion in the brief of the various kinds of trusts that are recognized by the authorities, and special attention is devoted to the consideration of a resulting trust, of which respondent contends this is an example. Therein are recited the different conditions upon and according to which such a trust may arise, and it is claimed that only one of these conditions could possibly apply here, and that is "when a purchaser of an estate pays the purchase money or some portion thereof and takes the title in the name of a third person." But it is insisted that such is not the case here, for the reason that no part of the consideration of the conveyance passed from respondent to Noyes, the owner of the property. In support of the position certain authorities are cited, including Pomeroy's Equity Jurisprudence, § 1037; Woodside v. Hewel, 109 Cal. 485, 42 Pac. 451; and Los Angeles, etc., Co. v. Occidental Oil Co., 144 Cal. 534, 78 Pac. 25. In the first it is said:

> "The fundamental idea of such a trust is that equity considers that the beneficial interest follows the consideration and attaches to the party from whom the consideration comes. But in order that this effect may be produced it is absolutely indispensable that the payment should be actually made by the beneficiary B. or that an absolute obligation to pay should be incurred by him as a part of the original transaction of purchase, at or before the time of the conveyance."

In the Woodside Case, supra, the doctrine is therein stated:

> "The resulting trust, not within the statute of frauds, and which may be shown without writing, is when the purchase is made with the proper moneys of the cestui que trust, and the deed not taken in his name. The trust results from the original transaction at the time it takes place, and at no other time, and it is founded on the actual payment of money, and on no other ground."

And in the Los Angeles Case, supra, it was declared:

> "Efforts as the promoter or agent of the parties, and the traveling and other expense he incurred in bringing about this transfer, cannot be held to perform even a part of the consideration for the * * * transfer."

It is therefore urged, in opposition to the claim that respondent's share of the consideration was his efforts in bringing about the conveyance, that, since no part of this passed to the grantor or furnished any part of the consideration for the conveyance, it cannot be regarded as sufficient to create a resulting trust. However, we are not greatly concerned with the definition of words or in what category the alleged trust falls, but the vital inquiry, of course, is whether there was evidence of the creation of a legal obligation on the part of appellant to convey said one-sixth interest to respondent.

The written correspondence between the parties would seem to answer this inquiry. We can see no reason why it may not be held that thereby what is known as an express trust was created within the purview of sections 852 and 857 of the Civil Code. Estate of Hinckley, 58 Cal. 457; Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 659, and other decisions. In the Hinckley Case it was said:

> "The Code does not in terms declare the distinction between express and implied or resulting trusts. But section 857 declares that 'express trusts' in relation to real property may be created for certain purposes. Express trusts are put in opposition to those which are implied or resulting—the latter being such as exist 'by operation of law,' and the former such as are created or declared by instrument in writing."

It is true that, if the said letter of December 23d were the only writing in relation to the matter, it could hardly be held sufficiently definite and comprehensive to be enforced, but its deficiency was supplied in the other correspondence between the parties. There can be no mistake as to what was intended. Indeed, as we have seen, appellant on the witness stand admitted the agreement as claimed by respondent, but sought to justify his refusal to convey by reason of said misconduct.

[3] But, apart from the foregoing, the action may be upheld as one for specific performance. As to this appellant complains that there is no allegation in the complaint that the consideration was equitable and adequate. The issue, however, was tendered by the answer, evidence was received in relation to it, and it was found by the court in favor of plaintiff. It is immaterial, therefore, whether we regard the action as one for specific performance or to enforce a trust. In either event there is sufficient foundation for a judgment in favor of plaintiff.

[4] But, regarded in either aspect, the particular judgment rendered, in our opinion, was not warranted by the facts. If a trust existed, it reached the whole tract, and fastened itself upon every portion of it. It was a trust to convey an undivided one-sixth interest in and to said land. It could not be executed by the conveyance of a larger proportion of a part of the land, at least without the consent of the defendant. The same would be true as to specific performance. Plaintiff must rely upon his contract for the conveyance of one-sixth of the entire estate. As to the part disposed of by appellant, respondent must rely upon a judgment for damages. This would not require, of course, a separate action, but can be included in the same complaint. The matter is treated at length in Lathrop v. Bampton, 31 Cal. 22, 89 Am. Dec. 141, wherein is quoted with approval the following from Mr. Justice Lewis in Thompson's Appeal, 22 Pa. 17:

> "Whenever a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held, in its new form, liable to the rights of the cestui que trust. No change of its state and form can divest it of such trust. So long as it can be identified, either as the original property of the cestui que trust, or as the product of it, equity will follow it; and the right of reclamation attaches to it until detached by the superior equity of a bona fide purchaser for a valuable consideration without notice. * * * But the right of pursuing it fails when the means of ascertainment fail."

In that case all the trust property was disposed of, but the principle is the same where only a part of it remains. Here 1,100 acres of the specific property covered by the trust is gone, "and nothing is left to the cestui que trust except a naked claim for damages generally, on account of the breach," as far as that particular tract is concerned.

In section 843 of Perry on Trusts it is said:

> "If the cestui que trust is unable to trace the trust fund into the hands of other persons or into the hands of third persons other than bona fide holders for value, or into other property in the hands of the trustee, or, if he elects not to do so, he may proceed against the trustee personally."

It may be said also, as before suggested, that if we regard the case as one for specific performance, to allow plaintiff to recover one-fourth of the residue of the property instead of one-sixth of the whole tract would be to make for the parties a contract that was never in their minds. Grey v. Tubbs, 43 Cal. 359; Magee v. McManus, 70 Cal. 553, 12 Pac. 451.

[5] Another consideration is worth mentioning. Under plaintiff's theory he was entitled to a deed of one-sixth of the real property subject to his proportion of the indebtedness. As we have seen, there was a cash payment and a note and mortgage given for the balance. The note called for the payment of $98,465.55, with interest at the rate of 6 per cent. per annum. As to the principal, it was provided that $10,465.55 should be paid on or before 90 days from the date of the note, $10,000 on or before January 20, 1916, and the balance, to wit, the sum of $78,000, on or before January 1, 1921. According to the decree, plaintiff was awarded the fee and the use and possession of nearly one-fourth of the residue of the property without being required to make any payment until the first of January, 1921. He could thus enjoy the use of the property for nearly six years, and then abandon it without the payment of anything. That he was favored in this manner arises from the circumstance that appellant had sold a portion of it and been in the exclusive possession of the residue ever since the purchase. The judgment may not have been inequitable, but we are left to conjecture as to the extent of the damage done to plaintiff by his exclusion from the enjoyment of this portion of the property. We think

there should be an accounting between the parties that it may be determined how much is due plaintiff for the said sale and how much for the use of the property, and a decree entered for the residue in accordance with the terms of the contract, if the court is still of the opinion that plaintiff should recover.

The judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

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33 Cal. App. 515

KEENEY v. BANK OF ITALY. (Civ. 2020.)

(District Court of Appeal, First District, California. April 25, 1917.)

1. Trusts 🔑1—Constructive Trusts—Separation of Interests.

A trust is created in judicial intendment whenever the legal and equitable interests in the property are separated.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 1.]

2. Trusts 🔑356(1) — Rights of Owner—Following Funds.

The equitable owner of trust funds may follow them into the hands of all persons who acquire them with notice of the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 529–538.]

3. Trusts 🔑372(2) — Identification of Funds—Presumptions.

Where a trustee mingles trust funds with his own money, drawing upon the aggregate from time to time, it will be conclusively presumed against him and his creditors and persons claiming under him that the residue is attributable to the trust so far as necessary to keep the trust moneys intact.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 601.]

4. Banks and Banking 🔑134(7) — Diversion of Funds—Application to Debts to Bank.

If a bank has notice of the equitable rights of a third person in funds of its depositor, it cannot apply such funds in satisfaction of the individual indebtedness of the depositor to it.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 362.]

5. Banks and Banking 🔑130(1) — Trust Funds—Duties of Bank.

There is no duty cast upon a bank in paying out checks upon a trust fund to look to the disposition of the fund.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 319, 320, 322, 327.]

6. Banks and Banking 🔑130(1)—Deposits—Trust Funds—Constructive Notice.

Where a check deposited bore the indorsement "Pay to H. P. Platt, Agent, or order," it was sufficient to put the bank upon inquiry as to the rights of third parties in the money.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 319, 320, 322, 327.]

7. Banks and Banking 🔑130(1)—Deposits—Trust Funds—Constructive Notice.

Where a bank carried an account for "H. P. Platt, Trustee," it was under the duty of inquiring as to the rights of third persons in the fund composing the account before it could appropriate them in payment of a debt due it from such trustee.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 319, 320, 322, 327.]

8. Banks and Banking 🔑130(1)—Deposits—Trust Funds—Constructive Notice.

The fact that such account was the only one kept by the depositor, and that he paid into it his individual funds, and used it as a personal account, does not overcome the constructive notice conveyed by its title.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 319, 320, 322, 327.]

9. Estoppel 🔑72 — Equitable Estoppel—Innocent Party.

A bank having constructive notice that an account was impressed with a trust was not an innocent party, and could not invoke the doctrine that where one of two innocent parties must suffer he should suffer whose act contributed to the wrong.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 188.]

10. Banks and Banking 🔑130(1)—Diversion of Funds—Debts Due Bank.

Conceding that deposit of a check made payable to a depositor as agent and credited to a fund in his name as trustee constituted a sale of the check to the bank, that view of the transaction would not avoid the effect of constructive notice conveyed by the title of the account and the indorsement of the check.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 319, 320, 322, 327.]

11. Banks and Banking 🔑130(1)—Diversion of Funds—Debts Due Bank.

A bank which applied moneys deposited in a trust fund in payment of the individual indebtedness of the depositor to itself cannot avoid liability on the ground that the depositor acted for himself and not as agent, arguing therefrom that no trust was created in the fund.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 319, 320, 322, 327.]

Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf, Judge.

Action by Marie Adele Keeney against the Bank of Italy. Judgment for plaintiff, and defendant appeals. Affirmed.

James A. Bacigalupi and Harry G. McKannay, both of San Francisco, for appellant. Orville C. Pratt, Jr., of San Francisco, for respondent.

LENNON, P. J. Action to recover the amount of two checks aggregating $979.98, and interest, drawn upon the defendant, a banking corporation, by a depositor therein. Plaintiff recovered judgment, and defendant appeals.

The facts were agreed upon by the parties, and from their agreed statement we extract those following, which we think will sufficiently present the questions in dispute between the parties. H. P. Platt carried with the defendant an account under the designation "H. P. Platt, Trustee," which he used generally, depositing therein his own funds and any others he might receive as agent or trustee of other persons, and this practice was known to the defendant. On June 2, 1913, Platt deposited in said account a check for $4,680, being the proceeds of a sale of real estate in which the plaintiff and her assignor were interested and which Platt as their agent had sold. It was a cashier's check drawn upon the First National Bank of Berkeley to the order of A. C. Wyckoff, and was transferred by him to Platt with the following indorsement: "Pay to H. P. Platt, Agent, or order." Platt appended his own indorsement in corresponding terms, and the defendant duly collected the check and credited it to Platt's account. On the same day Platt drew the two checks upon which the action is based, and delivered them to the respective payees on June 5th and 6th in payment of their interests in the real property referred to, and on June 7th both were presented for payment, and payment refused upon the ground of "No funds"; the defendant having some time between June 2d and 7th appropriated, by virtue of its banker's lien, Platt's credit balance, then amounting to $1,968.66, in satisfaction or part payment of an indebtedness due from Platt to itself.

The main question in the case is whether under the facts as narrated the trial court's conclusion is correct, that the defendant bank was charged with notice of the equitable interest of plaintiff and her assignor in the funds derived from the check of $4,680 so deposited in said account of H. P. Platt, trustee.

[1-3] There can be no doubt that a trust is created in judicial intendment whenever the legal and equitable interests in property are separated. 2 Story's Eq. Jur. § 964; Mandeville v. Solomon, 33 Cal. at page 44. Under this principle it will not be controverted that the proceeds of the sale of the real estate in the hands of Platt as agent equitably belonged to his principals. It is equally well settled that the equitable owner of trust funds may follow them into the hands of all persons who acquire them with notice of the trust (Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141; 3 Pomeroy's Eq. Jur. § 1048); and that where a trustee has mingled trust funds with his individual moneys, drawing upon the aggregate from time to time, it will be conclusively presumed both against him and his creditors and persons claiming under him that the residue thereof is attributable to the trust so far as may be necessary to keep the trust moneys intact. Hallett's Case, L. R. 13 Ch. Div. 696; Elizalde v. Elizalde, 137 Cal. at page 641, 66 Pac. 369, 70 Pac. 861.

[4] This brings us to the question of whether, both by the form of Platt's account (he being designated therein as trustee) and the form of the indorsement of the check to him as agent, the defendant is charged with constructive notice (it is admitted that it had no actual notice) of the equitable rights of the plaintiff and her assignor in the money derived from such check. If it had such notice it was not at liberty to apply it in satisfaction of the individual indebtedness of Platt. Miami Bank v. State (Ind. App.) 112 N. E. at page 43; Clemmer v. Bank, 157 Ill. 206, 41 N. E. 728; Globe Sav. Bank v. Nat. Bank of Commerce, 64 Neb. 413, 89 N. W. 1030; Nehawka Bank v. Ingersoll, 2 Neb. (Unof.) 617, 89 N. W. 618.

[5] It is not contended by respondent, nor could it well be in the light of the later decisions, that if the defendant had paid out to third parties the funds here in question upon checks regularly drawn upon the account, it could be held accountable for them, for under such a state of facts no duty is cast upon the bank to inquire into the purpose for which the funds are being used (U. S. Fid. & G. Co. v. First Nat. Bank of Monrovia, 18 Cal. App. 437, 123 Pac. 352; Interstate Nat. Bank v. Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885; Silisbee State Bank v. French Market Co., 103 Tex. 629, 132 S. W. 465, 34 L. R. A. [N. S.] 1207); but the cases draw a clear distinction between such payments and an appropriation by the depositary of the fund in payment of its own claim against the trustee or agent.

[6] As to the form of the indorsement, i. e., "Pay to H. P. Platt, Agent, or order," we are of the opinion that by the weight of authority it was sufficient to put the defendant upon inquiry as to the rights of third parties in the money represented by the check. In Third Nat. Bank v. Lange, 51 Md. 138, 144, 34 Am. Rep. 304, a note in favor of "W., Trustee," was held to give notice of a possible trust to parties dealing with it. In Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234, a check signed "———, Agent, Glass Bldgs.," was held sufficient to put the payee thereof on inquiry as to the equitable ownership of the fund drawn upon. In American Trust Co. v. Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167, the proceeds of a check payable to "C. as administrator," and so indorsed by him, were deposited to his individual credit with the defendant bank and used to pay his individual debt to it. It was held that the bank had notice of the trust, and was liable to the beneficiaries thereof for the misappropriation of the trust funds through the joint act of itself and C. In Davis v. Henderson, 25 Miss. 549, 59 Am. Dec. 229, the drawer and indorser of a bill of exchange had signed it "H., Agent." The court there said:

> "These facts appearing upon the bill itself, if not conclusive evidence that the defendant was acting in a representative capacity, were at least sufficient to put a prudent man, taking the bill from the drawee, upon inquiry. * * * As ordinary diligence would have placed them in possession of the terms of the contract, it is but right that they should be charged with notice of the facts as proved."

In Bank of Hickory v. McPherson, 102 Miss. 852, 59 South. 934, it was held that a check payable to "H., Commissioner," on its face does not belong to H. individually. The court there said:

> "We rest this decision upon the naked language of the check itself. * * * It appears that the check was payable to H. as commissioner, which denoted to an ordinarily prudent person that H. was acting in some sort of fiduciary capacity,

> * * * which information, if followed up, would have disclosed to the" defendant bank "the actual status of H. with reference to the money. * * * It was also perfectly manifest that, on the face of the paper, the money represented by the check did not belong to H."

See, also, U. S. Fid. & Guaranty Co. v. Adoue & Lobit, 104 Tex. 379, 137 S. W. 648, 138 S. W. 383, 37 L. R. A. (N. S.) 409, Ann. Cas. 1914B, 667; Cohnfeld v. Tanenbaum, 176 N. Y. 126, 68 N. E. 141, 98 Am. St. Rep. 653; Bischoff v. Yorkville Bank, 170 App. Div. 679, 156 N. Y. Supp. 563; Id., 218 N. Y. 106, 112 N. E. 759, L. R. A. 1916F, 1059; U. S. Fid. & Guaranty Co. v. Union Bank & T. Co., 228 Fed. 448, 143 C. C. A. 30.

[7] We think also that the form in which the account was carried, "H. P. Platt, Trustee," placed upon the defendant the duty of inquiring as to the rights of third persons in the funds composing the account before it could appropriate them in payment of a debt due to it from Platt. In Bundy v. Monticello, 84 Ind. 119, a bank deposit in the name of "W., Trustee," was considered, and the court held that the bank had constructive notice of the character of the funds in such deposit saying:

> "The word 'trustee' meant something. It was not merely descriptio personæ, but was a description of the fund deposited. It imported the existence of a trust, and was notice of the character of the fund."

In Central National Bank v. Connecticut Ins. Co., 104 U. S. 54, 26 L. Ed. 693, there was a bank account, standing in the name of "D., General Agent," and the court, while not placing its decision solely on the constructive notice to the bank afforded by those words, held that the designation of the account put the bank on inquiry as to the rights in the funds to the credit thereof of those for whom D. was agent. In Union Stockyards Nat. Bank v. Gillespie, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724, it was held that a bank cannot take from a factor in payment of his own debt money which it either knows or should know belongs in equity to the factor's principal. To the same effect are Sayre v. Weil, 94 Ala. 466, 10 South. 546, 15 L. R. A. 544; Moore v. Hanscom, 101 Tex. 293, 106 S. W. 876, 108 S. W. 150; Silisbee State Bank v. French Market, 103 Tex. 629, 132 S. W. 465, 34 L. R. A. (N. S.) 1207.

[8] The fact that this account designated "H. P. Platt, Trustee," was the only one kept by Platt with the bank, and that he paid into it his own personal funds and used it as a personal account would not, we think, overcome the constructive notice which its title conveyed to the bank of the rights therein of third persons. Such notice places upon the bank the duty to inquire whether there existed any such rights; and such inquiry, if made, would probably have resulted in defendant gaining actual notice of the rights of respondent and her assignor, for there is nothing in the evidence to warrant the presumption that Platt would have concealed the true state of affairs.

[9] Nor is this a case, as argued by the appellant, where there are two innocent parties, one or the other of whom must suffer through the wrongful act of a third. Platt did nothing wrongful when he deposited the trust funds in the way and to the credit of the account which he did; and in the next place the bank is not an innocent party if it had constructive notice of the rights of third persons in the fund. We are of the opinion also that the addition of the word "trustee" to the name of the account is not to be regarded in the same light as the addition of that word to the name of a person in a certificate of mining stock. The cases cited by the appellant, viz. Brewster v. Sime, 42 Cal. 139, and Thompson v. Toland, 48 Cal. 99, holding that the addition of the word "trustee" to the holder's name in such a certificate gives no notice of the rights of third parties therein, we believe to be inapplicable to a case like the present, for the reason that in those cases the court took judicial notice without pleading or proof that the word "trustee" on a certificate of mining stock was meaningless as a result of universal custom. We know of no reason for holding that the use of the word "trustee" in connection with the name of a bank account has become for a similar reason devoid of meaning.

[10] It is strenuously urged by the appellant that the check under consideration being a negotiable instrument, its transfer to the defendant, and the crediting by the latter of its amount to Platt's account, constituted in effect a sale of the check to the defendant for a valuable consideration. Without assenting to this proposition in view of the well-known custom of the banks of San Francisco (the place of business of the defendant) of receiving customers' checks "for collection only," even this view of the transaction would not avoid the effect of the constructive notice to the bank given by the form of the check; for its proceeds when placed to the credit of Platt's account equitably belonged to his principals, of which the defendant had the same notice as of their rights in the check itself. If the defendant had paid Platt the amount of the check in money over the counter instead of placing it to his credit, and Platt had deposited the cash instead of the check, it might be difficult, perhaps impossible, to follow the fund; but, as we have seen, this is not the form that the transaction took, and we think the analogy attempted to be set up by appellant does not hold.

[11] It is also argued very earnestly by appellant that there was no relation of trust even between the plaintiff and Platt himself, the contention being made that Platt was merely the debtor of his principals in the transaction relating to the sale of real estate made by him for their account. In support of this the language of the late Chief Justice Beatty, in dissenting from an order denying

a petition for transfer in the case of People v. Cal., etc., Trust Co., 23 Cal. App. 210, 137 Pac. 1111, 1115, is quoted to the effect that:

> "When an agent is accounting to his principal and paying over the balance due his principal he is not acting in the character of agent, but in that of a debtor paying his creditor."

The correctness of this statement by Chief Justice Beatty is obvious, for when an agent, by reason of transactions entered into on behalf of a principal—as, for instance, receiving money for his account—becomes indebted to him, and proceeds to make a settlement, any action taken in making such settlement is taken by the agent in his own behalf. It could hardly be said that it was in behalf of the principal, for if so we would have the principal through his agent paying money to himself. But this view of the matter does not help the appellant, for so long as Platt, the agent of the plaintiff, retained the proceeds of the sale it was the money of his principals and not his own.

This disposes of the points requiring detailed discussion; and for the reasons given we are of the opinion that the trial court was correct in holding that the defendant was charged with notice of the plaintiff's rights in the money applied by the defendant in reduction of Platt's individual indebtedness and in rendering judgment in her favor.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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33 Cal. App. 496

HOUGHTON v. KERN VALLEY BANK et al. (NG HON KIM, Intervener). (Civ. 1665.)

(District Court of Appeal, Third District, California. April 21, 1917.)

TAXATION 🔑421(3)—ASSESSMENT—DESCRIPTION OF PROPERTY.

An assessment, on which tax title is claimed, of property as lots 1, 2, and 3, in block 132, town of B., though made in 1896, and though there was but one block 132 in the town, is insufficient to identify the lots; two maps dividing the block into north and south lots having been filed in 1875 and 1888, and one dividing it into east and west lots having been filed in 1889, and there being no testimony of which was the official map, or which was in use at the time the assessment was made.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 722, 723.]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by R. E. Houghton against the Kern Valley Bank and others; Ng Hon Kim intervening. From adverse judgment and order, plaintiff and defendants appeal. Reversed.

Nancy Ella Houghton, in pro. per. Octave G. Du Py, of San Francisco, Rowen Irwin, of Bakersfield, C. Brower, J. W. P. Laird, of Bakersfield, Olney & Olney, of San Francisco, W. S. Allen, of Los Angeles, Fred E. Borton, of Bakersfield, and Emmet H. Wilson and G. C. De Garmo, both of Los Angeles, for other appellants. Charles N. Sears, of Bakersfield, for respondent Ng Hon Kim.

CHIPMAN, P. J. The action originally was in partition and involved numerous different lots of land owned by many different persons. Respondent, Ng Hon Kim, filed a complaint in intervention in the nature of an action to quiet title, alleging ownership in fee of certain three of the lots situated in the city of Bakersfield, Kern county. Intervener had judgment in his favor from which plaintiff and defendants appealed to the Supreme Court.

The judgment and order denying motion for a new trial in favor of intervener were reversed. 157 Cal. 289, 107 Pac. 113. The complaint described the property as lots 1, 2, and 3, block 132, in the Baker homestead tract, according to the map of said tract filed in the office of the county recorder of Kern county, state of California, on the 3d day of April, 1889. Intervener claimed title under delinquent tax sales. The complaint in intervention described the property as "lots 1, 2, and 3 in block 132, situate in the city of Bakersfield, county of Kern, state of California," but made no reference to any map. We quote from the opinion:

> "No map showing the location of any lots or blocks was introduced in evidence. Under the decisions of this court there seems to be no escape from the conclusion that the assessment is prima facie invalid."

The assessment book was offered in evidence and, under the heading "Description of Property," showed entries as follows: "In the town of Bakersfield, lots 1, 2, 3," and under the heading "Block" the figures "132" appeared. The theory upon which the decision proceeded was:

> "That a description of this kind is of such a nature as to indicate that the property can ordinarily be located only by reference to some map or plat, and no such map or plat being referred to as being in existence, the description is prima facie insufficient. There is no presumption, in the absence of such a reference, that there is such a map in existence."

In remanding the case the court said:

> "Upon a new trial it will, of course, be competent for the intervener to offer evidence for the purpose of showing that the description was sufficient. To this end he may show, if it be the fact, that there was of record at the time of the assessment a map by the aid of which the description of the lots in question would serve to fully and completely identify and locate them."

At the second trial the evidence submitted at the former trial was introduced by stipulation, and is in the transcript on page 31 down to the middle of page 66, at which point the transcript shows as follows:

> "Thereupon the trial proceeded and the intervener offered in evidence a map entitled Map of the 'Baker Homestead Tract,' which was indorsed: 'Filed in the office of the County Recorder of Kern County, Cal., this 3d day of

April, 1889, N. R. Packard, County Recorder,' and the same was admitted in evidence."

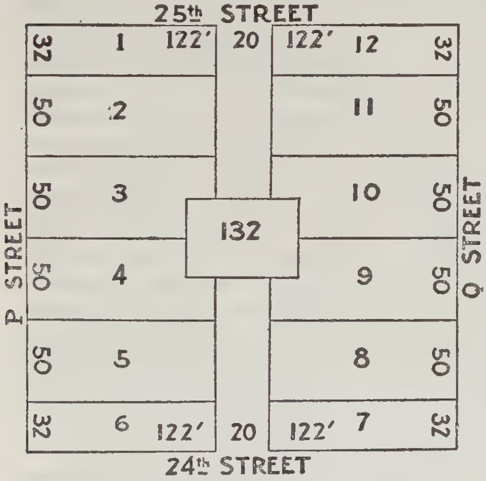
The plaintiff and defendants thereupon, "with a view of showing that there were two maps of block 132 in Bakersfield, and that the lots in the blocks were not described in the same manner, nor did they cover the same land, and with a view of showing that there existed an uncertainty in the description of the land that was carried into the assessment, offered in evidence two maps of Bakersfield." The transcript is as follows:

"Thereupon the plaintiff and defendants offered in evidence a map entitled 'Map of Bakersfield, Kern County, Cal.,' and indorsed, 'Filed in the office of the Recorder of Kern County, Cal., August 17th, 1875, F. W. Craig, Recorder,' and the same was admitted in evidence.

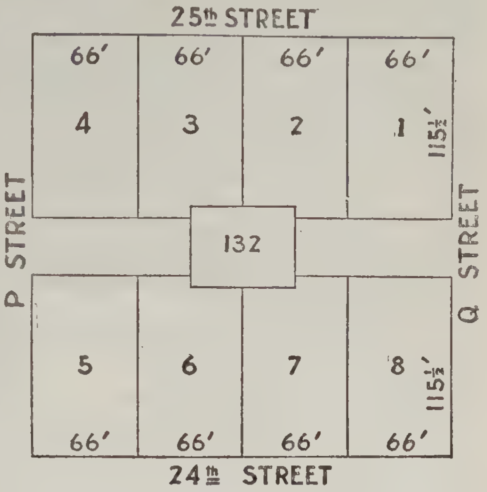
"The plaintiff and defendants also offered in evidence a map entitled 'Map of Bakersfield and Sumner, Kern County, California,' and indorsed, 'Filed in the office of the County Recorder of Kern County, June 5th, A. D. 1888, N. R. Packard, County Recorder,' and the same was admitted in evidence."

These maps were by stipulation omitted from the transcript with an understanding that either party might, if necessary, produce them for inspection by the reviewing court. Appellants have presented in their opening brief, at page 13, a diagram which shows without controversy the situation of the lots in question on the three different maps, as follows:

Block 132, Bakersfield, showing division into lots as delineated on map offered in evidence by the intervener, respondent herein, entitled "Map of Baker Homestead Tract, Bakersfield," filed in the office of the county recorder, Kern county, Cal., this 3d day of April, 1889. N. R. Packard, County Recorder.



Block 132, Bakersfield, showing division into lots as delineated on the two maps offered in evidence by the plaintiff and defendants, appellants herein, entitled Map of Bakersfield, Kern county, Cal.—the first being indorsed, "Filed in the office of county recorder of Kern county, Cal., August 17, 1875. F. W. Craig, Recorder;" the second map being indorsed, "Filed in the office of Kern County Recorder, June 5, 1888. N. R. Packard, County Recorder."



An inspection of these maps will show that block 132 is the same size in all three of them—264 feet square; that, on the map of Baker homestead tract block 132 is divided in 12 lots fronting east and west on P and Q streets with an alley between of 20 feet in width; that lots 1, 2, and 3 front on P street with a depth of 122 feet and, with half of the alley, would make one-fourth of the block in the northwest corner. The other maps show that the block is surrounded by the same streets, but that the lots front north and south on Twenty-Fourth and Twenty-Fifth streets and the block is divided into eight lots. Lots 1, 2, and 3 on those maps have a uniform width frontage of 66 feet and a depth of 115½ feet, which would be three-eighths of the block, less half of an alley, and are in the northeast corner of the block and have a frontage of 198 feet on Twenty-Fifth and 115½ on Q street. On the face of the maps it would seem impossible to identify the lots in question.

There was but little oral testimony, which we give in its entirety, as follows:

"Mr. Sears: What is your name? A. J. M. Jameson. Q. What office, if any, do you hold in this county? A. County assessor. Q. How long have you been assessor of this county? A. Since 1899. Q. You have the supervision over the assessment of property in this county? A. Yes, sir. Q. I will ask you if you know anything as to this map, August 17, 1875? A. Well, I have seen it before. Q. Will you observe lot 132 upon this map? A. Yes, sir. Q. Now I will show you another map here sought to be offered in evidence by the plaintiff which shows to have been filed in the recorder's office on the 5th day of June, 1888. Have you ever seen that map? A. I think so. Q. Known as Bakersfield and Sumner. A. I think I have. Q. Will you observe as to block 132 upon that map of Bakersfield. Now, in making your assessments, do you know as to whether or not these maps are in use, or whether or not they have been abandoned in making the assessment of property in this city, and in this county? A. Well, it would take a comparison of a map I think to tell that. In making my assessment, I have always gone by the official map at the time the assessment was made and I could not say as to that. Q. In making your assessments in this case, and involving the property involved in this case, being lots 1, 2, and 3, block 132, the assessment shows that the same was assessed at that time, at the time of the assessment as shown in this case, to the city of Bakersfield. I will ask you as to whether or not at the time of the date of those maps there, there was any city of Bakersfield? A. How is that? Q. Whether there was any city of Bakersfield, known as the city of Bakersfield. A. It was not incorporated —that is, I don't know—there was an old incorporation a good many years ago; I don't know anything about that, but my memory is that there was an old incorporation a good many years ago, which fell through with; but the later incorporation came later.

"Mr. Houghton: Of which the record is the best evidence of when the city was incorporated, disincorporated and reincorporated.

"The Court: That is true.

"Mr. Sears: The maps themselves merely show 'Bakersfield' and 'Bakersfield and Sumner,' while the assessment says 'lots 1, 2, and 3 in block 132, in the city of Bakersfield.' Q. Now, what has been your custom and procedure in making assessments in this city as to the descriptions as in this case, for instance, in property in the city of Bakersfield?

"Mr. Houghton: We object to it as incompetent what the custom has been, the question is what has been done in this case.

"Mr. Sears: I think I said 'in this case.'

"Mr. Houghton: The record speaks for itself as to what has been done in regard to the assessments.

"The Court: He can tell how he made this assessment if you want him to. A man might have a custom and it might be wrong, and they would not be bound by it.

"Mr. Sears: The language in this case is 'evidence showing the system of assessment.'

"The Court: You can show that.

"Mr. Sears: What has been the system of assessments of property in this city? A. What do you mean, in descriptions, in describing? Q. Yes, as in this case, the property is situated in the city of Bakersfield? A. I describe it by lots and blocks. Q. Have you found that that has been generally sufficient so that parties may identify the property?

"Mr. Houghton: Object to it as irrelevant, incompetent, and immaterial.

"The Court: The objection is sustained.

"Mr. Sears: Note an exception. Q. Now, in making the assessments in this case, as 'lots 1, 2, and 3, in block 132,' if there were another map covering the same, what do you do? A. Another map covering the same property? Q. The same block for instance. A. You mean if there was a duplicate block 132 in the city of Bakersfield? Q. Yes, sir. A. If there was a duplicate block in the city of Bakersfield, it would be necessary to designate it, in my opinion, as of a certain tract. Q. Now, in assessing the property here described as 'lots 1, 2, and 3, in block 132,' and it appeared that that was part of the Baker homestead tract, has it been the general system of assessing property then, as lots 1, 2, and 3, in block 132 of the Baker homestead tract? A. No, because there is only one 132 in the city of Bakersfield. I think a few instances where people took the pains to write in 'Baker homestead tract' in giving the statement in that that description would probably be carried into the roll from the statement, but in an instance where a person gave in lots 3 and 4 or any other lots in block 132, the description of 'block 132' I considered sufficient for the description of the property, because there is only one block 132 in the city of Bakersfield. Q. There is at this time only one block 132 in the city of Bakersfield, and that is in the Baker homestead tract? A. Yes, sir.

"Mr. Sears: Take the witness.

"Mr. Houghton: That is all."

The assessment book of the property showed as follows:

"Unknown Owners—In Town of Bakersfield—Lots one, two, three, block 132, value $115.00. Total tax, $1.90. School tax, 29 cents."

In all the instruments relating to the assessment and in all subsequent conveyances this description is followed and in none of them is there any reference to a map. It thus appears that there were, at the time these lots were assessed, three maps of record of the town of Bakersfield—one entitled "Baker Homestead Tract," one entitled "Map of Bakersfield," and one entitled "Bakersfield and Sumner," both of the latter having been filed before the first one above mentioned. The most than can be said of the testimony of the assessor is that in the assessment he described the property by "lots and blocks"; that it has not been the general system of assessing these lots as of the Baker homestead tract, "because," as the assessor stated, "there is only one 132 in the city of Bakersfield." He testified, "I think in a few instances where people took the pains to write in 'Baker homestead tract' in giving the statement" that description would probably be carried into the roll, but where a person gave in "lots in block 132 the description of 'block 132' I considered sufficient for the description of the property, because there is only one block 132 in the city of Bakersfield. Q. There is at this time only one block 132 in the city of Bakersfield, and that is the Baker homestead tract? A. Yes, sir." It is not disputed that these three maps relate to the same lots and block and the assessor expressed the opinion that "if there was a duplicate block in the city of Bakersfield, it would be necessary to designate it as of a certain tract." The witness testified, "In making my assessment, I have always gone by the official map at the time the assessment was made," but he could not say whether the maps of 1875 and 1888 were in use when he made his assessment and he did not state which map was the official map. When the case was remanded it went back with the statement that intervener "may show, if it be the fact, that there was of record at the time of the assessment (the assessment was made in 1896) a map by the aid of which the description of the lots in question would serve to fully and completely identify and locate them."

In the case of Baird v. Monroe, 150 Cal. 560, 89 Pac. 352, a case cited with approval by the court when the present case was decided, the question of the sufficiency of the description was involved where a party was claiming under a tax title. In discussing the use of a map for identification of the property, the court said:

> "It was, however, permissible to show, in aid of this description, that it was in fact sufficient to identify the land, and, in this behalf, to show the recorded map of such Pellissier tract, designating with certainty the property referred to in the assessment. If by such evidence it was made to appear that there was such a recorded map, and only one such map, or, if more than one, no difference therein so far as the assessed property was concerned, the evidence was sufficient to sustain a conclusion that the assessment sufficiently identified the property. The trial court had the right to assume, in the absence of a showing to the contrary by the person assailing the description, that there was but one Pellissier tract in the county of Los Angeles, and that this tract and the extent of its boundaries were well known by that name. People v. Leet, 23 Cal. 161."

The court then quoted from Best v. Wohlford, 144 Cal. 733, 78 Pac. 293, as follows:

> "Parol evidence will not be admitted to help out a defective description, or to show the intention with which it was made, or to resolve an ambiguity in its terms. * * * If reference is made to a map, the map thereby becomes a part of the description, and may be read in evidence to identify the land, by showing that it is delineated thereon according to the recital; and although it is not competent to show that any particular map was intended, if none is referred to, yet if it can be shown that there is only one map of a tract which includes the lot in controversy, upon which this lot is delineated or designated, and that that map is well known and generally accepted as authentic, it may be received in evidence as tending to identify the land before the court."

See Furrey v. Lautz, 162 Cal. 397, 122 Pac. 1073; Campbell v. Shafer, 162 Cal. 207, 121 Pac. 737; McLauchlan v. Bonynge, 15 Cal. App. 240, 114 Pac. 798.

There was no evidence that these lots were assessed in accordance with any existing system of numbering lots and blocks as shown by but one map, nor is there evidence that the lots delineated on all the maps introduced are the same and embrace the same land. The maps, in our opinion, add to the uncertainty of the description in the assessment rather than "to fully and completely identify and locate them." Bearing in mind that there is but one block 132 in the city of Bakersfield and that all three of these maps refer to that and no other block, it is plain enough that lots 1, 2, and 3 as delineated on the 1889 map are in a different part of the block and do not embrace all the land referred to by lots 1, 2, and 3 in the other maps. "The purposes to be subserved by the description," said the court, in Best v. Wohlford, supra, "are to enable the owner to discharge his land from the lien of the assessment by paying the same; and also, in case the land shall be sold to satisfy the lien, that bidders may know what land is offered for sale, and that the purchaser may receive a sufficient conveyance. The assessment becomes a lien only upon the land which is described in the assessment book, and it is therefore essential that such description be sufficiently definite to inform the owner whether any of his land is burdened by the lien. The description must be such that the land claimed by virtue of the deed can be identified or located upon the ground by means thereof."

The judgment rested upon the finding of the trial court "that the said property was duly assessed by the county assessor of Kern county, in the year 1896, for the year 1896." This finding is challenged on the ground "that the description of the land in said assessment was not sufficient, and on account of the want of such description the assessment was void." We think that this finding is not sustained by the evidence.

The judgment and order are therefore reversed.

We concur: HART, J.; BURNETT, J.

(175 Cal. 315)

CLINE v. LEWIS, County Auditor.

(L. A. 4781.)

(Supreme Court of California. June 6, 1917. Rehearing Denied July 5, 1917.)

1. OFFICERS 🔑100(2)—INCREASE OF COMPENSATION.

Charter of Los Angeles County (St. 1913, p. 1500) § 52, providing that the compensation of any elective county or township officer shall not be increased or diminished during the term for which he is elected, nor within 90 days preceding his election, makes the amount of compensation such an officer shall be entitled to during his term of office depend on the law in existence on the ninety-first day preceding his election.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 154.]

2. COUNTIES 🔑55 — ORDINANCES — TIME OF TAKING EFFECT.

Under Const. art. 11, § 7½, subjecting the provisions of county charters as to powers and duties of supervisors to the control of the general laws, Charter of Los Angeles County (St. 1913, p. 1487) art. 3, § 11, requiring the board of supervisors to provide by ordinance for the compensation of elective officers, etc., and Pol. Code, § 4058, providing for the enactment of ordinances by the initiative process and also for referendum votes upon ordinances passed by the board of supervisors, and providing that, with certain exceptions, no such ordinance shall go into effect before 30 days from its final passage, within which time it is subject to referendum, an ordinance of the board of supervisors of Los Angeles county fixing the salary of the county sheriff was not in force as an existing law until 30 days after its passage.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 71, 72.]

In Bank. Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Petition for writ of mandate by John C. Cline against Walter A. Lewis, Auditor of Los Angeles County. From judgment for petitioner, respondent appeals, and the appeal is transferred from the District Court of Appeal. Reversed.

Thomas Lee Woolwine, Dist. Atty., and Geo. E. Cryer, Chief Deputy, both of Los Angeles, for appellant. Joseph L. Lewinsohn, Daniel M. Hunsaker, and Hunsaker & Britt, all of Los Angeles, for respondent.

SLOSS, J. The appeal before us was taken, in the first instance, to the District Court of Appeal for the Second Appellate District. The justices of that court differed in opinion, and the cause was accordingly transferred to this court.

While the appeal was pending in the District Court of Appeal, an opinion, of which the following is a copy, was prepared by Presiding Justice Conrey, of that court:

"This is an appeal by the respondent in the court below from a judgment granting the petitioner's demand for a peremptory writ of mandate.

"At the general election held in November, 1914, the petitioner was elected to the office of sheriff of Los Angeles county for the term beginning January 4, 1915. Claiming that his salary is $5,000 per year, he presented demands computed at that annual rate for the months of January to November, 1915. Appellant, as county auditor, refused to audit these demands for any sum in excess of a salary computed at the rate of $4,000 per year.

"Ordinance 326 (New Series) of the county of Los Angeles, as adopted by the board of supervisors under date of June 2, 1913, provided for a sheriff's salary which, during the term of petitioner, was to be $4,000 per annum. On the 1st day of August, 1914, the board of supervisors passed and adopted an ordinance amending said Ordinance 326, and thereby providing that the salary of the sheriff of Los Angeles county should be $5,000 per year. We are called upon to determine whether this latter provision applies to the sheriff's present term of office.

[1] "Section 52 of the charter of Los Angeles county (Stats. 1913, p. 1500) states that 'the compensation of any elective county or township officer shall not be increased nor diminished during the term for which he was elected, nor within ninety days preceding his election. * * *' As applied to the sheriff, this plainly means that the amount of compensation to which the sheriff shall be entitled during his term of office shall be controlled by whatever law was in existence on the ninety-first day preceding the election, with respect to the salary of that office for and during the ensuing term. August 1, 1914, was the ninety-fourth day preceding the general election of that year. If the ordinance passed on that date was not an existing law for a full period of 90 days prior to November 3, 1914, it cannot be the law under which petitioner may claim his salary. This brings us to certain questions arising under the provisions of section 4058 of the Political Code, under which it is claimed that the ordinance could not become

a law until 30 days after its final passage by the board of supervisors.

"The authority for county charters is derived from section 7½, art. 11, of the state Constitution, and it is there declared that a county charter, when duly adopted and approved, 'shall supersede all laws inconsistent with such charter relative to the matters provided in such charter.' It is further declared, among other things, that county charters shall provide 'for the powers and duties of boards of supervisors; * * * provided, that the provisions of such charters relating to the powers and duties of boards of supervisors and all other county officers shall be subject to and controlled by general laws.' The charter of Los Angeles county, in article 3, § 11, thereof, declares it to be the duty of the board of supervisors to 'provide, by ordinance, for the compensation of elective officers and of its appointees, unless such compensation is otherwise fixed by this charter.' It is conceded that under this section valid ordinances may be passed establishing the salary of a sheriff. It is equally clear that there may be two existing and valid ordinances at the same time, one operative with respect to the current term, and another postponed in its operation to a subsequent term.

"The charter is silent as to the time when ordinances shall take effect and as to the subjects of initiative and referendum, and under the foregoing provisions of the Constitution these matters are subject to be controlled by the provisions of the Political Code as a part of the general law of the state. Section 4058 of the Political Code provides for the enactment of ordinances by the initiative process and also for referendum votes upon ordinances passed by the board of supervisors. As to the latter, we find therein the following provision: That no ordinance passed by the board of supervisors (with exceptions not applicable in the present case) 'shall go into effect before thirty days from its final passage; and if, during said thirty days, a petition signed by qualified electors of the county equal to ten per cent. of the entire vote cast therein for all candidates for governor of the state at the last preceding general election at which a Governor was voted for, protesting against the passage of such ordinance, be presented to the board, the same shall thereupon be suspended from going into operation, and it shall be the duty of the board to reconsider such ordinance. If said board shall thereupon not entirely repeal said ordinance, it shall submit the same to a vote of the electors either at a general election or a special election to be called for the purpose, and such ordinance shall not go into effect or become operative, unless a majority of the voters voting upon the same shall vote in favor thereof.'

"A legislative act cannot become operative until it has become a law, but the time when it becomes operative may be much later than the date when it becomes a law. This is illustrated by frequent instances where legislative acts by their own terms are not to go into effect until a certain date named. It is well illustrated by the instance to which I have referred of two laws in existence at the same time, one establishing the present salary of a public office and another establishing the future salary of that office. 'The Constitution (article 11, § 9) clearly implies that there must be a law in force, fixing the compensation of every county and township officer at the date of his election, and it imperatively forbids any increase of that compensation by a law subsequently enacted. It permits, however, an increase of compensation to the person to be elected to the ensuing term, and if such increase is provided it must be by a law for that limited purpose takes effect long before the expiration of the current term; the old law remaining in the meantime in full effect as to the incumbent. In such a case the operation of the amended law is postponed, not because it is unconstitutional, but because the courts, construing it in the light of the Constitution, hold that such was the intention of the Legislature.' Smith v. Mathews, 155 Cal. 752, 757 [103 Pac. 199, 202].

"When it is said in section 4058, supra, that no ordinance 'shall go into effect before thirty days from its final passage,' and again that, where a referendum petition has been filed, 'such ordinance shall not go into effect or become operative, unless a majority of the voters voting upon the same shall vote in favor thereof,' is it merely intended that the operation of the ordinance and its enforceability in any concrete case shall be postponed? Or do the words 'shall go into effect,' or 'shall not go into effect,' mean that it shall not be an existing ordinance in any event during the period of 30 days from its final passage by the board of supervisors, and (if referendum petition be filed) until further approved at the referendum election? In the case In re Pfahler, 150 Cal. 71, 84 [88 Pac. 270, 275, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911], the Supreme Court gave full consideration to the initiative and referendum provisions of the charter of the city of Los Angeles and expressed its view as to the effect of such provisions as follows: 'The effect of the provisions of the Los Angeles charter, as amended, is to give the legislative power vested in the city to the council and mayor, subject to such control by the electors as is given them by the initiative and referendum provisions. The reserved power of the electors to directly enact such ordinances as the council refuses to enact, as well as their power to effectually veto ordinances adopted by the council, is made paramount to the power of the council and mayor, the council being without power to repeal or amend an ordinance so enacted, and the objection that under the initiative we have "two equal co-ordinate lawmaking bodies, the one absolutely independent of the other," is therefore without foundation. This feature renders the decision in Ex parte Anderson, 134 Cal. 69, 66 Pac. 194, 86 Am. St. Rep. 236, a decision strongly relied on by petitioner, inapplicable, for the only thing decided therein was that there could not be under our system of government two equal, co-ordinate lawmaking powers, 'each existing without any restrictions the one upon the other."' The analogy suggested in the foregoing quotation between the referendum and the familiar power of veto tends to support the view that an ordinance or statute, during the period when it remains subject to referendum, has no validity as a law, for it will scarcely be contended that bills which are subject to executive veto have any validity or can be considered as existing laws until the time has expired withing which such veto might be exercised.

"Section 4057 of the Political Code provides with respect to county ordinances that 'no ordinance passed by the board shall take effect within less than fifteen days after its passage,' and further provides for publication of each ordinance within said period of 15 days. If the referendum provisions of section 4058 do not have the effect to postpone for 30 days after its passage the time when an ordinance becomes a law, and if in a given case the referendum petition be filed within the 30 days, but more than 15 days after the date of the passage of the ordinance, then the effect of a subsequent unfavorable vote upon the ordinance at the referendum election will be that of a repeal of an existing law; on the other hand, a favorable vote by the electors will not be a part of the process of enactment of the law, but will be merely a refusal to veto such existing law. The language of the statute does not require that we adopt a view so far out of harmony with the theory of referendum legislation. Where the law governing the process of enactment requires something to be done before the proposed enactment shall take effect, it generally means that the enactment shall not be a law until that thing has been done. Thus, where the statute provided that a county ordinance should not take effect until it had been published in its entirety, and the entire ordinance was not published, it was treated as a nonexisting ordinance. People v. Russell, 74 Cal. 578 [16 Pac. 395.]

[2] "It is my conclusion that the ordinance passed by a vote of the board of supervisors on August 1, 1914, amending Ordinance 326, was not in any sense in force as an existing law until a time less than 90 days preceding petitioner's election as sheriff; and that his salary for the current term is not to be measured by that amendment.

"The judgment should be reversed."

The quoted opinion contains an adequate statement of the facts involved in the controversy. We think, too, that the learned presiding justice made correct disposition of the legal questions presented. We adopt his opinion as the expression of our own views, adding merely the statement that the conclusion reached is in harmony with the decision of this court in Harrison v. Colgan, 148 Cal. 69, 82 Pac. 674.

The judgment is reversed.

We concur: SHAW, J.; MELVIN, J.; HENSHAW, J.

ANGELLOTTI, C. J. I concur. Were the question a new one in this state, I would feel very doubtful as to the correctness of the conclusion as to the proper construction of the charter provision involved. It seems to me, however, that the construction that must be given to section 52 of the Los Angeles county charter, so far as pertinent to the case at bar, is determined by the decision of this court in Harrison v. Colgan, 148 Cal. 69, 82 Pac. 674. I do not think that what was said as to when the salaries there involved were increased can be held to be obiter dictum. That decision was rendered in the year 1908. The Los Angeles county charter was framed and submitted to and approved by the electors of the county in the year 1912. In all material respects section 52 thereof is similar to the provision of the Constitution considered in Harrison v. Colgan, supra, and I do not think we would be warranted in holding otherwise than that it was adopted in the light of that decision and with the meaning given thereby to similar language.

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175 Cal. 366

BELL v. MOLONEY et al. (S. F. 7236.)

(Supreme Court of California. June 7, 1917.)

1. Trusts 🔑34(2)—Bank Deposit.

A trust is created where one deposits money in the bank to the credit of herself "or" her daughter, receives a passbook on which their names are written and gives directions, accepted by the bank, that the deposit shall be paid to either of them on production of the passbook.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 44.]

2. Gifts 🔑30(4) — "Gift Inter Vivos" — Bank Deposit.

A valid gift inter vivos within Civ. Code, §§ 1146 and 1147, defining gifts and providing how they may be made, was made of money deposited by the donor in a bank to the credit of herself "or" daughter, where the daughter, under directions of her mother and pursuant to her mother's expressed intent to make a gift, reduced the money to possession and reported that action to her mother.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 56.

For other definitions, see Words and Phrases, First and Second Series, Gift Inter Vivos.]

3. Witnesses 🔑246(1)—Examination—Interrogation by Judge.

Where it appears to the judge that by taking part in the examination of a witness he may aid in bringing out the truth or prevent a misunderstanding, it is his right and duty to take part therein.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 852, 856.]

4. Trial 🔑29(3)—Statement of Court—Interrogation of Witness.

Where, in an administrator's action for conversion of money belonging to the estate, it appeared that a witness misunderstood the purport of a question when she replied that she had an interest as an heir in the money sought to be recovered, it was not erroneous, as a prejudgment of the principal issue, for the court to interrogate the witness and inform her that such money was not in the estate.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 82.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Andrew J. Bell, administrator of the estate of Catherine McGuire, deceased, against Lillie Rose Moloney and another. From judgment for defendants and denial of new trial, plaintiff appeals. Affirmed.

F. J. Kierce, of San Francisco, for appellant. Joseph Farry, of San Francisco, for respondents.

MELVIN, J. Andrew J. Bell, as administrator of the estate of Catherine McGuire, deceased, brought suit for the alleged conversion by Lillie Rose Moloney of the sum of $2,088.46, which he alleged to have been the property of her mother, Catherine McGuire. James J. Moloney was joined as a defendant because he is the husband of said Lillie Rose Moloney. It is alleged in the complaint that Mrs. McGuire died on or about June 21, 1912; that during her lifetime the money here in dispute was deposited with a certain banking establishment to the credit of Catherine McGuire or Lillie R. Moloney; and that the latter withdrew and converted the fund on or about the 14th day of March, 1912. By the answer Mrs. Moloney admitted the withdrawal of the sum of $2,088.46 from the bank, but averred that she was at the time of such transaction the owner and entitled to the possession of said sum. Further answering defendants averred that Catherine McGuire during her lifetime created a trust of the sum deposited whereby it was to become the property of Mrs. Moloney at Mrs. McGuire's death; and it was also pleaded that during her lifetime Mrs. McGuire had made a valid gift of the money to Mrs. Moloney. The case was tried by the court without a jury, and judgment was given and entered in favor of defendants. From this judgment and from an order denying his motion for a new trial, the plaintiff appeals.

The court found that in August, 1897, Catherine McGuire and Lillie Rose Moloney deposited $160 in the bank to the credit of both of them, receiving a passbook on which their names were written; that they then and there in writing directed the banking corporation to pay and said corporation agreed to pay any sum or sums of money then or thereafter deposited to the credit of their account to either one of the depositors who should demand and receipt for the same and produce the passbook; and that on March 14, 1912, Mrs. Moloney withdrew $2,088.46, the balance then on deposit, and thereby closed the account. It was also found that at the time of the original deposit it was Catherine McGuire's intention to create and she did create a trust of said deposit in favor of her daughter, and that upon the death of said Catherine McGuire said Lillie Rose Moloney became the owner of the balance of the fund. The court further found that on or about March 14, 1912, Catherine McGuire gave and transferred to her daughter, Lillie Rose Moloney, all of the money then on deposit in the bank as evidenced by the bank book. There is abundant evidence to support these findings and the judgment based thereon. Respondent, Mrs. Moloney, lived with her mother at No. 49 Farren street, San Francisco. According to the uncontradicted testimony, on August 12, 1897, at the request of Mrs. McGuire, the respondent, her daughter, accompanied her to one bank where the mother withdrew a sum of money and then they went to another bank where at the mother's instance and request the money was deposited to the credit of "Lillie R. M*a*loney [an obvious clerical error] *or* Catherine McGuire." A printed form furnished by the bank was filled and executed at that time. The material part of the writing was as follows:

> "Pay all of any sum, or sums, of money that are now or may hereafter be deposited with you, by us, and entered in passbook No. 113,847 to whichever of us, the undersigned, shall demand and receipt for the same and produce said book.
> "[Signed] Lillie R. Maloney.
> her
> "Catherine X McGuire.
> mark
> "Witness: F. E. Wagner."

According to Mrs. Moloney's testimony her mother told her that the deposit was made in that form so that upon Mrs. McGuire's death her daughter might have all the money then on deposit because, as the mother asserted, she had confidence that the daughter would use the money as she wished to have it applied. Mrs. Moloney said that upon one occasion her mother read a will to her, and when she asked why the money in that certain bank was not mentioned the mother replied that there was no necessity for such mention as that had been fixed otherwise. Later, according to Mrs. Moloney's testimony, her mother told her to take the money from the bank and put it in a safe deposit vault so others should know nothing about it, as she (the mother) did not want any one but respondent, Mrs. Moloney, to have it. Mrs. Rock, another daughter of Catherine McGuire, corroborated Mrs. Moloney in this part of her testimony, and also stated that their mother had frequently said that this money was so deposited that Mrs. Moloney could have it upon her death. Plaintiff and another witness testified to certain alleged conversations with Mrs. Moloney and the former to certain purported declarations of Mrs. McGuire shortly before her death which tended in some degree to contradict the evidence offered on behalf of defendants, but with this conflict we are not concerned, the court below having reached its conclusions, as we have seen, upon ample evidence.

[1] It is true, as respondent's counsel say, that the entire transaction may be upheld upon the theory of a trust supported by such authorities as Booth v. Oakland Savings Bank, 122 Cal. 19, 54 Pac. 370; Drinkhouse v. German Savings & Loan Society, 17 Cal. App. 162, 118 Pac. 953; Sprague v. Walton, 145 Cal. 228, 78 Pac. 645; Cahlan v. Bank of Lassen County, 11 Cal. App. 535, 105 Pac. 765; Thomas v. Lamb, 11 Cal. App. 717, 106 Pac. 254; Carr v. Carr, 15 Cal. App. 480, 115 Pac. 261; Culver v. Lompoc Valley Bank, 22 Cal. App. 379, 134 Pac. 355.

[2] But there was also abundant evidence to support the finding of a valid gift inter vivos as Mrs. Moloney, corroborated by her sister, told of taking the passbook and at her mother's direction reducing the money to possession, and of reporting that action to her mother. Thus actual dominion over the property, together with declarations of the donor's intent to give, were shown. These were ample circumstances to support a finding of a gift between living persons. Sections 1146, 1147, Civ. Code; Field v. Shorb, 99 Cal. 661, 34 Pac. 504; Russell v. Langford, 135 Cal. 356, 67 Pac. 331; 20 Cyc. 1204.

Counsel for appellant accuses the learned judge of the superior court, who presided at the trial, of being unfair toward plaintiff "in his attempt to make the witness" (Mrs. Rock) "testify that she had no interest in the outcome of the litigation and no interest in the estate, which, up to the point of interruption, she conclusively showed she had." (We quote from the brief.) The criticism is without merit. The witness had said upon cross-examination, "I have an interest in this money as an heir." After she had again made that declaration in the form of an affirmative answer to a leading question from the cross-examiner the court took part in the inquiry and the following occurred:

> "The Court: What interest have you in it? A. An interest in the estate. Q. This money is not in the estate. Do you realize that? A. I don't mean to say that the property—no. Q. What do you mean? A. I mean that it is this way: That my sister is always interested in these things and naturally I was an heir also. Q. In what way are you an heir? A. In the interest of my sister. Q. Do you realize that according to your sister's story this money was given to her absolutely and nobody else in the world? A. Sure. Q. What right have you in it, what interest have you in it? A. The interest of my sister. Q. I don't understand what you mean. Have you any right to any part of this money? A. No, not at all. Q. Could you claim it at any time? A. No. Q. That is what Mr. Kierce wants to know when he asks you what interest you have in it. A. I misunderstood Mr. Kierce."

The quotation demonstrates the propriety of the court's interruption. The witness had testified regarding her mother's declarations that the money in question was to go to Mrs. Moloney, and that no mention was made of it in the will because it was disposed of otherwise. This testimony, followed by the statement that the witness had an "interest" in the property "as an heir," called for an explanation, and the court by a few questions developed the fact that Mrs. Rock was not using the word "interest" in its technical sense of "part ownership" or "right to participate in" the money, but with a very different meaning. Counsel criticizes the court for saying, "The money is not in the estate, do you realize that?" By the use of these words, says counsel, the court "assumed that it had already concluded the very issue in the case against the appellant." Commenting further upon this matter in his brief counsel uses the following language:

> "This was a very unfair interruption of the examination of the witness for the very question involved in this proceeding was whether the money belonged to the estate of the deceased, Catherine McGuire, or belonged to the sister of the witness then on the witness stand. The court had no right whatever, either to interrupt the cross-examination of an unfair witness, or to assume in advance that the very money which was the subject of his own inquiry, did not belong to the estate at all."

[3, 4] There is nothing in the record to justify this criticism. It is the right and the bounden duty of a judge of a trial court to take part in the examination of a witness whenever he believes that he may aid in bringing out the truth or in preventing a misunderstanding. By remarking that the money was not in the estate the learned judge was not declaring a prejudgment of the principal issue in the case, but was uttering a fact about which there was no dispute among the litigants. That the money had been taken by Mrs. Moloney and used as her own was charged and not denied. That it was out of the estate was the very reason for the administrator's suit. The purpose of the action, so far as he was concerned, was to force her to return an equivalent sum to the estate. Until and unless it should be restored to the estate the witness could have no interest in the money as an heir and the judge was very properly endeavoring to discover why she declared herself so interested in a fund which, according to her testimony, her mother had disposed of some months before the latter's death.

We have carefully examined the other assignments of error, and find them without merit.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(175 Cal. 399)

In re DE ROME'S ESTATE.

DE ROME v. GREAT WESTERN SMELTING & REFINING CO.

(S. F. 7819.)

(Supreme Court of California. June 8, 1917. Rehearing Denied July 5, 1917.)

1. EXECUTORS AND ADMINISTRATORS 🔑93(1)—MANAGEMENT OF BUSINESS — LIABILITY OF ADMINISTRATOR.

An administrator managing a business belonging to an estate is personally liable for debts which cannot be paid from the profits of such business.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 407, 408.]

2. APPEAL AND ERROR 🔑151(2)—ACCOUNT—WHO MAY APPEAL—"PARTY AGGRIEVED."

A creditor furnishing material to an administrator conducting a manufacturing business is not a "party aggrieved" within Code Civ. Proc. § 938, regulating parties who can appeal from an order settling an administrator's final account, since the administrator personally, and not the estate, is liable for the debt.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 947, 948.

For other definitions, see Words and Phrases, First and Second Series, Party Aggrieved.]

Department 2. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

In the matter of the estate of Louis De Rome, deceased. From an order settling the administrator's final account and decreeing distribution, the Great Western Smelting & Refining Company appeals. Affirmed.

Louis H. Brownstone, of San Francisco, for appellant. Dudley Kinsell, of Oakland, and Mastick & Partridge, of San Francisco, for respondent.

MELVIN, J. This is an appeal from an order settling the final account in the estate of Louis De Rome, deceased, and decreeing distribution of certain machinery and of $1,067.77 in the possession of the administrator to the widow and the four children of said Louis De Rome.

The record reveals the fact that, after his appointment as administrator of the estate of his deceased father, Louis M. De Rome conducted the affairs of the business which was the principal asset of the estate. The elder De Rome had operated a bronze and bell foundry and the business was continued by the administrator of his estate. Admittedly the debt due to appellant was incurred during the period in which the work in the foundry was thus carried on, without order or permission of the court by Louis M. De Rome. Respondent insists that, upon the authority of decisions of this court, notably In re Rose, 80 Cal. 166, 22 Pac. 86, Great Western Smelting & Refining Company is not a "party aggrieved," and therefore is not entitled to appeal from the order settling the account. Section 938, Code of Civ. Proc.

Appellant admittedly is not contending upon this appeal that the estate is liable for its debt, but only is seeking to have the administrator account for money received by him officially and (so it is contended) not properly accounted for. There were two accounts filed. In one the administrator set forth certain payments as "family allowance," but no formal order for such an expenditure had ever been made by the court. Before any proceedings looking to the settlement of this account had been taken, a second one was filed omitting all reference to family allowance and taxes. This is the account which was settled. It is argued by appellant that the unauthorized payment of these sums by the administrator amounted to an appropriation of the assets of the estate by him. But there was no showing that this money came from the profits of the business conducted by the administrator, and under the authority of Estate of Rose, supra, the estate was not interested except in the profits of that enterprise. Therefore the court held that the administrator could not be compelled in this probate proceeding to account for the money.

[1, 2] From this decision the Great Western Smelting & Refining Company is in no position to appeal. As was said in the Rose Case, the administrator who assumes the perils of the management of a business belonging to an estate does not, by so doing, subject the estate to the liabilities growing out of his conduct of the enterprise. They are his liabilities and he may pay them out of the increase of the business, but if by so doing a loss to the estate is sustained he must make that loss good. This has been the rule of law for many years, and one who, like the corporation here appealing, deals with an administrator who is conducting a manufacturing enterprise with the property of the estate, does so with full knowledge of its situation as a creditor. Since the liabilities are the administrator's, it follows that errors in his accounting with the estate, if any there be, are not the affairs of his personal creditor. Clearly Great Western Smelting & Refining Company is not a "party aggrieved" within the meaning of section 938 of the Code of Civil Procedure, and it cannot matter to that corporation what decree the court may have entered. Estate of Piper, 147 Cal. 606–608, 82 Pac. 246; Estate of Walden, 168 Cal. 759, 145 Pac. 100.

The order and decree are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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175 Cal. 309

FARNSWORTH et al. v. CASHIN.

(S. F. 7252.)

(Supreme Court of California. June 6, 1917.)

COMPROMISE AND SETTLEMENT 🔑5(1)—ACTION ON NOTE.

Where defendant in action on a note left in escrow an agreement that in consideration of a new note and a certain mortgage the time of payment should be extended and the suit should be dismissed, together with the note and mortgage, for signature by one of the plaintiffs, but thereafter withdrew the papers from escrow before signature, there was no compromise of the litigation.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 10, 11, 14–16.]

Department 2. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by O. G. Farnsworth and J. H. Cluck against K. S. Cashin. From a judgment for plaintiffs, and from an order denying new trial, defendant appeals. Affirmed.

C. K. Bonestell, of Fresno, for appellant. Barnard & Watters, of Fresno, for respondent.

MELVIN, J. Defendant appeals from the judgment and from an order denying his motion for a new trial.

The action was on a promissory note for $2,000, and the judgment, which included costs and attorney's fee, was for $2,249.05. The answer admitted the execution of the note for the amount due plaintiffs from defendant in consideration of services rendered by plaintiffs in the sale of certain land. It was alleged, however, in the answer that after the commencement of the action a writing had been executed by defendant and O. G. Farnsworth, one of the plaintiffs and copartner of the other plaintiff, J. H. Cluck, whereby the time of payment was extended and it was mutually agreed that defendant should execute a new note for $2,030, secured by a mortgage on specified real property and certain crops, and that the suit should thereupon be dismissed. It was also averred that defendant tendered the note and mortgage to plaintiffs, and that subsequently plaintiff Cluck without reason refused to sign the agreement. The purported contract was pleaded by copy as an exhibit.

It is contended that upon the showing made the trial of the case should have been continued until the date of the maturity of the note. It fully appears, however, upon the testimony of plaintiffs and of the lawyer, who drew the alleged agreement, that defendant left the contract in escrow with the note and mortgage to be delivered only upon condition that Mr. Cluck, who was absent from home during the preliminary negotiations between his coplaintiff and Mr. Cashin would, upon his return to Fresno, attach his signature to the agreement. Mr. Cluck having refused to sign the instrument, defendant took the note and mortgage and left the attorney's office. A few days later he came back and asked for the agreement. At first the lawyer refused to surrender it because the copies of the instrument had been left in escrow, but upon plaintiff's statement that the "deal was off" and his assurance that he wanted the paper in order that he might show it to another lawyer, he was permitted to take it.

Clearly the agreement never was executed. It was drawn for execution by both plaintiffs, and the defendant never intended that it should become effective upon the signing of the instrument by one of the partners only. But even if we regard it as an executed agreement (which we can only do by overlooking the fact that the minds of the parties never met), the defendant by withdrawing the note and mortgage from escrow refused to perform his part of the contract, and therefore was in no position to enforce any supposed rights under it. No defense to the action was established. All that defendant succeeded in proving was an unsuccessful attempt to compromise the litigation.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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175 Cal. 263

GIBSON v. McREYNOLDS et al. (L. A. 3809.)

(Supreme Court of California. June 4, 1917.)

1. CONTRACTS 🔑346(16) — PLEADING AND PROOF—VARIANCE.

There is no fatal variance between the contract alleged, which was termed a "special contract," and the one found by the court, which was an "express contract," although its terms were not precisely those of the alleged contract.

2. CONTRACTS 🔑346(1)—PLEADING — VARIANCE—STATUTORY RIGHT—RECOVERY ON EXPRESS CONTRACT.

That a party to a contract has rights founded on his status as a locator does not exclude existence of or recovery upon an express contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1714, 1718.]

3. CONTRACTS 🔑346(10) — PLEADING AND PROOF—"VARIANCE."

The mere fact that the contract found by the court differed in scope from that pleaded did not constitute a "variance," the difference being merely in degree.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1737–1743, 1746, 1747, 1749.

For other definitions, see Words and Phrases, First and Second Series, Variance.]

4. APPEAL AND ERROR 🔑1039(13)—REVERSAL —IMMATERIAL ERROR—"VARIANCE."

In view of Code Civ. Proc. § 469, providing that no variance between pleading and proof is material unless the adverse party has been prejudiced thereby, a simple variance in degree of contract alleged and proved did not prejudice defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4086.]

5. APPEAL AND ERROR 🔑1052(4)—HARMLESS ERROR—EVIDENCE.

Error, if any, in admitting a copy of a document without accounting for the absence of the original, was not prejudicial, where the adverse party subsequently sufficiently accounted for the absence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4174.]

6. APPEAL AND ERROR 🔑204(1)—PRESERVATION OF EXCEPTIONS — ADMISSION OF EVIDENCE.

An objection to the admission of evidence not made or argued at the trial will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1258; Trial, Cent. Dig. § 172.]

7. APPEAL AND ERROR 🔑926(5)—SCOPE OF REVIEW—PRESUMPTIONS.

In an action against two defendants, where a conversation admitted was admissible as against one defendant but not against the other, the court on appeal will not presume that it was admitted other than as against the defendant as to whom it was admissible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3729, 3742.]

Department 2. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by G. R. Gibson against O. O. McReynolds and another. From judgment for plaintiff and order denying motion for new trial, defendants appeal. Affirmed.

John W. Kemp, of Los Angeles, and Geo. E. Whitaker, of Bakersfield, for appellants. Frank H. Short, of Fresno, and E. L. Foster, of Bakersfield, for respondent.

MELVIN, J. Defendants appeal from the judgment and from an order denying their motion for a new trial.

By his pleading G. R. Gibson alleged: That he and the defendants had entered into "a special agreement whereby the plaintiff was to have a certain interest equivalent to that of defendants in certain placer mining claims to be located upon unappropriated government land, under the laws of the United States in the county of Kern." That thereafter, in pursuance of the agreement, defendants and their wives, with J. A. Stroud, G. W. Derby, and their wives and the plaintiff, made mineral locations upon certain lands designated as follows: "Sections 14, 12, 4, 8, 26 and the N. E. ¼, N. W. ¼, and the S. E. ¼ of section 2, and the N. W. ¼, S. W. ¼ and S. E. ¼ of section 24, all in township 32 south, range 24 east, M. D. M." That thereafter plaintiff conveyed to defendant O. O. McReynolds all his right, title, and interest in the said locations so that the said

McReynolds might conduct negotiations for disposing of the property. That plaintiff paid his proportion of the expenses of location, recording, and assessment work, and such other amounts as were demanded by defendants for holding the mining claims. And that all of the other locators conveyed to McReynolds their interests for the better carrying on of the selling or otherwise disposing of the properties. Then follow allegations regarding a sale of 920 acres of the land. It is alleged that McReynolds stated in writing to plaintiff that the latter's proportion of the 920 acres was 80 acres. Then follow averments that Parker Barrett offered plaintiff $550 as his share of the amount paid on account of the sale; that plaintiff refused to accept Barrett's check for that amount; that Barrett and McReynolds had received $4,000 in cash and $4,000 in notes of the vendee for plaintiff's 80 acres; and that plaintiff had sent $75 to Barrett as balance due on his proportion of the expense connected with the holding of the property, but that Barrett had refused to accept it. Judgment was demanded that defendants be declared trustees and that defendant McReynolds be required to pay plaintiff $4,000; to transfer to him $4,000 in the notes of the Lakeview Oil Company of Midway, the vendee of the 920 acres; to assign to him his proportion of the agreement involving the remainder of the purchase price; and to transfer to said Gibson his share of the lands described in the proportion of 80 acres to 920 acres.

The gist of the defenses pleaded by the defendants McReynolds and Barrett is found in the amendments to their amended answers. Barrett avers, in the amendment to the amended answer, that in October, 1908, he and his wife, together with O. O. McReynolds, J. M. Dunn, and G. W. Derby and their wives, formed an association for the purpose of making locations on oil lands in Kern county; that they proceeded to make such locations; that, while the locations were being made it was suggested that plaintiff might render assistance in the development and protection of the lands; that it was mutually agreed between Barrett and Gibson that the former would request his associates to place plaintiff's name on some of the claims being located in lieu of the name of Barrett's wife; that the request was made and granted, and, accordingly, the name of plaintiff was placed upon five of the mineral location notices; that the total expense of locating and developing the lands was $930; and that it was agreed between Barrett and his associates McReynolds, Derby, and Dunn that plaintiff should be requested to pay one-sixth of such expenditure or $155. It is not alleged in any of the pleadings that plaintiff joined in said agreement, or that he bound himself to pay one-sixth of the expenses. It is further averred that plaintiff contributed only the sum of $80 toward the payment of the sum of $155, and that Barrett was compelled to pay the other $75 to his associates. The pleading also contained the averment that:

> "The said plaintiff agreed with this defendant that his, said plaintiff's, interests in any proceeds obtained from the sale of the lands should be based upon the amount which said plaintiff had contributed toward the protection and development of the said lands and should be such percentage of 20 acres of the lands as included in the said five claims upon which the plaintiff's name appeared as a locator."

Barrett further alleged that he paid to plaintiff $500, which was more than Gibson was entitled to receive from the proceeds of the sale of the option or 20 acres of the land, which was plaintiff's proportionate share. There is also an averment of a settlement between plaintiff and Barrett. As a separate defense, Barrett pleads that Gibson had never paid any consideration except $80 for an interest in the property, and that he was equitably entitled to receive of the proceeds of the transaction with the Lakeview company only an amount proportionate to his payment towards the expenses.

The amendment to the amended answer of defendant McReynolds follows the theories of that of defendant Barrett. It does not, however, set forth any agreement between Barrett and the plaintiff to the effect that the latter's interest in the proceeds derived from the sale of the lands should be based upon the amount of Gibson's contribution to the expenses, and it does not plead the alleged settlement between Barrett and Gibson. This pleading also contains the assertion that Gibson agreed with Barrett to pay his proportion of locating and protecting the five mineral locations of which he was one of the locators.

The court found that in October, 1908, plaintiff and defendants entered into an agreement that plaintiff was to join with defendants in the location of certain placer mining claims and was to have an interest in said claims. The court found against plaintiff upon his assertion that he was interested in all of the property in the same proportion as was each of the other locators. There were findings that plaintiff's interest in the 920 acres was 20 acres net and that his original interest in the locations amounted to 80 acres and was so stated by defendant McReynolds in writing. There were findings against the claim of settlement as set up by Barrett and against Gibson's averment that he had paid $75 in addition to the $80 admittedly contributed by him. There were findings against the special defense. The court also found that the sums actually paid by plaintiff were largely in excess of his share of the expenses incurred in connection with the claims in which he actually had an interest.

[1-3] The appellants insist that there is a fatal variance between the contract alleged by plaintiff and the one found by the superior court, and that therefore the judgment should be reversed. In the plaintiff's

pleading the contract was styled a "special" agreement. They do not attach any peculiar magic to the word "special," except as that epithet emphasizes the fact that plaintiff declares upon an express contract. There is no merit in their contention. While it is true that the court did not find the exact contract pleaded by plaintiff, the defendants themselves asserted the existence of an express agreement by which Gibson was to share in the proceeds of the sale of those rights obtained in and to the lands described in the notices on which plaintiff's name appeared as a locator. The judgment is not based upon a finding of an implied contract. On the contrary, the court found that in the month of October, 1908, plaintiff and defendants entered into an agreement that plaintiff was to join with defendants in the location and was to have an interest in certain mining claims. The theory of appellants seems to be that, where a court finds that the rights of a party to an agreement are those of a locator, the existence of an express contract is absolutely negatived. But the fact that a party to a contract has rights founded upon his status as a locator does not exclude the existence of or recovery upon an express contract. For example, the law will imply that two partners will share the losses or the profits of their business, but such implication will not exclude proof of the existence of an express contract to the same effect. The enterprise outlined and proven in this case was in the nature of a partnership, and, while perhaps plaintiff's rights as against the government or against those claiming in opposition to the locations made by him or his associates would rest entirely upon implication, his rights as against his fellow locators depended, as alleged and found, upon an express contract. It is true that plaintiff claimed greater scope for his contract than the court found, but that circumstance did not produce a variance between the allegations and the proof such as requires a reversal of the judgment. Such difference as there was did not lie in kind, but in quantity and degree, and was not in contemplation of law a variance. Plate v. Vega, 31 Cal. 384.

[4] But in any view of the case defendants suffered no injury. The trial was had upon the issues arising out of the contractual relations of the parties, and whether we call the contract an express or an implied one we cannot see that defendants were injured by any variance between averment and proof. Section 469, Code Civ. Proc.; Herman v. Hecht, 116 Cal. 553, 48 Pac. 611; Herd v. Tuohy, 133 Cal. 55, 65 Pac. 139; Lyles v. Perrin, 134 Cal. 417, 66 Pac. 472; Cheda v. Bodkin, 158 Pac. 1025–1029; Gordon v. Cadwalader, 172 Cal. 254–257, 156 Pac. 471.

The court did not err in denying the motion for nonsuit. The plaintiff testified to the existence of the agreement, and defendants not only set up a contract in their pleadings, but they alleged that the consideration was Gibson's promise to pay his proportion of the expenses incurred in developing and protecting the oil bearing lands. That he did pay something was admitted, the principal controversy being in regard to the amount.

Certain of the findings are attacked on the ground that they are not supported by the evidence. One objection is that the court erred in finding that plaintiff paid his share of the costs of locating the land and other amounts demanded by defendants. One of the defendants, McReynolds, testified that $930 had been spent upon the location, assessment work, protection, etc., of the lands. Plaintiff was interested in one-fourth of the total locations. He was therefore bound to pay his proportion of $232.50, which is one-fourth of $930. There were ten locators upon each of the five tracts in which he was interested. Upon the basis of one-tenth of the obligation, he would be bound to pay $23.25, and, even upon the claim of appellants that his duty was to bear one-sixth of the expense, his share of the burden would be less than half of the amount, $80, concededly paid by him.

Appellants attack the finding that the interest of Gibson was 80 acres net and was so stated by defendant McReynolds in writing. This finding is based upon a letter from McReynolds to Gibson informing him that he was associated with others in the locations made on November 16, 1908, on five quarter sections therein described. There was no declaration in terms that such interest amounted to 80 acres, but, as respondent's counsel says, that is "a mere matter of arithmetic." There were 10 locators and 800 acres. The result is obtained by a simple division of 800 by 10.

[5, 6] Appellants attack the ruling of the court in admitting a copy of a certain memorandum received by plaintiff from defendant Barrett. The document was admitted in evidence without proof of the loss of the original or accounting in any way for its nonproduction. Counsel for defendants, when the document was offered at the trial objected that it was "incompetent, irrelevant, and not shown to be a copy." As the witness Gibson had sworn that the paper was "an exact copy" of the original, there was evidence to support the ruling admitting it. The objection now urged by appellants was neither made nor argued at the trial and will not be considered here. But, if the court erred in accepting the writing, defendants were uninjured, as defendant Barrett later testified that the original was returned to him and that he had it among his papers. But when he looked for it he could not find it. Thus defendants themselves sufficiently accounted for the failure of plaintiff to produce the original memorandum.

[7] The superior court permitted a witness named Myers to testify to a conversation

had with defendant Barrett when defendant McReynolds was not present. The conversation was clearly admissible as against Barrett, and we are not to presume that the court considered it for any other purpose. We cannot see that the error, if error it was, prejudiced defendant McReynolds. The gist of the conversation was that Mr. Barrett expressed the belief that by failing to meet an assessment or call for $25 Mr. Gibson had either put himself in jeopardy of losing or had lost rights worth $8,000. We do not feel called upon to reverse the judgment or the order before us for review, merely because the court failed to declare the intention of limiting the effect of the testimony of Myers to the case against Barrett.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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175 Cal. 311

CITY OF BEVERLY HILLS v. CITY OF LOS ANGELES et al. (L. A. 4012.)

(Supreme Court of California. June 6, 1917.)

1. Waters and Water Courses 🔑192 — Waterworks — Right to Maintain Pipe Line—Acceptance of Grant by City.

In the absence of requirement that a municipality formally accept a legislative grant of the right to maintain water pipes in any road, street, or highway, the question as to whether a municipality asserting such right to use the public highway for such purpose has in fact accepted the offer must be determined from the action taken with a view of acquiring the same.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 279.]

2. Waters and Water Courses 🔑192 — Waterworks — Acceptance of Grant of Right to Use Highways—Statute.

Where the city of Los Angeles irrevocably committed itself to the work of installing a pipe line by expending hundreds of thousands of dollars therein, and, prior to the incorporation of a city of the sixth class through which the line must run, the board of supervisors of the county, at the request of the city of Los Angeles, granted the city the use of highways in question to construct the pipe line through and across them, the state's grant, offered to every city by St. 1911, p. 852, of the right to use highways, for water lines, etc., was accepted by the city of Los Angeles prior to the incorporation of the city of the sixth class, through which the pipe line must pass.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 279.]

3. Constitutional Law 🔑134—Obligation of Contracts—Grant by State.

The state's grant, resulting from a city's acceptance of the state's offer to permit the use of highways for a water pipe line, constituted a contract, the property right in which is protected by the federal Constitution, the extent of the right being measured by the purpose for which the grant was made and accepted—i. e., for the construction of the contemplated pipe line as an entirety.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 344.]

4. Waters and Water Courses 🔑192 — Waterworks—Pipe Line — Use of Highways.

So far as the construction by a city of a water pipe line contemplated the use of intervening highways between the origin and end of the line, the right to use such highways, under the state's grant to every city, offered by St. 1911, p. 852, attached and became effective as completely as though the pipes had been actually laid when the grant was accepted.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 279.]

5. Constitutional Law 🔑134—Obligation of Contracts.

Where one city obtained from another the right to use the latter's streets for a water pipe line, the latter could not, after a part of such line had been installed, revoke the grant or add new conditions and restrictions which might nullify and render the grant inoperative.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 344.]

6. Constitutional Law 🔑134—Obligation of Contracts—Agency for State.

Where the state itself could not change or revoke its grant to a city of the right to use highways for a water pipe line on account of the constitutional prohibition against impairing the obligation of contracts, another city, to which, on its incorporation, the management of some of the highways involved was given, was equally bound to respect the grant.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 344.]

In Bank. Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the City of Beverly Hills, a municipal corporation, against the City of Los Angeles, a municipal corporation, the Board of Public Service Commissioners of the City of Los Angeles, and another. From a judgment for defendants, and an order dissolving a restraining order, and an order denying an injunction pendente lite, plaintiff appeals. Judgment and orders affirmed.

Emmet H. Wilson, of Los Angeles, for appellant. Albert Lee Stephens, City Atty., Wm. B. Himrod, Deputy City Atty., and W. B. Mathews, all of Los Angeles, for respondents.

VICTOR E. SHAW, Judge pro tem. In this action plaintiff sought a decree perpetually enjoining the city of Los Angeles from laying, constructing, and maintaining a pipe line over, through, across and under certain streets of the city of Beverly Hills for the purpose of conveying water from the source of supply thereof to the city of Los Angeles. The result of the trial was a judgment in favor of defendants and denying plaintiff's right to an injunction from which, and an order dissolving a restraining order made upon filing the complaint, and an order denying an injunction pendente lite, plaintiff has appealed.

The facts, as to which there seem to be no just ground for dispute, are that for some six or seven years prior to the filing of the complaint the city of Los Angeles had been engaged in the construction of the Los Angeles aqueduct extending from a point in the Owens river in Inyo county to a point in San Fernando valley in Los Angeles county about 21 miles northwesterly from the city of Los Angeles, where defendants had, for the purpose of receiving and impounding water so conducted from Owens river through said aqueduct, constructed reservoirs.

Beverly Hills, located in Los Angeles county, was under and by virtue of the general laws incorporated as a city of the sixth class on January 26, 1914, prior to which time it was unincorporated territory. By an act of the Legislature, approved April 10, 1911 (Stats. 1911, p. 852), it was provided:

> "That there is granted to every municipal corporation of the state of California, the right to construct, operate and maintain water and gas pipes, mains or conduits, electric light and electric power lines, and telephone and telegraph lines, along or upon any road, street, alley, avenue or highway, or across any railway, canal, ditch or flume which the route of such works intersects, crosses or runs along, in such manner as to afford security for life and property; but the municipality shall restore the road, street, alley, avenue, highway, canal, ditch or flume thus intersected to its former state of usefulness, as near as may be: Provided, however, that such municipality may not use any street, alley, avenue or highway within any city and county or incorporated city or town, for such purpose, unless the right so to use the same is granted by a two-thirds vote of the governing body of such city and county, or incorporated city or town."

Prior to the incorporation of the city of Beverly Hills and while said act of the Legislature was in full force and effect, defendants, as found by the court, designed, projected and located a route from said reservoirs over and along which to construct a pipe line to conduct the water therefrom to the city of Los Angeles which route of said pipe line was surveyed, projected, and located across San Fernando valley to Franklin canyon, thence through the unincorporated territory of Beverly Hills, and in part over and across the public highways therein to the city of Los Angeles, the construction of which pipe line contemplated an expenditure of $1,500,000, two-thirds of which sum had, prior to January 26, 1914, been expended, and a large part of the material required for use in installing the pipe line from Franklin canyon to the city of Los Angeles purchased, some of which had been delivered along said route prior to the incorporation of Beverly Hills. It was also made to appear that the only practical and feasible route for such pipe line between Franklin canyon and the city of Los Angeles was through Beverly Hills.

[1] Appellant concedes that the city of Los Angeles might have acquired the right to the use of the highways by acceptance of the legislative grant, but insists that such acceptance could be manifested only by the actual use of the highway prior to the incorporation, which use thereof, to the extent occupied, must be deemed the measure of said defendant's right thereto. The legislative grant is in terms general and applies to every municipality in the state, but it contains no provision for the formal acceptance thereof by a corporation desiring to avail itself of the proffered grant of such right. Hence, in the absence of such requirement, the question as to whether a municipality asserting such right to use the public highway for the purpose named has in fact accepted the offer must be determined from the action taken with a view of acquiring the same.

[2] The intention of the city of Los Angeles to construct the pipe line from Franklin canyon through the territory known as Beverly Hills and over the public highways of which it had, prior to the incorporation of plaintiff, surveyed and located the route for the said pipe line, was clearly indicated by the extent and nature of the work prosecuted by defendants with the purpose of conducting water to the city, in which undertaking the city of Los Angeles had, in reliance upon the grant so made by the state, irrevocably committed itself by the expenditure of hundreds of thousands of dollars in the prosecution of the work of installing the same. Moreover, the record discloses that on January 6, 1914, prior to the incorporation of Beverly Hills, the board of supervisors of Los Angeles county, assuming authority so to do, and at the request of defendants, adopted an ordinance whereby it, in express terms, granted to the city of Los Angeles the use of the highways in question for the purpose of constructing the pipe line through and across the same. That the offered grant so made by the state was accepted by said defendant prior to the incorporation of the city of Beverly Hills, in our opinion, admits of no doubt. City Ry. Co. v. Citizens', etc., R. R. Co., 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114; Russell v. Sebastian, 233 U. S. 195, 34 Sup. Ct. 517, 58 L. Ed. 912, Ann. Cas. 1914C, 1282; Grand Trunk Ry. Co. v. South Bend, 227 U. S. 544, 33 Sup. Ct. 303, 57 L. Ed. 633, 44 L. R. A. (N. S.) 405.

[3, 4] The grant resulting from defendant's acceptance of the state's offer constituted a contract, the property right in which is protected by the federal Constitution (Russell v. Sebastian, supra, and the cases therein cited), and the extent of which right is measured by the purpose for which the grant was made and accepted. This, as we have seen, was for the construction of a pipe line as an entirety from Franklin canyon to the city of Los Angeles, and, in so far as the construction thereof contemplated the use of the intervening highways between said termini, the right to use the same attached and became effective as completely as though the pipe had been actually laid.

[5, 6] Assuming, in the absence of the accepted legislative grant, that defendant had obtained from the city of Beverly Hills the right to use its streets for a pipe line, clearly it could not, after a part of such line had been installed, revoke the grant or add there-

to new conditions and restrictions the effect of which might nullify and render the grant made wholly inoperative. Dillon's Municipal Corporations (5th Ed.) § 1242. And yet that is the effect of appellant's contention. No doubt exists as to the power of the state to make the grant, which, when accepted as we have seen, constituted an inviolable contract the extent of which is measured by the purpose for which it was intended, and in the exercise of which right defendant was limited alone by the language used in the grant. And since the state itself could not change or revoke it, the city of Beverly Hills, to which, upon its incorporation as a city of the sixth class, the management of the highways therein was given (Stats. 1915, p. 828, § 862, subd. 4; General Laws, Act 2348), is equally and likewise bound.

The power to control such highways, by general laws as to such cities given their boards of trustees, must as to appellant be deemed to have vested subject to the right of defendant, acquired by the legislative grant approved April 10, 1911, to use the highways in question over, across, in, and along which to construct and maintain its pipe line for the purpose specified in the grant. This view renders it unnecessary to discuss other grounds upon which respondent bases its claim to the use of the highways.

The judgment and orders appealed from are affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

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175 Cal. 305

LOS MOLINOS LAND CO. v. MacKAY.

(Sac. 2320.)

(Supreme Court of California. June 6, 1917.)

1. Vendor and Purchaser 🔑101—Termination of Contract for Vendee's Default—Notice—Sufficiency.

Where a contract for the sale of land provided that if any installment of the price, or interest, should be in default for 60 days, the vendor might terminate the contract by notice in writing, served personally or by mail to the holder's last known post office address, and the vendor, on default for more than 60 days in payment of interest, notified the holder in writing by mail at his post office address that his rights under the contract were terminated, the contract canceled, and that all payments made were forfeited, there was a compliance with the terms of the contract on the part of the vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 170–174.]

2. Vendor and Purchaser 🔑117—Rescission of Contract—Surrender of Possession.

A purchaser of land, payment to be made in installments, who wishes to rescind the contract, may do so only by surrendering the land to the vendor, whereupon he is in position to sue for the portion of the price paid; if he chooses to retain possession under the contract, he may do so only by paying the purchase price and interest according to his agreement.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 209.]

3. Vendor and Purchaser 🔑299(4) — Defense—Fraud in Sale of Land.

In a vendor's action to quiet title and to have the contract declared terminated for the purchaser's default in payment, and to remove vendee from the land, etc., where defendant failed to deny any of the essential averments of the complaint, he could not defend on the theory that plaintiff had been guilty of fraud; the action being in ejectment, and an independent tort not being available against such pleading.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 842.]

4. Vendor and Purchaser 🔑299(4)—Counterclaim—Damages—Fraud.

In vendor's action to quiet title, and for repossession after breach of contract, a counterclaim, alleging fraud and asking for money judgment by way of damages, does not arise in the same transaction.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 842.]

Department 2. Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Suit by the Los Molinos Land Company, a corporation, against T. C. MacKay. From a judgment for plaintiff, defendant appeals. Affirmed.

P. H. Coffman and A. H. Ludeman, both of Red Bluff, for appellant. W. P. Johnson, of Red Bluff, for respondent.

MELVIN, J. Plaintiff sued to have a certain contract for the sale by it of land to the defendant declared at an end by reason of defendant's breach thereof, to obtain a decree for the removal of defendant from the land involved in the contract, and to quiet title to said real property. Defendant demurred to the complaint, and, the demurrer being overruled, answered, and also pleaded a counterclaim. Demurrers of plaintiff to defendant's pleadings were sustained without leave to amend, and after the taking of testimony judgment was entered in favor of plaintiff as prayed. From this judgment, defendant appeals.

[1] The only objection to the sufficiency of the complaint which is urged by appellant's counsel in their briefs is that the pleading does not indicate whether or not the defendant was served with notice to quit the premises prior to the commencement of the action. This objection is without merit. The contract, which was fully set forth in the complaint, provided that if any installment of the purchase price, interest, or taxes should become due and be in default for 60 days Los Molinos Land Company might terminate all of the rights of the holder of the contract by notice in writing served personally or by mail to the last known post office address of said holder. The complaint, after setting forth the default of defendant for more than 60

days in the payment of an installment of interest, avers that he was notified, on a day specified, in writing by mail at his post office address at Los Molinos, Cal., that his rights under the contract were terminated, the contract canceled, and that all payments theretofore made were forfeited. This was a sufficient compliance with the terms of the agreement, and the court properly overruled the demurrer to the complaint.

The complaint contains allegations to the effect that plaintiff and defendant executed the pleaded agreement; that defendant went into possession of the land under said contract; that he was then occupying the premises; that certain interest had become due for a period of more than 60 days; that said interest was still unpaid; that plaintiff, exercising its option given by the terms of the contract, had declared the said agreement at an end, and the payment previously made on account of the purchase price forfeited. None of these allegations was denied by the answer, but defendant pleaded certain alleged fraudulent representations operating to induce defendant to purchase the land; the offer of defendant, on discovery of the fraud, to rescind the contract and restore the land, on repayment of the amount paid on the purchase price, and plaintiff's refusal to accept the terms so offered. The counterclaim sets up the alleged fraudulent acts of plaintiff in inducing defendant to enter into the contract, and prays recovery of $350, the initial payment on the purchase price, $350 alleged to have been expended by defendant in efforts to produce crops on the property, and $100 counsel fees.

[2-4] The demurrers to the answer and counterclaim were properly sustained. A purchaser, wishing to rescind a contract of this sort, may only do so by surrendering the land to the vendor. He is then in a position to sue for the portion of the purchase price previously paid; or, if he chooses to retain possession under the contract, he may only do so by paying the purchase money and the interest according to the terms of the agreement. Gervaise v. Brookins, 156 Cal. 103-108, 103 Pac. 329; Empire Investment Co. v. Mort, 169 Cal. 732-737, 147 Pac. 960; Empire Investment Co. v. Mort, 171 Cal. 336-339, 153 Pac. 236. Having failed to deny any of the essential averments contained in the complaint, MacKay could not defend upon the theory that plaintiff had been guilty of fraud. This is an action in ejectment, and an independent tort is not available against such a pleading. There was nothing in the contract by which the vendor guaranteed the quality of the land or its productiveness, and all of the allegations of fraud in the answer and counterclaim relate to misrepresentations and concealments regarding such matters. There was nothing in the fraud which prevented the defendant from carrying out the stipulations contained in the writing and then suing for the damages suffered because of plaintiff's misrepresentations and concealments, if any there were; or he might have surrendered the land and sued while the contract was still of full vitality, praying for its rescission on account of the vendor's fraud and for damages. Having chosen to permit the vendor to rescind on account of his (the vendee's) own failure to comply with the terms of the contract, he is in no position to set up plaintiff's fraud, either as an answer or by way of counterclaim, as against the action in ejectment, because such purported counterclaim may not be said to arise out of the same transaction. The counterclaim does not tend to defeat plaintiff's recovery, which was for the repossession of the land after admitted breach of the contract of sale by the vendee. Defendant's demand was for a money judgment by way of damages, and cannot be said to arise out of the same transaction. See Empire Investment Co. v. Mort, 169 Cal. at page 738, 147 Pac. 960, and cases there cited.

Our conclusion upon this subject makes it unnecessary to discuss the sufficiency of defendant's allegations of fraud as matters of pleading.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

175 Cal. 293

J. FRANK & CO. v. NEW AMSTERDAM CASUALTY CO. (S. F. 7302.)

(Supreme Court of California. June 6, 1917.)

1. INSURANCE 🔑371—RIGHTS OF INSURER—WAIVER.

While an insurer may stand upon the letter of its contract, it may waive its provisions when placed in the policy for the insurer's benefit, and may by its conduct be estopped from asserting defenses otherwise available.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 943-946.]

2. INSURANCE 🔑388(5)—RIGHTS OF INSURER—WAIVER.

Where the insurer, under an indemnity policy issued to J. & Co. as an individual, defended a suit brought against J. & Co. as a corporation, it waived the defense of misrepresentation in the policy as to the status of the insured.

3. INSURANCE 🔑388(5)—RIGHTS OF INSURER—WAIVER.

In such case, where the insurer permitted a judgment against the insured to become final, it could not afterwards deny the binding force of the policy.

4. INSURANCE 🔑390—RIGHTS OF INSURER—WAIVER.

When an insurance company, with full knowledge of all the facts, enters into negotiations and relations with the assured, recognizing the continued validity of the policy, the right to a forfeiture for any previous default which may be asserted is waived.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1037, 1038.]

5. INSURANCE 🔑665(8)—RIGHTS OF INSURER —WAIVER.

Evidence *held* to show that the insurer had full charge of a suit against the insured, so that it was bound by the judgment in such suit.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1725.]

6. EVIDENCE 🔑78—PRODUCTION OF EVIDENCE—CORPORATE RECORDS—PRESUMPTIONS.

The mere fact that the corporate books and papers were not brought into court, though such action was suggested, but not ordered by the judge, does not raise the presumption that there was no corporate action regarding the matter involved when such action was prerequisite to maintaining a suit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 98, 100.]

7. INSURANCE 🔑665(4)—LIABILITY OF INSURER—INDEMNITY POLICY.

Evidence *held* to show that the insured against whom a judgment was recovered had paid the judgment, so as to render the insurer liable therefor.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1722.]

8. INSURANCE 🔑558(1)—RIGHTS OF INSURER —WAIVER.

While requirement in indemnity policy that notice of probable liability be given to the home office of the insurer is reasonable and just, it is waived when the insurer actually assumes control of the litigation involved.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1382, 1383, 1389, 1390.]

9. INSURANCE 🔑514—LIABILITY OF INSURER—INDEMNITY POLICY.

In suit under an indemnity policy binding the insurer to pay any judgment recovered against the insured, the insurer may inquire whether the judgment has been paid, but not where the funds with which to pay it were obtained.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1298.]

10. APPEAL AND ERROR 🔑1058(2)—HARMLESS ERROR.

Error, if any, in excluding testimony was harmless where the same witness was subsequently permitted to testify to all the matters as to which his testimony was previously excluded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4201.]

11. INSURANCE 🔑555—INDEMNITY POLICIES —CONSTRUCTION.

A prohibition in an indemnity policy against waiver of its conditions except in writing does not apply to stipulations to be performed after loss, such as giving notice and furnishing preliminary proof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1367–1373, 1382–1390.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by J. Frank & Co. against the New Amsterdam Casualty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lilienthal, McKinstry & Raymond, of San Francisco, for appellant. Louis H. Brownstone, of San Francisco, for respondent.

MELVIN, J. Defendant appeals from the judgment and from an order denying its motion for a new trial.

The facts are simple. Cousins, an employé of plaintiff, was injured and brought suit for a large sum of money in damages. Defendant, a surety company, which had issued a policy in favor of plaintiff, took charge through its counsel of the defense in that action. Cousins obtained a judgment for $2,500 against J. Frank & Co., and the attorney for the New Amsterdam Casualty Company, although promising that an appeal would be taken, allowed the judgment to become final. The judgment was paid and this suit was by J. Frank & Co. (a corporation) to compel repayment of the amount of said judgment from its insurance carrier, New Amsterdam Casualty Company (a corporation). The defense was highly technical, and was based for the most part upon alleged rights of the insurer under its policy, which were waived by its assumption of liability evidenced by its undertaking the defense in the suit of Cousins against his employer.

[1-3] Appellant's first point is that it was not bound by the terms of the policy to indemnify plaintiff for any loss because it did not, as found by the court, enter into a contract of insurance with "the plaintiff" (a corporation), but with J. Frank & Co., an individual. Undoubtedly an insurance corporation may usually stand upon the letter of its contract, and where the policy is based upon a warrant of status by the person, firm, or corporation seeking insurance, the insurer may in certain cases be relieved of liability by misrepresentations of the applicant, even when there is an absence of fraud. But an insurance company, like any other contracting party, may waive provisions placed in the policy solely for its own benefit and may by its conduct be estopped from asserting defenses which might otherwise be available. We do not mean to say that the mere statement by the assured of individual rather than corporate status would avoid the policy if timely objection were made, but it is certain that whatever the rights of the casualty company may have been by reason of the false statement in the policy, it is now prevented by its own conduct from taking any advantage of that representation because it undertook the defense of its assured, under the recognized duty imposed by the contract, when J. Frank & Co. was sued as a corporation. The same able counsel who represented the interests of the defendant on behalf of the surety company in Cousins v. Frank & Co. (a corporation) conducted the defense in this action. The complaint in the action for damages described J. Frank & Co. as "a corporation duly organized and existing under and by virtue of the laws of the state of California." This was admitted by lack of denial in the answer, and that pleading was

verified by Mr. Frank as president of the corporation. Thus the misnomer as well as any similar infirmity was waived by the conduct of the surety company. Moreover, the surety company, by failing to appeal on behalf of J. Frank & Co. from the judgment in the suit for damages, deprived the latter of important and valuable rights. The president of J. Frank & Co. was told that counsel for the surety company had the matter of a settlement in hand, that an effort to settle was being made, but that no agreement would be made which would involve the payment of more than $200. Having permitted the insured thus to alter its position, the surety company may not now seek to deny the binding force of the policy.

[4] When an insurance company, with full knowledge of all the facts, enters into negotiations and relations with the assured, recognizing the continued validity of the policy, the right to a forfeiture for any previous default which may be asserted is waived. Murray v. Home Benefit Association, 90 Cal. 402–407, 27 Pac. 309, 25 Am. St. Rep. 133; Knarston v. Manhattan Life Insurance Co., 124 Cal. 74–78, 56 Pac. 773; Knarston v. Manhattan Life Insurance Co., 140 Cal. 57–62, 73 Pac. 740.

Appellant attacks as not sustained by the proof the finding to the effect that the insurer erroneously inserted in the policy a designation of the assured as an individual. In view of our decision with reference to waiver of conditions, this finding is immaterial, and we are relieved from the necessity of discussing the alleged lack of evidence applicable to it.

[5] Another finding which, according to appellant, is unsupported is the one by which the court declared that "defendant through its attorneys had entire charge of the defense of said action" (meaning the suit of Cousins against J. Frank & Co.) It is asserted that because there was a claim by Cousins for an amount in excess of the maximum liability under the policy, the surety company deemed itself bound to invite Mr. Brownstone, who had acted in other matters for J. Frank & Co., to become associated with its counsel. Unquestionably he was asked to participate in the preparation and trial of that case, but he refused to accept the invitation. Mr. Raymond, one of the attorneys for defendant in this action, while on the witness stand, speaking of Cousins v. Frank, said: "I had absolute charge and control of the case." The finding is therefore fully supported, because it appears clearly from the testimony that Mr. Raymond was acting in behalf of the surety company when appearing for the insured.

[6] The court found that plaintiff paid in full the judgment in favor of Cousins on the 24th of February, 1913, together with interest and costs, amounting in the aggregate to $2,635. In attacking this finding appellant again lays great stress upon the personal as distinguished from the corporate entity. The evidence tends to show, as appellant admits, that M. M. Morris loaned to the corporation $2,000, to be applied to the payment of the judgment, but appellant insists that the remainder, $635, was paid by Mr. Frank personally. Appellant calls attention to the provision in the policy to the effect that no action by the assured against the surety company will lie to recover for any amount except a loss "actually sustained and paid in money by the assured." After the recovery of judgment and before its payment J. Frank & Co. made an assignment for the benefit of creditors. Subsequently the sum of $2,000 was borrowed from Morris on the security of a purported assignment by the corporation, J. Frank & Co., of its rights under the policy and the satisfaction of judgment was obtained on the same day. Yet there is no proof, according to appellant, of any corporate act, either in the execution of the note to Morris, the making of the assignment or the payment of the judgment; and, further, it is argued in appellant's behalf that by failure to produce the corporation's records (although ordered to do so by the court), respondent established the presumption against it that there was no corporate act touching the matter of the settlement of the judgment. This last contention is without merit. It is true that the court suggested to counsel for J. Frank & Co. that he would better get the minutes and other books of the corporation during an adjournment, but there was no order to produce them, and if there had been the surety company easily might have requested its enforcement. This was not done. The mere fact that the books and papers were not brought into court did not create the presumption for which appellant contends.

[7] There is no pretense that the proof does not show the payment of the judgment in actual money on behalf of J. Frank & Co. It is therefore immaterial to the insurance carrier how or when that corporation obtained the money or the credit which enabled it to pay Cousins the amount due. However, it does appear from the testimony of Mr. Frank that the assignment to Mr. Morris of the proceeds of any judgment against the surety company, given as security for the loan, was made after a meeting of the directors of the corporation, and as the president signed the assignment for the company, presumably he did so in the fulfillment of the formal action and instruction of the board of directors. Mr. Frank was the alter ego of the corporation owning all the stock except that necessary to qualify other directors. He had been sued on his liability as a stockholder after the judgment was obtained by Cousins against the corporation, and for that reason he arranged, as he testified, to get the loan for J. Frank & Co. We are of the opinion that the evidence supports the finding of payment of

the judgment against it by J. Frank & Co., the corporation.

[8] There was a motion for nonsuit based upon alleged failures on the part of the assured to obey certain requirements of the policy, namely, to send to the home office of the insurer written notice of the accident to Cousins, and after the commencement of the action by said Cousins to forward to the home office the summons served upon J. Frank & Co. in that suit. Of course the conditions of the policy requiring notice to the home office of probable liability are intended primarily to afford opportunity to the insurer promptly to take charge of a defense. Such requirements are reasonable and just, but they are waived when, as in this case, the insurer actually does assume control of the litigation growing out of the accident. Knarston v. Manhattan Life Insurance Co., supra. There was no error in the denial of the motion for nonsuit.

[9] Certain rulings relative to the admission of evidence are specified as erroneous. The admission of the policy issued to J. Frank & Co., an individual, and the acceptance in evidence of the judgment roll in Cousins v. J. Frank & Co. (a corporation) were justified upon principles discussed above. Certain questions were propounded to Mr. Faull, a representative of appellant, by which it was sought to bring out the details of a certain conversation between him and Mr. Frank. These interrogatories were evidently designed to elicit testimony about Mr. Frank's declarations regarding the sources from which he expected to obtain funds for the payment of the judgment in favor of Cousins. The court, in sustaining objections to these questions, ruled that counsel had a right to discover whether or not the loss had been actually sustained and paid in money, but the learned judge said he did not see that the examination was addressed to such a purpose. Whereupon one of the counsel for defendant said: "I think your honor is right." We agree with the court and with counsel's opinion expressed at that time.

[10] Another exception was based upon the ruling sustaining the objection of plaintiff to a question directed to Mr. Morris in which it was sought to have him say with whom he had a conversation about the loan to plaintiff. If the ruling was erroneous it was not harmful to appellant, because later in the examination Mr. Morris testified very fully concerning the conversations and all of the circumstances connected with the making of the loan.

An expert insurance broker, Mr. MacMeans, was asked if the rates of insurance for individuals were different from those charged to corporations. Over defendant's objection he was permitted to answer. In view of that which we have decided with reference to the waiver in the matter of the incorrect designation of plaintiff in the policy, this error, if it was error, is entirely immaterial.

[11] The waiver evidenced by the conduct of the insurer is also a sufficient answer to the specification of error based upon the admission in evidence of certain conversations between Mr. Frank and Mr. Raymond, attorney for the surety company, and others between Mr. Frank and Mr. Vella, that corporation's adjuster. These conversations did not, as appellant insists, relate to prohibited waivers of the terms of the policy on the part of agents. They merely referred to the action of the company through its agents after it had waived all informalities and all possible objections by assuming control of the litigation. The prohibition in a policy against waiver, except in writing, does not apply to those stipulations which are to be performed after loss such as giving notice and furnishing preliminary proof. Carroll v. Girard Fire Insurance Co., 72 Cal. 297–300, 13 Pac. 863; Wheaton v. North British & Mercantile Insurance Co., 76 Cal. 415–426, 18 Pac. 758, 9 Am. St. Rep. 216. In the case at bar the conduct of the insurer, without reference to the statements of its agents, was sufficient to show its assumption of full liability under the policy.

Appellant's final point admittedly is not supported by the record, but in the brief of appellant it was announced that a motion in diminution of the record would be made, to the end that the argument might become relevant. No such motion has been made. Therefore we may not consider the argument on that point.

Judgment and order affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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175 Cal. 292

McCORMACK v. McCORMACK. (S. F. 7144.)

(Supreme Court of California. June 6, 1917.)

1. DIVORCE ⚷39—SUFFICIENCY OF FINDINGS.

Findings that the parties' marriage had been declared null and void in another state sufficiently supported decree denying divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 160.]

2. DIVORCE ⚷183—APPEAL—RECORD—QUESTION PRESENTED—FINDINGS.

Where the evidence is not incorporated in the record on appeal in divorce case, no question arises as to its sufficiency to support findings.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 569.]

3. EVIDENCE ⚷80(1)—PRESUMPTIONS—LAW OF ANOTHER STATE.

In the absence of contrary evidence, the law of another state touching the subject in question will be deemed to be the same as that of this state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101.]

4. JUDGMENT 🔑815—FOREIGN—CONSIDERATION—CONSTITUTION.

The final judgment of another state, whether erroneous or not, is, under Const. U. S. art. 4, § 1, requiring full faith and credit to be given to judicial proceedings of other states, entitled to same weight and consideration as though rendered by the court of this state where want of jurisdiction is not shown.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1445–1448.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Suit for divorce by Henrietta Elizabeth McCormack against Robert Hughson McCormack. Decree denying divorce, and plaintiff appeals. Affirmed.

West & de Journel, of San Francisco (T. C. West, of San Francisco, of counsel), for appellant. Frank J. Hennessy, of San Francisco, for respondent.

VICTOR E. SHAW, J. pro tem. This is an appeal prosecuted by plaintiff upon the judgment roll alone from a decree denying her a divorce from the defendant.

It appears from the findings that on March 11, 1907, the parties were married in the province of British Columbia, Canada; that thereafter on March 12, 1908, in an action therefor brought by defendant herein against plaintiff herein, the superior court of Kings county, state of Washington, after due and regular proceedings had therein, made and entered a judgment whereby it declared the marriage so contracted by the parties null and void, which judgment is in full force and effect; and that at the time of the commencement of the action the parties were not husband and wife.

[1, 2] That these findings support the judgment admit of no possible question, and, since the evidence upon which they were made is not incorporated in the record, no question arises as to the sufficiency thereof to support the findings. Redlands, etc., W. Co. v. Redlands, 121 Cal. 365, 53 Pac. 843; Estate of Brown, 143 Cal. 450, 77 Pac. 160.

[3, 4] Appellant insists that, since the marriage contracted in Canada was valid, the superior court of Washington, though concededly having jurisdiction of the parties, could not legally declare it void. The Supreme Court of that state has held otherwise. See Johnson v. Johnson, 57 Wash. 89, 106 Pac. 500, 26 L. R. A. (N. S.) 179. There is nothing in the record showing the grounds upon which the court acted in annulling the contract of marriage. Presumably, since the contrary is not made to appear, and as the law of Washington touching the subject in the absence of evidence to the contrary is deemed to be the same as that of this state (O'Sullivan v. Griffith, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323; Fox v. Mick, 20 Cal. App. 599, 129 Pac. 972), the action for annulment was based upon some one of the grounds specified in section 82 of the Civil Code as cause for annulling the marriage. With this, however, we are not concerned, since, whether erroneous or not, the final judgment of the superior court of Washington declaring the marriage null and void—there being nothing to show want of jurisdiction—is under section 1, art. 4, of the federal Constitution, entitled to the same consideration and weight as though rendered by a court of this state. Philbrook v. Newman, 148 Cal. 174, 82 Pac. 772. The appeal is without a semblance of merit.

Judgment affirmed.

We concur: SHAW, J.; SLOSS, J.

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175 Cal. 345

In re CAMPBELL'S ESTATE. (L. A. 4854.)

(Supreme Court of California. June 6, 1917.)

1. WILLS 🔑81—INVALID GIFT TO CHARITY—SEPARABLE PROVISIONS.

Where a will left an estate in trust during life of testatrix's son, on whose death the trust was to "cease and determine," and on such termination the estate was to go to the son's lawful issue and another, and in default of such issue three-fourths thereof to a hospital and one-fourth to certain others, the will further providing that "the invalidity of any use or trust herein shall not vitiate such as are valid," the validity of no other provisions of the will than the disposition to the hospital would be affected by Civ. Code, § 1313, invalidating devises or bequests to charities exceeding one-third of the estate; such disposition to the hospital not being part of a single and indivisible scheme.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 201, 202.]

2. WILLS 🔑15 — VALIDITY OF CHARITABLE DEVISE.

In such case, where the present value of the distributable assets was about $15,000, and the trustee was directed to use, for the purposes of the trust, such portion of the principal, in addition to the income, as he might deem necessary, the determination whether the hospital would receive, under the will, of the distributable assets of the estate, more than the third allowed by Civ. Code, § 1313, could not be had until the termination of the trust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 36.]

In Bank. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Maria Campbell, deceased. Appeal by Isidore B. Dockweiler, trustee, and another, from decree of partial distribution. Reversed.

Isidore B. Dockweiler, Thomas A. J. Dockweiler, and W. D. Finch, all of Los Angeles, for appellants. Earle M. Daniels and Julius V. Patrosso, both of Los Angeles, for respondent.

ANGELLOTTI, C. J. This is an appeal by Isidore B. Dockweiler, as trustee under the will of Maria Campbell, deceased, and by the Los Angeles Infirmary, a corporation, as legatee under said will, from a decree of partial distribution whereby there was distributed to Jose Boniface Arzaga substantially an undivided two-thirds of the property of the estate of said deceased. The theory upon which this distribution was made was that as to such property the attempted disposition made by the will of deceased was ineffectual and void under our law, with the result that as to the same the deceased died intestate, and that said property passed to said Jose Boniface Arzaga, the sole surviving child and sole heir of said deceased.

Deceased died August 14, 1913. Her will executed April 23, 1913, gave all her property to Isidore B. Dockweiler in trust for certain purposes specified therein. Substantially stated, the material provisions as to the trust were as follows: The trust was to continue until the death of her son, Jose, on the happening of which event it was expressly declared that "the trust hereby created shall cease and determine." The trustee was fully authorized during the continuance of the trust to care for, preserve, and manage the property, and in the event that the net income was at any time insufficient for the proper care and support of the son, to use such portion of the principal as he deemed necessary for that purpose. During the existence of the trust he was required to distribute and pay out the net rents, issues, profits, interest, and dividends of the estate, as follows: $10 per month to her housekeeper, Eulalia Marquez, as long as her son, Jose shall live, and the remainder to or for the use and support of her said son. If said Eulalia Marquez died before her son, then the monthly $10 theretofore paid her was thenceforth to be paid to or for the use and support of said son. This constituted the whole of the trust upon which the property was bequeathed to the trustee. It was then provided in apt terms what should become of the property upon the termination of the trust, and to whom it should belong. These provisions were substantially as follows: If the son, Jose, left lawful issue surviving him, all of the property "shall immediately vest" in said lawful issue, provided said Eulalia Marquez be not then alive, and if the latter did survive the son, then $1,000 shall vest in her, and the remainder in the son's lawful issue. If said son died without lawful issue, but leaving a surviving wife, then $1,000 shall vest in said Eulalia Marquez, and one-fourth of the remainder in said surviving wife and the other three-fourths in the Los Angeles Infirmary, a corporation conducting a hospital in Los Angeles, for the purpose of founding, endowing, and maintaining free beds for deserving sick poor. If said son died without leaving lawful issue or surviving wife, one-fourth shall vest in said Eulalia Marquez, and the remaining three-fourths in said Los Angeles Infirmary for the purpose above stated, provided that, if said Eulalia Marquez did not survive the son, her share shall vest in said Los Angeles Infirmary. The will further provides:

> "The invalidity of any use or trust herein declared, if ever decreed by a court of competent jurisdiction, shall not vitiate such as are valid."

According to the agreed statement of facts dated January 20, 1916, found true by the lower court, the following facts appear: Deceased died, as has been said, August 14, 1913. Her estate consisted entirely of personal property. The son, Jose, sole heir at law, attained the age of 31 years on June 5, 1915. He is married, his wife, Margaret L. Arzaga, being 32 years of age. There is as yet no lawful issue of such marriage. Said Eulalia Marquez is alive, and is in her forty-seventh year of age. The present value of the estate is, according to the findings of the court, $15,379.48, out of which $250 for a monument is to be paid. The present value of the bequest to the Los Angeles Infirmary, according to the American Experience Table of Mortality, with interest at 5 per cent. is, under the conditions most favorable to it, viz. the death of the son without leaving either lawful issue, a wife, or Eulalia Marquez surviving him, less than $4,000.

Section 1313, Civil Code, after prohibiting bequests or devises to any charitable or benevolent society or corporation, or to any person in trust for charitable uses, except by will "duly executed at least thirty days before the decease of the testator," declares:

> "And if so made, at least thirty days prior to such death such devise or legacy, and each of them shall be valid: Provided, that no such devises or bequests shall collectively exceed one-third of the estate of the testator, leaving legal heirs, and in such case a pro rata deduction from such devises or bequests shall be made so as to reduce the aggregate thereof to one-third of such estate; and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law."

It was upon the theory that the provisions as to the vesting of all the property in the Los Angeles Infirmary upon certain contingencies, and three-fourths thereof upon certain other contingencies, were void as to two-thirds of the property, as being in violation of this section, and that as a result thereof the son, as sole heir, there being no residuary legatee, was entitled at once to take such two-thirds, that the distribution complained of was made to him.

[1] 1. It seems clear to us that, even if it be conceded that the disposition in favor of the Los Angeles Infirmary is invalid to the extent stated, nevertheless the son was not entitled to have the property distributed to him free of the trust. Such disposition in favor of the infirmary was no part of the trust, but a thing entirely apart from and independent thereof. As in Hornung v. Sedgwick, 164 Cal. 629, 130 Pac. 212, the provisions as to the disposition of the corpus upon the death of the son constituted no part of the trust and were solely by way of prescrib-

ing to whom the property to which the trust related should belong upon the termination of the trust, and of a bequest of the property subject to the execution of the trust. The trust for the benefit of the son and Eulalia Marquez for the life of said son was in all respects valid, and by its terms the trustee was to hold all of the property until the happening of the event which would terminate the trust, viz. the death of the son. The attempted bequest was subject to this trust. If such bequest was to any extent invalid by reason of the provisions of section 1313, Civil Code, it may be conceded that the heirs of the deceased would succeed to the interest as to which the invalidity existed, but manifestly they could take no other or different interest than the Los Angeles Infirmary was given by the will. All the property of deceased other than such interest was otherwise effectually disposed of by the will, and it was only as to this interest that any invalidity can be fairly claimed. The bequest to the Los Angeles Infirmary was also entirely contingent upon the death of the son without lawful issue surviving him, and in part contingent upon his death without leaving a wife surviving, and it was wholly subject to the complete execution of the trust. An heir succeeding by reason of the invalidity in part of this bequest under section 1313, Civil Code, could take nothing different or greater. There is no failure to dispose by will as to anything else. The paramount trust would necessarily exclude such heir from enjoyment of any of the property until its termination, i. e., until the death of the son; and by virtue of other provisions of the will he would then take only in the event of the death of the son without leaving lawful issue surviving.

The decree as made destroys the valid paramount trust to the extent of two-thirds of the property of deceased, and cuts out the valid bequest to possible surviving lawful issue of the son to the same extent, as well as the bequest to the possible surviving wife of the son, who may or may not be the present wife. It cannot be sustained upon any principle or rule of law of which we have knowledge.

The contention of respondent is that by the scheme embodied within the terms of the will more than one-third of the estate is devised to a charitable corporation, and that as a necessary consequence the devise of the entire estate to Dockweiler, trustee, to effectuate and carry out the purpose thereof, is void as to two-thirds of the estate so devised in trust, and that consequently, there being no residuary legatee, the testatrix died intestate as to this portion. As we have seen, the disposition to the Infirmary is no part whatever of the trust, and the devise to Dockweiler is in no sense one "to effectuate and carry out" the same. It was entirely competent under our law for the deceased to create this trust for the benefit of Eulalia Marquez and her son, for the life of the latter, and it, being a valid trust as to all the property, must stand regardless of any question of the invalidity in part of a bequest of what remains after the termination of the trust. So far as this particular question is concerned, respondent's case can be no stronger than it would have been had the will failed to contain any provision whatever as to the succession to the property upon the termination of the trust. In that case his succession as sole heir on the theory that deceased died intestate in part would necessarily have been subject to the trust for his life in favor of himself and Eulalia Marquez as to all the property.

There is no decision in this state contrary to the views we have expressed, and in none of the cases cited by learned counsel for respondent does any such question appear to have been discussed. Under our statutes the only disposition rendered void by the statute is the disposition made to charitable purposes, and if that attempted disposition be subject to other effectual disposition of the same property, its invalidity cannot affect such other disposition; that is at least, unless it constitutes part of a single and indivisible scheme, which, in our judgment, is not the situation here.

[2] 2. It is further claimed by appellant that it is not shown that more than one-third of the estate of testatrix is left by the will to the Los Angeles Infirmary. This court has held that, under section 1313, Civil Code, the one-third which may lawfully be given to charitable purposes is one-third of what remains after payment of debts and charges of administration; the value being ascertained as of the date of distribution. Estate of Hinckley, 58 Cal. 457, 516. The statute thus prohibits the giving to the Los Angeles Infirmary of more than one-third in value of the distributable assets of deceased. We have seen that the present value of the distributable assets is slightly over $15,000. We do not see how it is possible for a court to determine at this time that the will gives to the Infirmary more than one-third of this. It is true that under the will it does take, in a certain contingency, all that remains after the execution of the trust, and in another contingency three-fourths of all that remains. But what portion of the estate may so remain no one can foretell, and there is no basis for any ascertainment of that fact. All of the income of the property is to be devoted for the whole life of the son to the use and support of himself and Eulalia Marquez, and, as already stated, the trustee was directed to use, in addition to the income, such portion of the principal as he might deem necessary for the proper care, maintenance, and support of the son. The son had an expectancy of life of over 30 years. In view of the comparative smallness of the estate, two-thirds thereof might well be consumed for this purpose. There is no way of even approximately de-

termining. It is all in the realm of conjecture. It is in this respect a similar case to that presented in Rich v. Tiffany, 2 App. Div. 25, 37 N. Y. Supp. 330, in which it was held that a computation must necessarily be deferred until the death of the life tenant, because no possible basis could be furnished therefor at any previous time. And even as to what may remain, no one can foretell whether the Infirmary will ever take anything at all, in so far as the beneficial enjoyment of the property is concerned; for, if the son die leaving lawful issue him surviving, a condition certainly quite within the possibilities, it will receive nothing. It would seem that, in view of these conditions, the proportionate value of the interest given to the Infirmary cannot be ascertained, and the only way in which the rights of all parties can be fully protected is at this time to distribute all the property to the trustee, for the purposes of the trust, reserving the matter of further distribution until the termination of the trust, at least in so far as the charitable bequest is concerned. In view of what we have already said as to the paramount character of the trust in so far as any succession by the son is concerned, this result is in no degree unfair to him. It is the valid and paramount trust that excludes him as such successor during his life, and if he has in fact any interest in that capacity, as may hereinafter be determined, it is an interest that he can convey or dispose of by will, and that, if he dies intestate, will pass to his heirs. Any such interest that he might now properly obtain by decree of distribution would be no different in this respect, as we have already seen. The valid trust precludes all else.

The statute simply precludes gifts to charity in excess of one-third of the value of the entire distributable assets. Surely it must be that a showing of bequests excessive under this statute is essential to an adjudication of invalidity and consequent succession by another. In view of the character of the bequest here it is impossible to make any such showing at this time. Unless there be such excess there can be no intestacy. We cannot bring ourselves to the conclusion that the mere fact that attempted charitable bequests may in the future be ascertained to be excessive under the statute is sufficient to warrant a present conclusion that they are excessive, and therefore invalid in fact, and that consequently the residuary legatee or heir succeeds to a portion thereof.

3. Even if there were no right in the trustee to use the principal for the purposes of the trust, and if the right of the Infirmary to receive all of the property on the death of the son was fixed and certain, and not contingent upon the absence of lawful issue, its interest would be subject to the life estate or interest for the life of the son, vested in the trustee, for the sole benefit and enjoyment of Eulalia Marquez and the son. This life interest and the remainder constitute the whole of the property. In no contingency does the Infirmary take it all, but at best only the whole remainder after the determination of the life interest. Can it be fairly held that such a remainder exceeds in value one-third of the distributable assets? According to the decision of the Court of Appeals of New York in Hollis v. Drew Theological Seminary et al., 95 N. Y. 166, the only way in which this can be ascertained in such a case as we have mentioned is by ascertaining the present value of the life interest and the present value of the remainder, which together should be the precise value of the distributable assets, and if the total value of the remainder does not exceed one-third of the total value, there is no violation of the statute. In this case there was no such showing of excess over one-third. In fact, as we have seen, the showing, so far as made, was to the contrary. But in view of the possibility of consumption of portions of the principal for the purposes of the trust, we have here no such case as the one suggested, and it is unnecessary to determine whether the rule declared in Hollis v. Drew, etc., supra, is the correct rule, under our statute, for determining the question of excess where the right of the legatee to succeed to certain specified property upon the determination of a prior life estate or interest therein is fixed and certain.

The decree appealed from is reversed.

We concur: SLOSS, J.; VICTOR E. SHAW, Judge, pro tem.; SHAW, J.; MELVIN, J.

HENSHAW, J. I concur. The Chief Justice clearly points out that the bequest to charity forms no part of the trust scheme and can take effect only on the termination of the trust. So also he shows the impossibility of any court declaring at this day the value of the property which on the happening of certain future contingencies the testatrix designed should go to charity. In addition to this is the perfectly plain proposition that our statute against charitable devises and bequests is and can be violated under these circumstances only when the devise or bequest does take effect and at that time is shown to be illegal for excess. When the contemplated contingency has arisen, then, and then only, may the living parties in interest contest the bequest for them, and then only can it be determined whether or not the law has been violated.

175 Cal. 322

CURTIS et al. v. UPTON et al.

UPTON v. EASKOOT et al.

(S. F. 7095, 7096.)

(Supreme Court of California. June 6, 1917.)

1. EJECTMENT 🔑111(9)—FINDINGS—CONFINING TO PLEADINGS.

In an action of ejectment, where the land described in the complaint, title to which was put in issue by the answer, was not bounded by the Dodge survey, it was error for the court to make findings upon the theory that the land within such survey was the only land in controversy, as it was bound by the issues as framed by the pleadings.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 342, 343.]

2. EJECTMENT 🔑111(9)—FINDINGS—OUSTER—EVIDENCE.

In an action of ejectment, where defendants denied title of plaintiffs to all or any part of the land described in the complaint, a finding that there was no ouster *held* not sustained by the evidence, where it did not appear that the land in possession of defendants was no part of land described in the complaint.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 342, 343.]

3. JUDGMENT 🔑660—CONCLUSIVENESS—SUBSEQUENT ACTIONS.

A former judgment, although erroneous, is conclusive between the parties or their successors in interest in all subsequent actions involving the same questions and properly within the scope of the issues which might have been raised and determined.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1171.]

4. BOUNDARIES 🔑37(3) — EVIDENCE—SUFFICIENCY.

Where the position of the southerly corner of the ranch could only be ascertained by resort to other calls, a survey retracing the lines and distances given in the original survey was legal and sufficient evidence of the true site of the corner, in the absence of countervailing evidence.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 186–191.]

5. BOUNDARIES 🔑7—GOVERNMENT SURVEY—ESTABLISHMENT—EVIDENCE.

Where the post set to mark the southerly corner of the survey had been lost, it was the duty of the court to ascertain, if possible, the true corner, or, if that was impossible, the approximate position, where there was evidence thereof.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 58–65.]

6. BOUNDARIES 🔑3(3) — SURVEYS—NATURAL OBJECTS.

In determining the position of a tract of land from a description or survey, natural objects referred to as bounds prevail over the measurement of lines and angles, in view of Code Civ. Proc. § 2077, providing that, where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite or unknown does not frustrate the conveyance, which is to be construed by the first-mentioned particulars.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 6–19.]

7. NAVIGABLE WATERS 🔑36(3)—LANDS UNDER WATER—BOUNDARIES.

Where a meander line is run for the purpose of calculating the area of land granted, the shore line constitutes the real boundary.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 186.]

8. EJECTMENT 🔑120(1)—WRIT OF RESTITUTION—EVIDENCE—SUFFICIENCY.

Where successors of defendant in whom title was quieted against plaintiffs showed that plaintiffs were in possession of at least a part of the land, their motion for a writ of restitution should have been granted in view of Code Civ. Proc. § 380, authorizing such writ against defeated parties in possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 380, 384–387.]

In Bank. Appeals from Superior Court, Marin County; Edgar T. Zook, Judge.

Actions by J. F. D. Curtis and another against A. H. Upton and another, and by A. H. Upton against A. D. Easkoot and others. From an adverse judgment in the first suit and from a motion denying a new trial, and from an order denying their motion as successors of defendants in the second suit for a writ of restitution upon the judgment entered therein, plaintiffs in the first suit and as successors to defendant Easkoot appeal. Judgment and orders appealed from reversed.

Robert Harrison, of San Francisco, Thomas P. Boyd, of San Rafael, and Morrison, Dunne & Brobeck and Edward Lynch, all of San Francisco, for appellants. George H. Harlan, of San Rafael, and R. H. Countryman, of San Francisco, for respondents.

SHAW, J. The above-entitled actions involve the same controversy. Case No. 7095 is an action in ejectment, and the plaintiffs J. F. D. Curtis and H. L. Curtis appeal from the judgment and from an order denying their motion for a new trial. In case No. 7096, the same persons appeal from an order denying their application, as successors of A. D. Easkoot, for the issuance of a writ of restitution upon a judgment entered in said action in favor of said Easkoot against the plaintiff and intervener. We will consider the cases in the order of their number on our calendar.

1. No. 7095. Curtis v. Upton.

The complaint in this case alleges that plaintiffs, "by themselves and by their predecessors in interest," were, on November 9, 1905, the owners, seised in fee and possessed of the parcel of land described as follows:

> "Beginning at the post placed by the United States surveyor at the southerly corner of that portion of the Baulinas rancho, which lies on the east side of Baulinas (also spelled Bolinas) Bay, said post being south, 28½° east, fifteen and $^{80}/_{100}$ (15.80) chains from the northwest corner of the northeast quarter of section No. 33, in township No. 1 north, range No. 7 west, M. D. M., said post also being south 51½° west, six chains 30 links, and thence south 38½° east fourteen (14) chains from the house

> of Captain Easkoot as it stood in the month of October, 1858, thence following the line of said rancho, as described in the patent therefor executed by the United States of America to Gregorio Briones, and recorded in the office of the recorder of said county of Marin, in Liber A of Patents, at page 146, and along the line of ordinary high-water mark on the northeasterly shore of said Baulinas Bay as it existed in A. D. 1858, north 38½° west twenty (20) chains, thence crossing the tide lands in said Baulinas Bay and the sand bar and beach adjoining same on the southwest, south 51½° west fourteen (14) chains more or less to the line of low water of the Pacific Ocean on said beach, thence along the line of said low water of the Pacific Ocean south 60¼° east twenty-three (23) chains, and thence north 55¼° east five (5) chains more or less to the point of beginning. Being portions of Marin county tideland surveys Nos. 10 and 34."

It further alleges that the defendants without right entered upon said land, ejected the plaintiffs therefrom, and have ever since wrongfully withheld possession thereof. It is further alleged that on November 9, 1905, in a certain action in the superior court of Marin county, being the action involved in the above-entitled case No. 7096, a judgment was duly given and made that said A. D. Easkoot was the owner in fee and possessed of the two tracts of land referred to in the above description as "tideland surveys Nos. 10 and 34," and that neither the said A. H. Upton nor said Nathan H. Stinson had any right, title, or interest in or to said parcels or either of them; that afterwards the plaintiffs succeeded to the title of said Easkoot to said lands; and that said Nathan H. Stinson thereafter died and Amos H. Stinson has been appointed executor of his estate.

The complaint sets forth the descriptions of said tideland surveys Nos. 10 and 34 as given in the judgment in Upton v. Easkoot. They are as follows:

> "Survey No. 10 state tidelands, Marin county, township No. 1 north, range No. 7 west, M. D. M., sections Nos. 28, 29 and 33, fractional portions of said sections more particularly described in the field notes of said surveys as follows: Beginning at the post placed by the United States surveyor at the southerly corner of that portion of the Baulinas rancho which lies on the east side of Baulinas Bay, said point being S. 28½° E. 15.80 chains from the northwest corner of the northeast quarter of section 33, township No. 1 north, range No. 7 west, M. D. M., thence following the line of said rancho N. 38½° W. 72.20 chains, thence crossing the tidelands S. 42½° W. 20. chains to sand bank, thence S. 54° E. 71.70 chains to the place of beginning. Containing 70.17 acres."
>
> "Survey No. 34 state tidelands, Marin county, township No. 1 north, range No. 7 west, M. D. M., section No. 33, fractional portions of said section being more particularly described in the field notes of said survey as follows: Beginning S. 28½° east 15.50 chains from the northwest corner of the northeast quarter of section 33, township No. 1 north, range 7 west, M. D. M., thence north 60¼° W. 16.36 chains, thence crossing the beach of the Pacific Ocean to low water 5. chains, thence along the Pacific Ocean at low water S. 60¼° east 16.36 chains, south 47½° east 35. chains, thence crossing the beach to high water mark 5. chains, thence north 47½° west 35. chains to the place of beginning. Containing 16.45 acres."

Issue was joined upon the allegations that the plaintiffs were the owners of the land first described in the complaint, that the same or any part thereof was a portion of said tideland surveys or either of them, that the defendants or either of them had ousted the plaintiffs without right from said land or any part thereof, and that the plaintiffs are or ever have been the owners in fee or otherwise of any part of said surveys. With respect to the judgment pleaded in the complaint, the answer alleges that it is void because of the uncertainty of the description therein given of the land adjudged to belong to Easkoot.

The court found that the allegations of the complaint to the effect that the plaintiffs or their predecessor in interest, Easkoot, are or were the owners of the land sought to be recovered, and that the defendants had wrongfully ousted plaintiffs therefrom, and each of said allegations, were untrue. With respect to the judgment, it found that it was true that it was therein adjudged that Easkoot was the owner in fee of the lands described (being tideland surveys 10 and 34, aforesaid), but that it was not true that said judgment declared anything as to the position of said land. There is also a finding to the effect that a surveyor named Dodge, some two months before the action was begun, had set an iron bolt in the ground as the beginning point of the parcel of land sought to be recovered, and that the tract of land attempted to be described in the complaint was the tract beginning at said iron bolt and running thence according to the courses given in the description in the complaint, that said iron bolt was not set at the southerly corner of the Bolinas ranch, that the tract of land so marked out from said bolt did not include any portion of tideland surveys Nos. 10 and 34, and that the beginning point of the lands described in tideland survey No. 10, aforesaid, is not at the bolt set by Dodge as such beginning point.

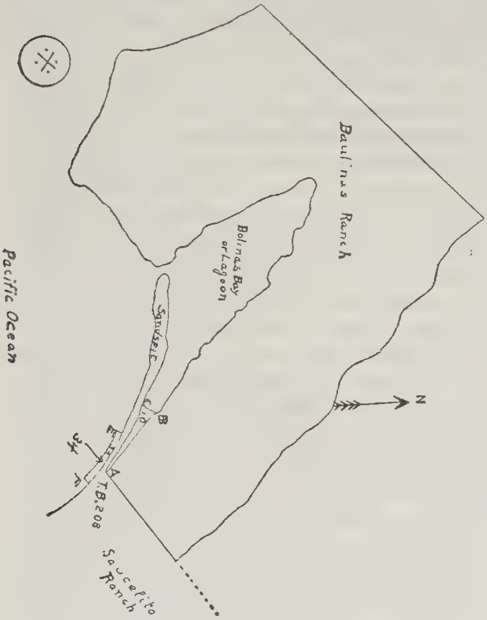
As conclusions of law upon the findings the court stated that the plaintiffs were not the owners of, nor entitled to the possession of, nor in possession of, the tract of land attempted to be described in the complaint, and that the defendants were entitled to a judgment that the plaintiffs take nothing by their said action.

Judgment was thereupon given that the plaintiffs take nothing by their action herein, and that they were not the owners of, nor seised in fee of, nor possessed of, nor entitled to the possession of, the tract of land described in their complaint, "which said tract of land," it proceeds to declare, "is located in Bolinas township in the county of Marin, state of California, and bounded and particularly described as follows:

> "Beginning at an iron bolt, or pipe, described in the findings in this case as the 'second iron bolt,' which was driven in the ground on the 25th day of August, 1910, by George M. Dodge, a civil engineer and surveyor acting for and on

behalf of the plaintiffs in the above-entitled action, which said iron bolt, or pipe, is located as follows: Commencing at an iron bolt which was, on said 25th day of August, 1910, set by the said George M. Dodge at a point upon the site of the house of Captain Easkoot as it stood in the month of October, 1858, as the site of said house was established by the testimony of Benjamin G. Morse, Peter Crane and Stephen A. Richardson, which testimony was taken at the trial of the above-entitled cause, said iron bolt, marking the site of Captain Easkoot's house, being located upon the hill at the north and northeast of the 'arenal' or 'sandpit' dividing Baulinas Inner Bay from the Pacific Ocean and running thence from said iron bolt marking the site of Captain Easkoot's house, south 51½° west 6.30 chains and thence south 38½° east 14 chains to said second iron bolt or pipe and the point of beginning of the lands herein described; running thence from said second iron bolt, or pipe, north 38½° west 20 chains to a point; thence south 51½° west 14 chains to a point and thence south 60¼° east 23 chains to a point and thence north 55¼° east 5 chains more or less to said second iron bolt or pipe above referred to, the point of beginning."

The following map shows approximately the relative positions of the Bolinas ranch, the Bolinas Bay or Lagoon, and the sandspit, as they appear on the map accompanying the patent from the United States to Briones for said ranch. It also shows the positions of the two tideland surveys:



The words "or lagoon" are not in the patent or survey or on the map.

The westerly and easterly boundaries of survey No. 10, according to the legal effect of the description, coincided with the lines of ordinary high tide, as they existed in 1863 when the survey was made. Survey No. 34 purports to cover a strip of tideland 5 chains wide, beginning on the outer shore of the sandspit some 16.36 chains from its junction with the main shore and extending along the sandspit to its said junction and thence about 35 chains southerly along the main shore. The land sought to be recovered does not include all of either of these surveys. It embraces a tract in the form of a trapezium, one side of which extends 20 chains northwesterly from the southerly apex of survey No. 10, and the opposite side whereof extends 23 chains along the line of ordinary low tide on the outer shore of the sandspit, whereas survey No. 10 extends to a distance of 72.20 chains along the line of the Bolinas ranch, and survey No. 34 runs along said outer shore a total distance of 51.36 chains. The center of the sandspit lies above high-water mark, and the land sought to be recovered includes a part of this portion of the sandspit within its boundaries.

The patent of the Baulinas ranch, now usually spelled Bolinas, was introduced in evidence, including the map and field notes of the survey thereof, to which the patent refers. These documents show that the southerly corner of the part of the Bolinas ranch lying on the east side of Bolinas Bay was established on the shore of Bolinas Bay "opposite a long sand bar or 'arenal' whose general course is N. 60° W. slightly curving to the left," and that the surveyor there set a post marked "T. B. 208." This corner is the point of beginning of tideland survey No. 10. It therefore fixes the position of that survey. The field notes state that survey No. 10 includes "that tract of tideland at the southeastern extremity of Bolinas Bay lying between the Baulinas rancho and the sand bank which divides Bolinas Bay from the ocean." The title to tideland vests in the state. State ownership is also shown of survey No. 34, since its beginning point, according to the calls, is situated N. 28½° W. 30 links from the corner of the ranch, and its lines cross the beach and cover the land between the high and low tide lines of the beach fronting on the Pacific Ocean. The state patents were introduced in evidence showing that in 1871 the state granted to A. D. Easkoot the lands included in these two tideland surveys. Easkoot's ownership of the two tracts on November 9, 1905, is also established by the judgment in Upton v. Easkoot, as set forth in the complaint, as aforesaid. The fact that this judgment was given, and its terms as well, are admitted by the pleadings. It is also admitted that Easkoot's title subsequently passed to the plaintiffs, at least as early as the decree of distribution of Easkoot's estate. Therefore it follows that at the time this action was begun the title to these two tideland surveys was vested in the plaintiffs.

The description of the land sought to be recovered, as set forth in the complaint, shows that parts of it are included in the two surveys, the title whereof was, as above shown, vested in plaintiffs. With respect to the parts so included, the findings and judgment that plaintiffs are not the owners thereof are, on the face of the pleadings and by the terms of the patents introduced in evidence, clearly erroneous.

The state patents purport to convey state tidelands only, and they could convey none of the upland of the sandspit, for, as it was neither school land nor swamp land, the state had no title to that upland. The terms of the descriptions of the surveys imply that no upland was intended to be included therein and they should be construed to embrace only tidelands, to which the state held title. The plaintiffs therefore failed to establish a record title to this upland along the center of the sandspit.

[1, 2] This action was begun on October 28, 1910. The survey made by Dodge on August 25, 1910, referred to in the judgment, purporting to establish and mark on the ground the precise position of the southerly corner of the Bolinas ranch, was made for the plaintiffs, apparently in preparation for beginning this action. Plaintiffs' attorneys in drawing the complaint may have supposed that the description set forth therein bounded the tract included in the Dodge survey. But the complaint makes no reference to that survey or to the iron bolt set by Dodge to mark the corner. The description in the complaint fixes the southerly corner of the portion of the Bolinas ranch lying on the east side of Bolinas Bay as the beginning point and ending point of the boundaries of the tract of which recovery is asked. The answer denies that the defendants have ousted plaintiffs of the possession of the parcel described or any part thereof. This put in issue the true position on the ground of the parcel described, it being necessary to fix the position in order to determine whether or not the possession of Upton or Stinson extended over any part of it. The survey of Dodge was evidence to prove that position. But it was not conclusive; not even upon the plaintiffs. It could not change the allegations of the complaint, nor change the issue raised thereby from an inquiry as to the true position on the ground of the southerly corner of that portion of the Bolinas ranch, to an inquiry confined to the question whether or not the iron bolt was set upon the right spot. It was the duty of the court to consider all the evidence on the subject and therefrom to find the fact of the true position of the corner and determine whether or not the defendants had taken possession of any part of the tract claimed by the plaintiffs, when measured from such true position. The findings first declare that the description set forth in the complaint does not include the tract surveyed by Dodge and actually claimed by the plaintiffs, and thereupon, proceeding upon the theory that the land included in the Dodge survey was the only land in controversy, declare that the allegation that the defendants ousted the plaintiffs of a part thereof is untrue. The court was not authorized to do this. It was bound by the issues as framed by the pleadings. The finding that the defendants had not ousted the plaintiffs cannot be considered as sustained by the evidence, unless it appears therefrom that the land in possession of the defendants did not include any part of the land described in the complaint measured from the true location of the ranch corner. The evidence shows that they had taken possession of a part of the tract described in the complaint, if it is located, as it must be, by reference to that corner. The finding that there was no ouster is therefore contrary to the evidence, and the part of the judgment relating to the Dodge survey was unwarranted by the pleadings.

The judgment roll in Upton v. Easkoot was introduced in evidence. The complaint of Upton alleged that he was the owner of the land included in the sandspit, describing it by metes and bounds. Stinson's complaint in intervention alleged that Stinson was the owner of the sandspit. Each asked to have his title thereto quieted against all the other parties to the action. Easkoot answered alleging that he owned tideland surveys Nos. 10 and 34, above described; that he had been, continuously for more than 30 years next before the beginning of the action, in the exclusive and actual and uninterrupted possession thereof under claim of title thereto by virtue of said state patents to him, and asking judgment quieting his title thereto against the claims of Upton and Stinson. The findings were that neither Upton nor Stinson was the owner, or entitled to the possession, of the sandspit, or any part thereof, and were in favor of Easkoot on all the allegations of his answer as aforesaid. It was also found that the patent of the United States to Briones, under which both Upton and Stinson claimed their alleged titles, did not include, or convey to Briones, any portion of the sandspit, that it extended only to the line of ordinary high tide of the bay, as it existed in October, 1858, and that Stinson was not the owner of, nor entitled to the possession of, any of the land described in his complaint in intervention which is situated south or southwesterly of the northeasterly shore of Bolinas Bay, sometimes called Bolinas Lagoon, at the line of ordinary high tide thereon as the same existed in the month of October, 1858.

The judgment declared that Upton take nothing by his action, that Stinson should take nothing by his complaint in intervention, that Easkoot was the owner of said tracts of land designated as tideland surveys Nos. 10 and 34, particularly describing them, and of the other tidelands claimed in his answer, that neither Upton nor Stinson had any right, title, or interest in the same, or any part thereof, and that they each be enjoined from asserting any claim thereto.

[3] This judgment is conclusive in favor of Easkoot and in favor of plaintiffs herein as his successors in interest and privies in estate, and against both Upton and Stinson upon all the points decided thereby.

"A former judgment between the parties to an action is conclusive in all subsequent actions involving the same question, not only as to the matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy and properly within the scope of the issues which also might have been raised and determined." Southern P. Co. v. Edmunds, 168 Cal. 418, 143 Pac. 598; Koehler v. Holt Mfg. Co., 146 Cal. 337, 80 Pac. 73.

The former judgment operates in favor of or against privies in estate of the original parties, and it "is none the less a bar for the reason that it is erroneous." Lamb v. Wahlenmaier, 144 Cal. 95, 77 Pac. 766, 103 Am. St. Rep. 66.

It follows therefore that the judgment in Upton v. Easkoot determines, not only that the plaintiffs in case No. 7095 are the owners of all of the land described in the complaint that is embraced within the two tideland surveys, but also that the northeasterly line of survey No. 10 is the line of ordinary high tide of Bolinas Bay, or Lagoon, as it existed in October, 1858, regardless of its present position. This will be important upon a new trial of the action, if, as the evidence indicates, the winds or waves have made accretions to the shore which have raised the surface of all or a part of tideland survey No. 10 above the line of ordinary high tide of the bay. In that event, the tideline of 1858 will determine the boundary between the lands of plaintiffs and Stinson.

[4-6] It appears from the evidence that the post set in 1858 to mark the southerly corner of the Bolinas ranch and all monuments of the tideland surveys and all traces thereof have long since disappeared. The position of the southerly corner of the ranch can only be ascertained by resort to other calls of the patent and survey. Dodge attempted to locate it by retracing the line from the collateral call to Easkoot's house, the position of which he determined from statements of persons once familiar with it. The court below found that Dodge did not locate the true corner. Proceeding apparently upon the theory that the plaintiffs were bound to prove the true position of said corner and that, if they failed to do so, their patents and the judgment in Upton v. Easkoot were all ineffectual to establish any right to the land claimed, the court gave judgment against them. This theory might possibly be correct, upon the question of an ouster, if the plaintiffs had produced no evidence of the position of the corner and none had been given on behalf of the defendants. But the testimony of Dodge of his survey retracing the line, according to the courses and distances given in the original survey, back from the site of the Easkoot house to its beginning point, was legal evidence of the true site of the corner. In the absence of countervailing evidence, it would have been sufficient proof thereof. Weaver v. Howatt, 171 Cal. 308, 152 Pac. 925. It was rejected as proof because the resurvey by Richardson, starting from a known natural monument of the original survey on the northeasterly side of the ranch and verified by other monuments mentioned in the calls of the survey found by him between that point and the southerly corner, together with evidence of other inconsistent facts, satisfied the court that the Dodge location was wrong. But it was the duty of the court to ascertain, if possible, the true position of the corner, accurately, if it could be done, or approximately within reasonable limits if the exact position could not be ascertained with absolute certainty. Weaver v. Howatt, supra, 171 Cal. 307, 152 Pac. 925; Weaver v. Howatt, 161 Cal. 86, 118 Pac. 519. The Richardson survey was, of itself, evidence of the actual position of the true corner; obviously, it was more convincing to the court below than that of Dodge. It was the duty of the court to decide the question of fact in accordance with its own views of the preponderance of the evidence. The difference in the position of the corner in the two surveys was about 300 feet. If the Richardson location had been taken as the true one and the lines of the tideland surveys run accordingly, it would have shown that survey No. 10 included some tidelands of the bay, and that if the tideline as it existed in 1858 were considered as the boundary of that survey it would probably have included a part of the land described in the complaint. It would certainly have shown that survey No. 34 was partly within the boundaries of the land sued for. It is a strip 5 chains wide and 51.36 chains long lying between the lines of the ordinary high and low tides on the beach of the southwesterly side of the sandspit fronting directly on the Pacific Ocean, and the place called for as its point of beginning is on its high-tide line 35 chains from one end, 16.36 chains from the other, and, according to its calls in connection with those of survey No. 10, this beginning point is situated north 28½° west 30 links from the southerly corner of the Bolinas ranch aforesaid. In determining the position of a tract of land from a description or survey, natural objects referred to as bounds prevail over the measurement of lines and angles. Code Civ. Proc. § 2077. The distance, 30 links, must yield to the calls for the tide lines. Hence, wherever the point of beginning of survey 34 may be, its southwesterly line is the low-tide line of the Pacific Ocean, and it extends landward to ordinary high-tide line. The lines of the tract sought to be recovered, as described in the complaint, include a part of this survey.

[7] The terminus of the southeasterly line of the Bolinas ranch, it being the common boundary of that and the Saucelito ranch, is at the line of ordinary high tide of the Pacific Ocean, or of Bolinas Bay, as the case may

be. The determining factor as to its location is the position of the common boundary. If it should be determined that its true terminus is on the shore of the ocean southerly of the sandspit, that point must be the southerly corner of the Bolinas ranch, regardless of the other calls of the survey and patent to Briones. But, it is necessary to add, the judgment in Upton v. Easkoot definitely determines that, in that event, the call of the patent in the course next following in the survey, "thence along the shore of Baulinas Bay at ordinary high-water mark north 38½° west," must be ignored for the distance between the true corner and the nearest point in the southeasterly extremity of the bay as it existed in 1858. It is to be noted further that the course above given, "north 38½° west," is not the exact course of the shore line, but is the course of a meander line run to approximately locate the shore line and to afford the means for calculating the area of the land granted. Where a meander line is run for this purpose, the shore line constitutes the real boundary. Foss v. Johnstone, 158 Cal. 119, 110 Pac. 294; Hardin v. Jordan, 140 U. S. 384, 11 Sup. Ct. 808, 838, 35 L. Ed. 428.

The question of the effect of gradual accretions may become important with regard to the lines of surveys Nos. 10 and 34 bordering upon the sandspit. Recently, in Strand Imp. Co. v. Long Beach, 173 Cal. 765, 161 Pac. 975, the court decided that the common law that gradual accretions from natural causes to land abutting upon water belong to the owner of the upland applied to lands fronting upon tidal waters and to the shores of the ocean. It may be that accretions to the inner side of the upland of the sand bar have covered a large part of survey No. 10 and have raised it above the high-tide line. The effect of the judgment in Upton v. Easkoot is that neither Upton nor Stinson can claim any title to the sandspit, as against plaintiffs here. Having no right to the sandspit, they could not claim accretions thereto.

We now proceed to the consideration of case No. 7096.

2. No. 7096. Upton v. Easkoot.

This is the case in which, as stated in the previous discussion, judgment was given in favor of Easkoot against the plaintiff, Upton, and the intervener, Stinson.

Easkoot, in his so-called answer therein, alleged his ownership in fee, and his possession, of four parcels of land, particularly described, among them being the tracts hereinbefore referred to as tideland survey No. 10 and tideland survey No. 34, and prayed judgment that Upton and Stinson be adjudged to have no right, title, or interest therein, and that they each be enjoined from asserting any claim thereto, and for general relief. The judgment was that Easkoot was the owner in fee of the parcels described, that neither Upton nor Stinson had any right, title, or interest therein, and that they each be forever enjoined from making or asserting any claim to the same, or any part thereof, as against Easkoot.

In October, 1910, after the death of Easkoot and after his estate in the lands was distributed to J. F. D. Curtis and H. L. Curtis, they filed a notice of motion for the issuance of a writ of restitution upon said judgment against said Upton and the executor of Stinson, who had died in the meantime. The ground of the motion was that after the entry of said judgment said parties had, contrary to its terms, entered into possession of portions of the land therein adjudged to Easkoot and were holding possession thereof and claiming title thereto. The portion which they were so claiming is the tract sought to be recovered in Curtis v. Upton, No. 7095. The description thereof is set forth at the beginning of part No. 1 of this opinion. The court below denied the motion and refused to order the writ. From this order the said moving parties appeal.

Before the hearing of the motion, the moving parties, Curtis and Curtis, began the action, the subject of the first part of this opinion, for the recovery of said parcel in dispute. The motion and the action were heard and tried together upon the same evidence. The court denied the motion upon the same grounds upon which it refused to give judgment for the plaintiffs in the aforesaid action, that is to say, because it was, as it believed, unable to identify upon the ground the exact position of the southerly corner of the Baulinas ranch. What we have said in the discussion of that case is applicable here, and we need not repeat it in full. There was evidence from which the position of the corner, and therefrom the position of the land in dispute, could have been ascertained with reasonable certainty, and it was the duty of the court to determine the same and make its order accordingly.

[8] Upon the evidence before it, the result would have been a determination that the moving parties were entitled by the judgment to the possession of a part, at least, of the land claimed by them. If Upton or Stinson were in possession of any of those portions, the writ should have been issued. The answer of Easkoot, though denominated by him an answer, contained all the allegations necessary to a cause of action to quiet title or determine conflicting claims to real property, and it prayed for affirmative relief of that character. The judgment in his favor was, in effect, a judgment declaring and quieting his title. It was as effectual for that purpose as if it had been made in a formal action of that nature. In such a case, a writ of possession may be issued at the instance of the prevail-

ing party to place him in possession, if he is out of possession, or to restore him thereto if the losing party re-enters. Code Civ. Proc. § 380; Landregan v. Peppin, 94 Cal. 465, 29 Pac. 771.

In case No. 7095, the judgment and the order denying a new trial are reversed.

In case No. 7096, the order denying the motion for a writ of restitution is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LAWLOR, J.; MELVIN, J; HENSHAW, J.

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175 Cal. 417

In re DREYFUS' ESTATE.

Appeal of HERBOLD et al.

(L. A. 4975.)

(Supreme Court of California. June 9, 1917. Rehearing Denied July 5, 1917.)

WILLS 🔑132—OLOGRAPHIC WILL—"WRITTEN."

Under Civ. Code, § 1277, requiring an olographic will to be "entirely written, dated, and signed by the hand of the testator himself," a will written and dated by testator on a typewriter and signed by him with pen and ink is not entitled to probate as an olographic will; the word "written," as used in the statute in the year 1872 when enacted, not including the process of making letters on paper with a typewriter, which is essentially a process of printing.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 341.

For other definitions, see Words and Phrases, First and Second Series, Write—Writing.]

Department 1. Appeal from Superior Court, Los Angeles County; W. H. Thomas, Judge.

In the matter of the estate of Gustav Dreyfus, deceased. Petition by Philip Herbold to probate a document as decedent's last will. From order refusing to admit the document to probate as a will, petitioner and another appeal. Affirmed.

Neighbours, Hoag & Burke, of Los Angeles, for appellants.

SHAW, J. Philip Herbold filed a petition for the admission to probate of a document, as the last will of the decedent, Gustav Dreyfus. The petition alleges that this paper was not attested by any witness, that it was wholly in typewriting, except the signature of the decedent thereto, that said signature was written by the decedent with pen and ink, and that the remainder of the document, including the proper date, was written by the decedent himself by the manipulation of a typewriting machine. The evidence was to the same effect. Thereupon the court below made its order refusing to admit the document to probate as a will. From this order the petitioner and said Maurice Blumlein, the latter being the sole beneficiary under the purported will, have appealed.

Our Code requires that an olographic will shall be "entirely written, dated, and signed by the hand of the testator himself." Civ. Code, § 1277.

To ascertain the meaning of this requirement, we must look to the reasons which led to its enactment, the conditions then existing, and the object sought to be attained thereby. Originally in England, by the ecclesiastical law and the common law, wills could be made by oral declaration. Gould v. Safford, 39 Vt. 505; Ex parte Thompson, 4 Bradf. Sur. (N. Y.) 154; Harrington v. Stees, 82 Ill. 50, 25 Am. Rep. 294; 30 Am. & Eng. Encyc. of Law, 560. This was found to be so fruitful of fraud and perjury that the statute of frauds was enacted providing that nuncupative wills could be made only by persons in their last sickness, to be proved by three witnesses, or by soldiers in service or mariners at sea, and that in all other cases a will must be a signed writing, attested, and subscribed by at least three credible witnesses. Statutes prescribing the manner of executing wills of all kinds and the degree of proof necessary to establish them have for their prime object the prevention of frauds and perjuries, or as the supreme court of Louisiana puts it, "to prevent imposition and abuse." Knight v. Smith, 3 Mart. O. S. (La.) 162. Our Code provision allowing olographic wills was first enacted in 1872. The commissioners who drafted the Civil Code, in their note, recommend it on the ground that it "may not, and indeed, it is confidently claimed in those countries where olographic wills are recognized, does not give rise to as many attempts at fraudulent will-making and disposition of property as where it does not exist."

From time immemorial, letters and words have been written with the hand by means of pen and ink or pencil of some description, and it has been a well-known fact that each individual who writes in this manner acquires a style of forming, placing, and spacing the letters and words which is peculiar to himself and which in most cases renders his writing easily distinguishable from that of others by those familiar with it or by experts in chirography who make a study of the subject and who are afforded an opportunity of comparing a disputed specimen with those admitted to be genuine. The provision that a will should be valid if entirely "written, dated, and signed by the hand of the testator," is the ancient rule on the subject. There can be no doubt that it owes its origin to the fact that a successful counterfeit of another's handwriting is exceedingly difficult, and that therefore the requirement that it should be in the testator's handwriting would afford protection against a forgery of this character. In 1872 the only mode of writing in use was by pen and ink or pencil. There were then in existence some crude machines for imprinting letters on paper by means of small levers similar to those now used in typewriters; but the practical modern typewriter, now in almost universal use, was unknown. It was not perfected until 1875 and did not come into general use until several years thereafter. The language of section 1277, by the common usage of the language in 1872, or even at the present time, would mean that the entire will must be in the "handwriting" of the testator. This would not include any sort of printing by the use of type, whether on a printing press or placed at the end of a rod manipulated by keys.

While it is true that a will made wholly by the testator and by means of a typewriter may be said to have been made "by the hand of the testator himself," it would not be true, accurately speaking, that such a will had been "written" by him. The process of making letters on paper with a typewriter is essentially a process of printing. The type fixed on a bar is stained with ink and then pressed against the paper, leaving its imprint precisely as in a printing press. The word "written," as used in section 1277, in the year 1872, had no such signification. There are cases where a word in a statute aptly describing a thing then well known has been extended so as to include some other thing afterwards invented or used to accomplish the same or a similar purpose and within the general statutory intent and object. For example, "carriage," meaning a wheeled vehicle, has been held to include the subsequently invented bicycle. But the reasons for these extensions of meaning have no application here. They were made to carry out the spirit and object of the statutory provision. The meaning here contended for would greatly enlarge the opporunities for successful forgeries by taking away the means of detection which the Legislature had in mind and would defeat the purpose of the statute by destroying the safeguards which its requirements were designed to secure.

The order is affirmed.

We concur: SLOSS, J.; VICTOR E. SHAW, Judge pro tem.

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175 Cal. 363

EWALD v. KIERULFF et al. (S. F. 7227.)

(Supreme Court of California. June 7, 1917.)

1. Trusts 🔑371(6½)—Pleading—Demurrer—Laches.

The defense of laches in neglecting to enforce an express trust for a long time may be raised by demurrer in action based on such a trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 596.]

2. Trusts 🔑365(2)—Enforcement—Laches.

Where plaintiff had known for 43 years that a trustee, taking title from him to an undivided interest in lots for partition, had repudiated the trust by divesting himself of title to the lots, and had been aware for at least 33 years that the trustee or his representatives had been in a position to carry out the terms of the trust, he was barred by laches from enforcing the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 571.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Edward Ewald against T. C. Kierulff and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Thomas V. Cator, of San Francisco, for appellant. Mastick & Partridge, T. C. Kierulff, and H. F. Chadbourne, all of San Francisco, for respondents.

MELVIN, J. This action was brought against the executors of the will of John Nightingale, deceased. The heirs of said Nightingale were also made parties defendant. The original complaint was filed March 12, 1913. In due course an amended complaint was filed. Defendants demurred to this pleading, and their demurrer was sustained, and plaintiff refusing to amend within the time allowed by the court, judgment was accordingly entered in favor of defendants. The appeal is from this judgment.

By the amended complaint it is alleged that John Nightingale died about March 20, 1912, and the usual formal matters relating to the probate of the will and the proceedings thereunder are set forth. It is alleged that prior to 1870 plaintiff was the owner of certain lands in the city and county of San Francisco, among which were the parcels designated as "blocks Nos. 991 and 992 of outside lands"; that for certain reasons title to plaintiff's property was held for him by a trustee who was one of his kinsmen; that Nightingale and others owned similar outside lands separately and as tenants in common; and that prior to the year 1870, such owners, including plaintiff and Mr. Nightingale, agreed to a partition of their properties by lot so that segregated title in fee might be placed by proper conveyances in the names of the respective owners according to their interests. There are further allegations to the effect that John Nightingale, knowing that plaintiff was entitled to receive a conveyance on demand, in fee, of an undivided half interest in blocks Nos. 991 and 992, requested plaintiff to convey said interest to said Nightingale; that on December 17, 1870, plaintiff made, executed, and delivered his deed of conveyance as requested; and that said conveyance was made pursuant to an agreement which was later reduced to writing as follows:

"San Francisco, Dec. 19, 1872.

"Mr. Edward Ewald: The deed received by me from you dated 17 December, 1870, to the one undivided half of blocks Nos. 991 and 992 of outside lands is given in trust to hold for me and for the object of partition, and when such partition is had you will be entitled to receive from me in an equal amount of land segregated and of equal value.

"John Nightingale."

The amended complaint contains further averments that plaintiff, fully relying upon the agreement, permitted the title in said blocks to become permanently vested in other persons; and that Nightingale, up to the time of his death, owned ample outside lands with which to satisfy plaintiff's claims under the trust, the partition of outside lands having been completed before the year A. D. 1880, and Nightingale having received thereby segregated title to large quantities of such outside lands similar to the two blocks in which he had acquired plaintiff's interest. The prayer is that the executor and heirs of John Nightingale be required to make conveyance of a suitable part of such lands belonging to the estate in execution of the trust.

[1, 2] The only question argued in the briefs and the only one necessary for consideration by this court is whether or not the superior court was justified in sustaining the demurrer to the complaint on the ground of laches. Plaintiff contends that the basis of his action is an express trust in writing; and that while laches may operate as evidence to defeat the plaintiff's demand upon an issue of fact, lapse of time alone will not upon demurrer avail in an action based upon an express trust admitted by the demurrer to exist. In support of this doctrine counsel for plaintiff cites certain authorities from the state of New York; but whatever the rule may be in any other jurisdiction it is well settled in California that the defense of laches may be raised by demurrer. In the case before us it appears by the affirmative averments of the complaint that the trustee was in a position to carry out the terms of his trust agreement at least as early as the year 1880, and that a decade earlier he had conveyed away all interest in the two blocks of outside lands numbered 991 and 992. There is no statement that plaintiff was ignorant of either of these facts, and under an elementary rule of pleading we must assume that he had knowledge of them. Plaintiff having known for 43 years that Mr. Nightingale had divested himself of all title to the two lots and by so doing had violated and repudiated the trust, and having been aware for at least 33 years that the said Nightingale or his representatives had been in a position to carry out the terms of the trust, was bound to plead, if he could, on seeking relief in a court of equity, circumstances showing good faith and reasonable diligence on his part. The burden was upon plaintiff to explain, if he could, his long-continued acquiescence in acts hostile to his claim. This he did not do, and it was therefore perfectly proper to sustain the demurrer on the ground of laches, a defense which, under an unbroken line of authority in California, may be raised by demurrer. Bell v. Hudson, 73 Cal. 285, 14 Pac. 791, 2 Am. St. Rep. 791; Kleinclaus v. Dutard, 147 Cal. 245, 81 Pac. 516; Elliott v. Clark, 5 Cal. App. 8, 89 Pac. 455; Elliott v. Bunce, 10 Cal. App. 741, 103 Pac. 897; Emerson v. Kennedy Mining & Milling Co., 169 Cal. 718, 147 Pac. 939.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(175 Cal. 270)

WINBIGLER v. SHERMAN. (L. A. 4449.)

(Supreme Court of California. June 4, 1917. Rehearing Denied July 2, 1917.)

1. MORTGAGES 🔑354—SALE—NOTICE.

If a trust deed specified the kind and manner of notice of sale, a sale without giving the notice as required would be invalid.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1051–1058, 1068, 1069.]

2. APPEAL AND ERROR 🔑1008(1)—REVIEW—FINDINGS.

In an action to require the purchaser at a sale under a trust deed to convey the property to the mortgagor on the ground that the sale was void, where neither the pleadings nor the findings of fact show the provisions of the trust deed relative to notice of sale, the finding to the effect that notice was not published as required by the trust deed is conclusive in so far as the motion to vacate the conclusions of law and the judgment and to enter another and different judgment are concerned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955.]

3. MORTGAGES 🔑356—DEED OF TRUST—NOTICE OF SALE.

Where a trust deed provided that the trustee should first publish notice of the time and place of sale with a description of the property to be sold at least twice a week for four successive weeks in some newspaper in a city and county named, a notice of sale of which the last publication was on January 22d, and in which the day noted for sale was February 6th, was publication of notice in accordance with the requirements of the trust deed, since it was not necessary that the four weeks be next preceding the date and the date fixed was not unreasonably remote from the period of publication.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1063–1067.]

4. APPEAL AND ERROR 🔑1008(1)—REVIEW—FINDINGS.

The findings of fact are conclusive upon the appellate court except as to the provisions of the trust deed and a letter admitted in evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955.]

5. MORTGAGES 🔑369(3) — SALE — SETTING ASIDE—INADEQUACY OF PURCHASE PRICE.

Where land is sold under a deed of trust, mere inadequacy of the purchase price is not sufficient ground for refusing to give full effect to such sale, although where the inadequacy is gross very slight additional evidence of unfairness or irregularity is sufficient to warrant setting it aside.

6. MORTGAGES 🔑369(3) — SALE — SETTING ASIDE—INADEQUACY OF PURCHASE PRICE IN CONNECTION WITH OTHER OBJECTIONS.

Where property worth at least $5,000 was sold under a deed of trust for $500, the purchaser being a nominal creditor and assignee for collection, the facts that there was a known dispute between the original mortgagor and mortgagee as to the adequacy of the consideration for the secured notes, and that the mortgagee wrote the mortgagor after notice by publication for sale under the deed of trust had been commenced, a letter, couched in such terms as to lead the mortgagor to believe that foreclosure proceedings had not been commenced, and that without actual notice before that time the mortgagor learned of the sale one-half hour before the time fixed, and requested a postponement for a reasonable time to enable him to procure the money to pay the amount due, *held* to constitute such an irregularity in the proceedings, together with the gross inadequacy of consideration, as to warrant setting aside the sale and ordering the property to be conveyed by the purchaser to the mortgagor.

In Bank. Appeal from Superior Court of Orange County; Z. B. West, Judge.

Action by Theo. A. Winbigler, as special administrator of the estate of Karl Wenzel, deceased, against W. H. A. Sherman. From a judgment for plaintiff and from an order denying a motion to set aside the conclusions of law and judgment and to amend the same and enter another and different judgment, and from an order denying a motion for new trial, defendant appealed to the District Court of Appeal, where an appplication for hearing in the Supreme Court was granted. Affirmed.

E. W. Forgy and John T. Jones, both of Los Angeles (Jones & Weller, of Los Angeles, of counsel), for appellant. H. C. Head, of Santa Ana (R. T. Walters and Ernest C. Griffith, both of Los Angeles, of counsel), for respondent.

ANGELLOTTI, C. J. This appeal was originally heard and decided by the District Court of Appeal of the Second Appellate District, and an application for a hearing in this court was subsequently granted. The following statement as to the nature of the case, the action of the trial court, and the appeals, is taken from the opinion of the district court of appeal:

> "Karl Wenzel executed to Charles A. Meyer, Jr., as trustee, a trust deed to secure the payment of certain promissory notes made by Wenzel to Fairbanks-Morse & Co., a corporation. Default having been made by nonpayment of one of the notes when it fell due, defendant W. H. A. Sherman, to whom the notes had been transferred, demanded that the real property described in the trust deed be sold by the trustee in accordance with the provisions of the trust deed. Sale was made by the trustee in conformity with that demand, and a deed of conveyance was executed to Sherman as purchaser at the sale. Karl Wenzel died on the 27th day of February, 1915, and the plaintiff was appointed special administrator of his estate. As such administrator the plaintiff instituted this action to obtain a decree, requiring that the defendants convey the property to the plaintiff upon payment by him of the amounts due under said notes and deed of trust. The defendants having filed their answer, the case went to trial, and the court made its findings and a decree ascertaining the amount of said indebtedness, and requiring that upon payment of that amount with interest as ascertained in the decree, the defendant Sherman should convey the described premises to plaintiff; and it was provided that upon failure to make such conveyance the deed be made by a commissioner appointed for that purpose. Within ten days after the entry of judgment the defendant Sherman gave notice of motion, and thereafter in due course made his motion for an order to set aside and vacate the conclusions of law and the judgment and to amend the same and enter another and a different judgment, to wit, a judgment that the plaintiff take nothing against the defendant and for costs in favor of the defendant. This motion was made as permitted by section 663 and 663a, Code of Civil Procedure, upon the grounds that the findings of fact do not support the conclusions of law or the judgment and that such findings of fact do require conclusions of law and judgment in favor of the defendant. The court having made its order denying that motion, the defendant Sherman has appealed from the order, and also from the judgment and from an order denying his motion for a new trial."

It may be added that the amount of indebtedness found by the trial court included all expenses of sale.

[1, 2] It cannot be held that the findings of fact do not support the conclusions of law or the judgment. Regardless of all questions in connection with the matter of the inadequacy of price, it is explicitly found that the trustee's sale of the land was not in compliance with the terms of the trust deed and the law, in that the notices of sale "were not published twice a week for four weeks next preceding the date of said sale, and in that more than one week elapsed after the last publication of said notices before the date of the said sale." Of course if the trust deed required the kind and manner of notice so specified in the finding, a sale had without giving the same would be invalid. Neither pleadings nor findings of fact show the provisions of the trust deed relative to notice of sale, and the finding to the effect that notice was not published as required by that instrument is conclusive in so far as the motion to vacate the conclusions of law and the judgment and to enter another and different judgment is concerned. The motion, therefore, was properly denied.

[3] The finding just referred to is, however, assailed on the appeal from the judgment and order denying a new trial as being without sufficient support in the evidence. The deed of trust is set out in the statement on appeal, and a reading thereof in connection with the findings of the trial court as to the publication had shows that notice of the sale was published in all respects as required thereby. So far as material this instrument provided:

> "Said trustee * * * shall first publish notice of the time and place of such sale, with a description of the property to be sold, at least twice a week for four successive weeks in some newspaper published in the city of Los Angeles, county of Los Angeles, state of California."

The trial court found "that notices of said sale were published by said trustee in the Los Angeles Daily Journal, a daily newspaper published in Los Angeles county, Cal., twice a week for four weeks," specifying the date of first and last publication. The last publication was on January 22, 1915, and the day noted for the sale was February 6, 1915. Publication of notice in accord with the requirements of the trust deed is thus shown. The point appears to be that the publication was not sufficient because not made for the four weeks "next preceding the date" of sale, and this appears to have been the view of the learned trial judge. But the trust deed, as we have seen, contains no such requirement, calling simply for publication "at least twice a week for four successive weeks." Upon this point the District Court of Appeal said:

> "Counsel for respondent have not referred to any decision holding that under a trust deed in the form here presented the publications of the notice of sale must be continued down to the very time of the sale; therefore, we may be justified in assuming that there is no such decision. In addition to that, however, we have examined some of the principal text-books and digests, and we fail to find any declaration of law in support of respondent's contention. The rule, of course, is that in executing a power of sale the trustee must act in good faith and strictly follow the requirements prescribed by the trust deed with respect to the manner of sale. The date fixed for the sale in the present instance was not unreasonably remote from the period of publication of the notices. The fact that it was a few days later than it might have been after the beginning of publication of the notice was a fact rather favorable than otherwise to the interests of the debtor."

The finding referred to is without support in the evidence.

[4] This result does not require a reversal, however, if the other findings sufficiently support the judgment. The claim of respondent is substantially that the gross inadequacy of price for which the land was sold by the trustee, in connection with the circumstances found, sufficiently supports the conclusion of the trial court that the sale was inequitable and fraudulent, and that the purchaser should not be allowed to retain the property. The findings of fact, which are conclusive upon us except as to the provisions of the trust deed and a certain letter hereinafter referred to which are the only matters of evidence contained in the statement on appeal, show the following facts: The notes of deceased secured by the trust deed were given to Fairbanks-Morse & Co. for the aggregate amount of $536.65 in consideration of the agreement of the latter to furnish and install certain pumping machinery on the land of deceased, a parcel of 15 acres in Orange county. The deed of trust covered all of said land. The trustee under the deed, Meyer, was at all times an employé of Fairbanks-Morse & Co. The pumping machinery was installed, and after the first note, one for $100, became due (October 1, 1914), deceased made complaint that the same was defective, and certain alterations were made therein by the vendor. Apparently the machinery was still unsatisfactory, complaint being made as late as the very day of sale. In the meantime, Fairbanks-Morse & Co. transferred the notes to defendant Sherman, who was a bill collector who had theretofore collected bills and accounts for it. The inference is that they were transferred solely for purposes of collection. On or about December 21, 1914, Sherman caused the trustee to advertise the land for sale under the trust deed. The first publication of notice was on December 31, 1914, the sale being noticed for February 6, 1915, "at the west door of the courthouse in the city of Los Angeles." On January 6, 1915, Sherman wrote deceased as follows, the letter being taken from the statement on appeal:

> "I have your letter of December 29th, and will say that I do not know anything about troubles you speak of, regarding the pumping plant. That is a matter that is between yourself and Fairbanks-Morse & Co. As to the trust deed, I have instructed the trustee to start foreclosure proceedings, so unless you care to pay the matter off at once, the same will be foreclosed in due course of time."

Deceased had no actual notice of the intended sale until about one-half hour before the time fixed, when he went to the place of business of Fairbanks-Morse & Co. for the purpose of negotiating with the latter about the alleged defects in the machinery, and then and there for the first time learned of the intended sale. He at once went to Sherman and the trustee, and talked with them about the matter, and requested a postponement of the sale for a reasonable time to enable him to procure the money and pay the amount due. The amount due, including expenses of sale, was only $680.58, and the actual value of the property was not less than $6,500, subject to a prior mortgage for $1,500. The trust deed fully provided for and authorized postponements of sale by the trustee. The request for a postponement was denied, and the sale was made to Sherman, the only bidder, for $500, the amount of his bid. Promptly after the sale deceased procured the necessary money and offered to Sherman a sum sufficient to pay all amounts due, including principal, interest, costs of sale and expenses, on condition that Sherman reconvey the property to him, and his offer was rejected. The trustee executed his deed to Sherman. The price paid was not more than one-tenth the actual value of the land, and was grossly inadequate. Another similar offer was made by this plaintiff to Sherman before the commencement of this action, and the same was refused. It is further found upon these facts "that the sale was inequitable and fraudulent."

[5] Although another rule prevails in some jurisdictions, it is the settled rule in this state that mere inadequacy of price is not a sufficient ground for refusing to give full effect to such a sale as this. This rule was recognized, and many authorities cited, in Odell v. Cox, 151 Cal. 73, 90 Pac. 194, where an execution sale was involved. In that case, however, a judgment vacating an execution sale was affirmed on the theory that there were circumstances which, considered in connection with the grossly inadequate price paid, were sufficient to support the conclusion of the trial court that there was such unfairness and undue advantage resulting in gross inadequacy of price as warranted the vacating of the sale. It was said in the

opinion that, notwithstanding the rule that mere inadequacy of price is insufficient to warrant setting aside the sale:

> "Where the inadequacy is palpable and great, very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought."

Several authorities were cited in support of this statement, including the case of Schroeder v. Young, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. Ed. 721, in which the court, after saying that courts are not slow to seize upon other circumstances impeaching the fairness of the transaction as a cause of vacating it, especially if the inadequacy be so gross as to shock the conscience, said:

> "If the sale has been attended by any irregularity, * * * if any undue advantage has been taken to the prejudice of the owner of the property, or he has been lulled into a false security; or, if the sale has been collusively, or in any other manner, conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price, the sale may be set aside, and the owner permitted to redeem."

This court said:

> "We think there can be no doubt under the authorities that where, in addition to gross inadequacy of price, the purchaser has, in the language of the United States Supreme Court, 'been guilty of any unfairness or has taken any undue advantage,' resulting in such gross inadequacy and consequent injury to the owner of the property, he will be deemed guilty of fraud warranting the interposition of a court of equity in favor of the owner who is himself without fault."

[6] In the case at bar, there can be no doubt that there was gross inadequacy of price. Property worth at least $5,000 was purchased for $500. The purchaser was the nominal creditor, having a claim, including all expenses, of only $680.58, secured many times over by this trust deed. Moreover, he was apparently only an assignee of Fairbanks-Morse & Co. for purposes of collection, its employé and representative. The trustee was an employé of the same corporation. All parties knew that a dispute existed between deceased and Fairbanks-Morse & Co. as to the adequacy of the pumping machinery furnished in consideration of the giving of the notes, and that deceased was endeavoring to obtain from the company some remedying of the alleged defects. On the very day noted for the sale, without any actual notice that notice of sale was being published, or that a time had been fixed therefor, he visited the office of the company for that purpose. It was only then that he learned of the proposed sale, only one-half hour before the time fixed. The letter written to him on January 6, 1915, by Sherman was couched in such terms as to convey to the mind of deceased that "foreclosure proceedings," as they were termed therein, had not as yet been commenced, and, as substantially found by the trial court, such proceedings would actually be commenced only "in due course of time," and this, although a time for the sale had actually been fixed and notice by publication actually commenced nearly a week before. Whether by design or otherwise it was well calculated to lead deceased to believe that no proceeding for a sale, which would leave in him no right of redemption and would effectually cut off all his rights in regard to his property, had as yet been begun. It certainly tended to lull him into a false security to this extent, if indeed the use of the term "foreclosure proceedings" did not convey to his mind the idea of proceedings of which actual notice would be given him. Learning that such a sale was in fact noticed only one-half hour before the time fixed therefor, he requested of both the purchaser and the trustee a postponement for a reasonable time to enable him to procure the proportionately small amount of money to pay the amount due. This request, perfectly reasonable under the circumstances and one that could be granted without in the slightest degree prejudicing the creditor in so far as the collection of the full amount due was concerned, was refused, with the result that the whole property was sold to the creditor for one-tenth of its actual value. We are of the opinion that under all the circumstances the refusal of the creditor to consent to a postponement and of the trustee to grant the same so savored of oppression and unfairness and an apparent desire to acquire the property of deceased for a mere pittance that, taken in connection with the gross inadequacy of price, it constitutes such an irregularity in the proceedings as to sufficiently support the conclusion and action of the trial court.

The judgment and the order denying a new trial and the order denying the motion to vacate the conclusions of law and judgment and to enter another and different judgment are affirmed.

We concur: SLOSS, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

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175 Cal. 278

RAUER v. HERTWECK et al. (S. F. 7081.)

(Supreme Court of California. June 4, 1917.)

1. TRIAL 🔑165 — MOTION FOR NONSUIT — HEARING.

On motion for nonsuit, the evidence and every inference that may fairly be drawn from it must be viewed in the light most favorable to plaintiff's claim.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374.]

2. EXECUTION 🔑256(2) — SALE — ACTION TO SET ASIDE—EVIDENCE.

In an action to set aside an execution sale of real estate, evidence *held* to show that the sale was fairly conducted, and that plaintiff's loss can be more properly attributed to the neglect of his own interest than to any unfairness on the part of the judgment creditor or the purchasers.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 730, 731.]

3. EXECUTION 🔑251(1) — SALE — SETTING ASIDE—INADEQUACY OF PRICE.

Mere inadequacy of price, however gross, is not itself a sufficient ground for setting aside an execution sale legally made, but there must, in addition, be proof of some element of fraud, unfairness, or oppression, before a court will be justified in depriving the purchaser of his legal advantage, although where the price is greatly disproportionate to the actual value, very slight evidence of unfairness or irregularity will suffice to authorize the granting of relief.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 708.]

4. ATTORNEY AND CLIENT 🔑104 — KNOWLEDGE OF CLIENT—SETTING ASIDE—GROUNDS.

Where an attorney had actual knowledge of the entry of judgment against his client, such knowledge is in law the knowledge of the client himself.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 92, 93.]

5. EXECUTION 🔑222(1) — SALE — NOTICE TO JUDGMENT DEBTOR.

As Code Civ. Proc. § 692, regarding notice of sale under execution, does not require notice to be given to the judgment debtor, neither the judgment creditor, the sheriff, nor the purchasers are under any obligation to give the judgment debtor such notice.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 629, 630.]

6. EXECUTION 🔑230 — SALE — SOLICITING BIDS.

No inference of impropriety is to be drawn from the fact that attorneys for the judgment creditor informed one of the purchasers at an execution sale that a sale was to be had, and suggested that he bid, since the judgment debtor is benefited, rather than harmed, by any action which tends to increase the number of bidders.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 648–652, 698.]

7. EXECUTION 🔑256(2) — SALE — ACTION TO SET ASIDE—ANSWER—CONSTRUCTION.

In an action to set aside an execution sale of real estate, an answer, alleging that defendants had no part in or concern with the issuance of the execution, or the levy upon or the sale of the premises other than attend the sale and become purchasers thereat, and that if, in said proceedings, there was any intent to prevent plaintiff from having knowledge thereof, or if such knowledge was intentionally concealed from plaintiff the defendants had no part therein, and were in no way responsible therefor, was clearly designed to dissociate the defendants from any connection with the purpose to take any unfair advantage of the plaintiff, and was a sufficient denial of any knowledge on their part of such purpose.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 730, 731.]

8. EXECUTION 🔑224—SALE BY LOTS OR PARCELS—STATUTE.

In view of Code Civ. Proc. § 694, regarding the conduct of sales of property under execution, in an action against the purchasers to set aside an execution sale of real estate, where there was nothing to indicate that the real estate consisted of more than one lot or parcel, a sale in parcels was not required.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 636–639, 705.]

9. JUDGMENT 🔑237(3) — DEFAULT AGAINST ONE DEFENDANT.

Under Code Civ. Proc. § 579, providing that in an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper, in an action to set aside an execution sale of real estate brought against two defendants, who did not have any unity of interest or claim, and in which plaintiff took a default judgment against one defendant, a subsequent judgment against the other defendant was not void, and hence execution for costs could issue thereunder.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 419.]

10. JUDGMENT 🔑504(3) — COLLATERAL ATTACK—PRESUMPTION.

Where it does not appear that two defendants, in an action to set aside an execution sale of real estate, had any unity of interest or claim making it improper to render several judgments against them, it will be presumed on collateral attack that they did not.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 946.]

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by J. J. Rauer against Edward Hertweck and another. Judgment for defendants, and plaintiff appeals. Affirmed.

H. M. Anthony, of San Francisco, for appellant. S. L. Strother and G. L. Aynesworth, both of Fresno, for respondents.

SLOSS, J. This action was brought to set aside an execution sale of real estate. The court below granted the motion of the defendants for a nonsuit, and thereupon entered judgment in their favor. The plaintiff appeals from the judgment.

In October, 1910, one Webb brought an action against Rauer and others to quiet his title to certain lands in Fresno county, and, in June, 1912, obtained judgment against Rauer quieting his title, and for costs amounting to $15.90. On December 19, 1912, an execution was issued on said judgment for costs. The sheriff levied the writ upon a tract of real estate in Fresno county, described as "Lot No. 7, Linda Vista Tract," belonging to Rauer, and sold said tract on the 18th day of January, 1913, to Hertweck and Sparkman, the defendants in this action, for the sum of $46. The sheriff duly made his return on said sale, and, on the 20th day of January, 1914, issued his deed to Hertweck and Sparkman, the purchasers at the execution sale. The complaint alleges that on the day of the execution of the sheriff's deed, and long prior thereto, the plaintiff was the owner of the land so sold, and that the same was worth between $100 and $150 per acre. He further alleges that he was ignorant of the judgment against him, of the issuance of the writ of execution, of the sale of the property, and of the issuance of the sheriff's deed, until about the 4th day of February, 1914; that no one ever notified him of the proposed sale of his property, although the defendants in this action, the attorneys for the judgment creditor, and the sheriff knew that plaintiff's residence was at the city of San Francisco. It is alleged that the writ of execution was issued and levied, and the sale made, with the intent to prevent all knowledge thereof on the part of plaintiff until after the sale and the issuance of the deed thereon, and that all said acts were intentionally concealed from the plaintiff for the purpose of depriving him of the whole of his land for a mere nominal sum. In addition, it is alleged that the sheriff did not offer the land for sale in any smaller parcel than the 20 acres. The plaintiff brought this action on February 13, 1914, offering by his complaint to refund to the defendants the amount paid by them to the sheriff.

By their answer, the defendants, Hertweck and Sparkman, allege that since the execution of the deed they have been the owners of the land. They deny that the land was worth any more than $35 per acre, and deny that plaintiff was ignorant of the judgment, of the execution, of the sale, or of the issuance of the deed by the sheriff, as alleged in the complaint. They further allege that they had no part in or concern with the issuance of the execution, or the levy upon or the sale of said premises, other than to attend at said sale, and become purchasers thereat, and that if, in said proceedings, there was any intent to prevent plaintiff from having knowledge thereof, or if such knowledge was intentionally concealed from plaintiff, they, said defendants, had no part therein, and were in no way responsible therefor. They also deny the allegation that the land was not offered for sale in subdivisions.

[1, 2] Upon a motion for nonsuit, the evidence, and every inference that may fairly be drawn from it, must be viewed in the light most favorable to the plaintiff's claim. Goldstone v. Merchants' Ice, etc., Co., 123 Cal. 625, 56 Pac. 776; Hanley v. California Bridge, etc., Co., 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597; Estate of Ricks, 160 Cal. 450, 117 Pac. 532. But, giving to the plaintiff every benefit to which he is entitled under this rule, we think it must still be held that he failed to establish a case entitling him to relief.

[3] There was testimony in support of the allegation of the complaint relative to the value of the land. The 20 acres must therefore be taken to have been worth between $2,000 and $3,000. The sum bid at the execution sale was only $46. Clearly, therefore, the purchase price was but a small fraction of the value of the property. It is, however, well settled in this state that mere inadequacy of price, however gross, is not itself a sufficient ground for setting aside a sale legally made. There must, in addition, be proof of some element of fraud, unfairness, or oppression, before a court will be justified in depriving the purchaser of his legal advantage. Where, however, the price obtained is greatly disproportionate to the actual value, very slight evidence of unfairness or irregularity will suffice to authorize the granting of the relief. These rules are clearly stated, and the authorities cited, in Odell v. Cox, 151 Cal. 70, 90 Pac. 194. The same principles are declared and applied in Winbigler v. Sherman (L. A. No. 4449) 165 Pac. 943, recently decided in this court.

[4] What, then, does the proof in this case show with respect to the unfairness of the sale? The plaintiff, Rauer, testified that he had no knowledge of the judgment, or of the proceedings on execution. But it appears without dispute that on June 21, 1912, 11 days after the entry of the judgment, Mr. H. M. Anthony, the attorney representing him in the action of Webb v. Rauer (and who also represents him here), filed, on behalf of Rauer, a notice of appeal from said judgment, and an undertaking to support such appeal. These facts furnish conclusive evidence that Rauer's attorney had actual knowledge of the entry of the judgment against his client, and such knowledge is, in law, the knowledge of Rauer himself. 6 C. J. 638; Mabb v. Stewart, 147 Cal. 413, 81 Pac. 1073. Besides this, there is uncontradicted evidence that on June 17, 1912, the attorneys for Webb wrote to Rauer's attorney, requesting payment of the judgment for the costs; that they mailed him a copy of the bill of costs, and received a letter of acknowledgment; and that, in October, 1912, they again wrote him asking that his client pay the costs. Both requests for payment were ignored. The execution was not taken out until two months after the sending of the second letter.

The notice of sale was published and posted in strict conformity with the requirements of section 692 of the Code of Civil Procedure, but no one gave Rauer or his attorney personal notice that the sale was to take place. The sheriff and the undersheriff testified that they knew who Rauer was, and could have found his address. Hertweck, one of the defendants, had done business with Rauer. He knew that Rauer's place of business was in San Francisco, and that he was reputed to be a man of means. Sparkman, the other defendant, had never heard of Rauer. He testified that he first heard of the proposed sale of the land when one of the attorneys for Webb told him that there was to be an execution sale, and asked him if he did not want to bid.

[5] The evidence which we have summarized constitutes plaintiff's entire showing on the question of the fairness of the sale. We are unable to find in it anything going to show fraud, unfairness, or oppression. The main stress of the appellant's argument is put upon the point that neither the judgment creditor, the sheriff, nor the purchasers notified the judgment debtor of the proposed sale. But there was no obligation upon them to give him any such notice. The statute defines how notice of an execu-

tion sale must be given. To say that a sale may be set aside because some other notice was not given would be to amend the statute, and this we cannot, of course, do. When the officer conducting the sale has done the acts prescribed by the Code, he has done his full duty. He is not required to search for the debtor and give him any further notice than that which the law exacts. Nor is any such duty imposed upon the judgment creditor. Much less is one who may contemplate bidding at an execution sale called upon to concern himself with the question whether the debtor has actual knowledge of the proceeding.

[6] No inference of impropriety is to be drawn from the fact that the attorneys for the creditor informed one of the defendants that a sale was to be had, and suggested that he bid. The judgment debtor is benefited, rather than harmed, by any action which tends to increase the number of bidders.

[7] It is argued that the complaint alleges, and the answer fails to deny, that the defendants knew that the writ was issued, and the sale made, with the intent to prevent knowledge thereof by the plaintiff, and to deprive him of his land. We think the complaint, properly construed, does not charge that the defendants knew of the alleged intent. But, in any event, the answer was clearly designed to dissociate the defendants from any connection with the purpose, which, so far as they could know, may have been entertained by others, to take an unfair advantage of the plaintiff. This may fairly be interpreted as a denial of any knowledge on their part of such purpose, and it was apparently so treated at the trial.

The attempt to show unfairness in the sale comes down simply to this: That the execution sale was regularly made upon due statutory notice, but that the judgment debtor did not, in fact, know of the sale, and no one gave him notice of it. He did, however, know that a judgment had been entered against him, and must be deemed to have known that his property might be levied on at any time. He failed to pay the judgment, and took no steps to protect his property until many months after the entry of judgment. He then found that a sale had been had, and that the time for redemption had expired. The resulting loss can more properly be attributed to his neglect of his own interests than to any unfairness on the part of the judgment creditor of the purchasers. The case presents none of the peculiar circumstances of oppression or inequitable conduct which were held, in Odell v. Cox and in Winbigler v. Sherman, to justify relief from a sale made for an inadequate price.

[8] It is claimed that the sale was irregular because the land was not offered in subdivisions. Assuming that the evidence shows that the sale was made as claimed by the appellant, there is no evidence that the situation was such as to require the sheriff to sell the land otherwise than as a whole. Section 694 of the Code of Civil Procedure provides that:

> "When the sale is of real property, consisting of several known lots or parcels, they must be sold separately."

The land is described in the record as "Lot No. 7 of the Linda Vista tract." There is nothing to indicate that it consisted of other known lots or parcels. A sale in parcels was not therefore required. Gleason v. Hill, 65 Cal. 17, 2 Pac. 413; Connick v. Hill, 127 Cal. 165, 59 Pac. 832; Meux v. Trezevant, 132 Cal. 487, 64 Pac. 848.

Finally, the appellant makes the point, raised by an amendment to his complaint, that the judgment upon which the execution was issued was void. It appears that the original action of Webb was brought against two defendants, Dewey Navigation & Trading Company and Rauer, for the purpose of quieting Webb's title to certain lands. Dewey Navigation & Trading Company defaulted, and Webb took judgment against it on March 28, 1912. This judgment, it is alleged in the amendment, is still in force. Rauer answered, and thereafter Webb took against him the judgment which formed the basis of the execution. The appellant's contention is that since, as this court has often stated, there can be but one final judgment in a case, the action was disposed of by the judgment against Dewey Navigation & Trading Company, and that the later judgment against Rauer was void.

[9] Without regard to other possible answers to the contention, the rule relied upon has no application to actions in which separate and independent relief is sought against several defendants. The court may, under the express provision of section 579 of the Code of Civil Procedure, render judgment against one or more of the defendants, "leaving the action to proceed against the others, whenever a several judgment is proper." Cole v. Roebling Construction Co., 156 Cal. 443, 105 Pac. 255; Bell v. Staacke, 159 Cal. 193, 115 Pac. 221.

[10] It does not appear that the two defendants in the suit brought by Webb had any unity of interest or claim making it improper to render several judgments against them. On this collateral attack on the judgment, it will be presumed that they did not.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

(175 Cal. 300)

HOLDEN et al. v. MENSINGER et al.

(Sac. 2314.)

(Supreme Court of California. June 6, 1917.)

1. Appeal and Error 🔑909(1)—Presumption in Favor of Judgment.

In the absence of a showing that an action was not timely commenced, the presumption on appeal will be in favor of the judgment rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3675.]

2. Appeal and Error 🔑680(1)—Transcript—Contents—Order Overruling Demurrer.

An objection that transcript failed to show order sustaining or overuling demurrer was frivolous, where the record showed appellant's recognition of the fact that it had been overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2880.]

3. Mechanics' Liens 🔑281(1)—Description of Property—Sufficiency of Evidence.

In suit to foreclose mechanic's lien, it was immaterial that witnesses colloquially spoke of the building as the "M. theater," where there was evidence of correct description, ownership, and knowledge of work done.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 565–567.]

4. Mechanics' Liens 🔑290(3)—Findings—Conformity to Pleadings.

Where mechanic's lien claimants sued in individual capacity and as copartners, and lien claim was filed in firm name, findings declaring that such individuals comprised the named firm did not create a fatal variance.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 594.]

5. Pleading 🔑398—Variance Between Allegations and Proof.

The variance between pleading and proof is fatal only where it has misled or may serve to mislead the adverse party, as where proof is addressed to issues different than the specific issues which the defendant was brought into court to meet, in which case it will be presumed that he was misled to his injury; he not being sufficiently advised, so as to be prepared to meet such allegations.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1338.]

6. Mechanics' Liens 🔑277(5)—Variance Between Claim and Complaint.

There was no variance between mechanic's lien claim, filed in name of a partnership with which contract was alleged to have been made, and the complaint, naming plaintiffs in their individual capacity and as copartners.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 552.]

7. Mechanics' Liens 🔑135—Sufficiency of Claim—Necessity of Stating Plaintiff's Firm Name.

The law does not require that members of a copartnership shall be specifically named in filing a copartnership lien claim.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 209.]

8. Partnership 🔑197—Pleading—Use of Firm Name.

A complaint in a partnership's mechanic's lien foreclosure will be demurrable, where it charges in the name of the copartnership alone.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 360.]

9. Partnership 🔑197—Action by Partners—Use of Firm Name.

Although a copartnership may be sued under its fictitious name, under Code Civ. Proc. § 388, in action brought by the partnership, the full names of all partners must be stated, since that was the rule at common law.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 360.]

10. Partnership 🔑212—Action by Partners—Failure to File Certificate.

It was not a fatal defect that a complaint by partnership using a fictitious name did not show filing of certificate required by Civ. Code, §§ 2466, 2468, and the omission merely subjected the complaint to a plea in abatement.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 404–407, 410, 414.]

11. Appeal and Error 🔑1039(2)—Harmless Error—Action by Partner—Failure to File Certificate.

A partnership's failure to show filing of certificate regarding its fictitious name, as required by Civ. Code, §§ 2466, 2468, was immaterial, where that issue was fully tried, and compliance therewith shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4075.]

12. Mechanics' Liens 🔑263(10)—Dismissal of Principal Debtor—Effect on Property Owner's Liability.

The dismissal of primary debtors, personally liable, in mechanic's lien foreclosure, did not release the property from the lien, since the action was not analogous to that of a mortgage foreclosure, and in a mechanic's lien foreclosure the real property is an independent fund, to which the lien claimant may resort without regard to the personal liability of him with whom he has contracted, and is an action in rem.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 481.]

13. Mechanics' Liens 🔑263(9)—Joinder of Primary Debtor and Property Owner.

In mechanic's lien foreclosure, the primary debtor and the owner of property impressed with a lien may be joined as defendants; but they are not both necessary parties defendant to the same action.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 479.]

14. Mechanics' Liens 🔑291(1)—Judgment—Deduction of Other "Claims."

Code Civ. Proc. § 1193, requiring deduction of all other claims from the judgment, in contractor's suit to foreclose mechanic's lien, refers to valid lien claims filed for work done for the contractor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 599.

For other definitions, see Words and Phrases, First and Second Series, Claim.]

Department 2. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Thomas Holden and another against W. R. Mensinger and others. Judgment for plaintiffs, and defendant named appeals. Affirmed.

Griffin & Carlson and J. M. Walthall, all of Modesto, and John L. McVey, of Oakland, for appellant. Austin Lewis and R. M. Royce, both of Oakland, for respondents.

HENSHAW, J. This is an appeal from a judgment given in favor of plaintiffs in their action as contractors to foreclose their mechanic's lien upon the property of appellant, Mensinger. Plaintiffs sued in their individual capacity and as copartners doing business under the firm name and style of the Thomas Holden Decorating Company, a copartnership. Their lien claim was filed in the name and on behalf of the Thomas Holden Decorating Company, a copartnership. The material which they furnished and the labor which they performed were in and about the decoration of a theater erected on the appellant's land.

[1] Appellant advances against the judgment certain untenable and highly technical propositions. Thus, he declares that the transcript does not show that the action was commenced within 90 days after the filing of the lien claim. This manifestly arises from the fact that the original complaint was superseded by an amended complaint, which appears in the transcript. He raised no plea of the statute of limitations, and does not even now contend that the action was not commenced in time, as manifestly it was, or he would have been at pains to show the contrary. Suffice it to say that, in the absence of a showing of the fact, the presumption will favor the judgment.

[2] He next contends that he interposed a general demurrer, and that "the transcript fails to show that any order was made by the court sustaining or overruling this demurrer." Again it may be said that the objection is wholly frivolous, in view of the fact that in more than one place in the record it is shown that appellant's counsel knew and recognized the fact that the demurrer had been overruled. Thus:

> "Mr. Royce. Well, may it please the court, we had a demurrer interposed upon the ground the complaint did not state facts sufficient to constitute a cause of action, and the demurrer was overruled."

[3] Still further, it is argued that there is no testimony in the record showing that any materials were furnished or labor performed upon the property, or any part of it, against which the lien is sought. This contention is based upon the fact that in their evidence many of the witnesses colloquially spoke of the building as the "Modesto Theater." But the property was described as being "on Tenth street, and located on lots 9, 10 and 11, block 56, and is known as the Mensinger Block." It is further abundantly established that Mensinger owned the land, and not only knew of the erection of the theater, but knew personally the work that was being done by these plaintiffs.

[4] Appellant next contends that there is a fatal variance between the lien claim and the complaint, which are as above indicated, and the findings, which declare that "Thomas Holden and Charles Frederick Holden comprise the firm of Thomas Holden Decorating Company, a copartnership," etc. Upon broad grounds the contention is without merit.

[5] A variance is fatal only when it has misled, or by its nature may serve to mislead, an adverse party; as, where he is brought into court to meet specific issues of fact, and the proof is addressed to quite different issues, it will be presumed that he has been misled to his injury in not being sufficiently advised of the nature of the action, so as to be prepared to meet it with evidence. But where this reasoning fails of applicability the variance itself ceases to be fatal, and such manifestly is the situation here presented.

[6, 7] But more specifically there is no variance whatsoever between the lien claim and the complaint; the lien claim properly declaring that the contract was with the copartnership, since in fact it was. Nor is there any requirement in the law that in filing a copartnership lien claim the members of the copartnership shall be specifically named.

[8, 9] Coming, next, to the complaint, it would have been demurrable if it had charged in the name of the copartnership alone. Gilman v. Cosgrove, 22 Cal. 356. While a copartnership acting under a fictitious name may be sued in that name (Code Civ. Proc. § 388), the rule governing its prosecution of an action is that the full names of all the partners must be stated. "Partners cannot, at common law, sue or be sued by their partnership names; but by statute in some of the states, as in Ohio, Iowa, etc., this is allowed, and so far partnerships are treated as corporations. Elsewhere their demands are joint and personal, and must be enforced by them as individuals." Bliss, Code Pleading, § 145; Williams v. S. P. Railroad Co., 110 Cal. 457, 42 Pac. 974; Clement v. British American Assurance Co., 141 Mass. 303, 5 N. E. 847.

[10] It is next urged by appellant that there is a fatal defect in the complaint, in that it appears upon the face of it that the copartners were doing business under a fictitious name, and the complaint itself does not aver a compliance with sections 2466 and 2468 of the Civil Code, which averment is asserted to be necessary when upon the face of the pleading the fictitious name of the copartnership appears. Sweeney v. Stanford, 67 Cal. 635, 8 Pac. 444; Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567, 577, 112 Pac. 454. But neither of these cases decides, nor does any other case decide, as appellant contends, that this omission is a "fatal defect." The omission merely subjects the complaint to the special defense of a plea in abatement, which plea was not here interposed.

[11] Upon the trial satisfactory evidence was offered of the timely filing of an adequate certificate. The fact, therefore, was established against appellant's contention, and while, had the complaint been more carefully drawn, it would have pleaded this compliance with the sections of the Civil Code,

the omission becomes immaterial, in view of the fact that the issue was fully tried and determined against the contention of appellant.

[12] Plaintiffs dismissed their action against Poland, the original contractor, and against the Coast Theater Company, who, it may be conceded, were primarily liable for plaintiffs' claim. It is contended that this dismissal of the primary debtors personally liable relieved the property of appellant, Mensinger, from the lien. To plaintiffs' argument that no personal or deficiency judgment could be entered against the landowner, Mensinger, the complete answer is that no such judgment was entered. To the argument that the property should be released from the burden of the lien by virtue of the dismissal against the primary debtor, an analogy is sought to be drawn between actions such as this and actions to foreclose mortgages resting on private contract and the rights of sureties and guarantors. The analogy is fallacious. In a mortgage or in a suretyship the liabilities are based upon an agreement of the parties, and by operation of law the release or discharge of the debtor releases the sureties for the debt. In the case of a mechanic's lien the real property is in its nature an independent fund, to which the lien claimant may resort without regard to the personal liability of him with whom he has contracted. It is an action in rem. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

[3] Our cases hold (Giant Powder Co. v. Flume Co., 78 Cal. 193, 20 Pac. 419) that the primary debtor and the owner of the property impressed with the lien may be joined as defendants in a single action. But it is not declared that they are necessary parties defendant, and the ground of the ruling is simply that of convenience in avoiding a multiplicity of suits.

[14] It is contended, because the copartners employed an artist to do a part of the decorative work and he testified to the value of the labor and material furnished by him, that this artist had an independent claim for the value of these services, and consequently that it was error to include this amount in the judgment given in favor of plaintiff. The evidence was abundant to support the court's finding of the value of the work done and material furnished. However, the testimony of the artist, a son of one of the copartners, but not a member of the copartnership, was that the value of his services was $1,250, that he had received no part of it, and had filed no lien claim for it. Section 1193 of the Code of Civil Procedure, at the time of the trial of this action, provided that:

> "Any contractor shall be entitled to recover upon a lien filed by him only such amounts as may be due him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished as aforesaid and embraced within his contract."

This contention also is without merit. Manifestly the "claims" for which deductions are to be made are claims based upon valid lien claims filed for work done or material furnished to the claimant contractor, and therefore to be deducted from the amount of his recovery, for the plain and principal purpose of this provision is to protect the owner against the possibility of being forced to make double payments. Such laborers, artisans, or materialmen could only have a recovery against the owner by filing their lien claims and prosecuting their actions, and therefore, we repeat, it is only in such cases that section 1193 contemplates a deduction. It would not only do violence to the statute, but would work a grave injustice upon these plaintiffs, if they were not allowed to recover from the owner the value of these services, for the payment of which they are legally bound to the man who performed them.

The judgment appealed from is therefore affirmed.

We concur: MELVIN, J; LORIGAN, J.

(175 Cal. 336)

RYSTINKI v. CENTRAL CALIFORNIA TRACTION CO. (Sac. 2331.)

(Supreme Court of California. June 6, 1917.)

1. CARRIERS 🔑314(1, 2)—INJURY TO PASSENGER—COMPLAINT.

In action by passenger against street railroad, a complaint, setting forth the defective state of the track and roadbed and that near where plaintiff was injured the car, by reason of such condition, was caused to swing violently, etc., whereby plaintiff was violently thrown, etc., *held* to sufficiently set forth the manner of the injury and defendant's negligence as its cause.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1273, 1275½.]

2. PLEADING 🔑365(1)—MOTION—WAIVER.

Where the court failed to rule on defendant's motion to dismiss a count of the complaint, the motion was waived by failure to renew it before the close of the trial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1163–1165, 1167, 1170–1172.]

3. CARRIERS 🔑318(4) — NEGLIGENCE AS TO PASSENGERS.

That at some time before a passenger's injury the conductor on the car was conversing with a passenger did not indicate breach of duty towards the injured passenger, where he was available to give the signal when she decided to have the car stopped, and it did not appear that he was in a position where he could not see the alighting passenger and give the signal to resume the trip after she might alight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1307, 1308.]

4. APPEAL AND ERROR 🔑1053(1)—EVIDENCE TENTATIVELY ADMITTED — CURE BY SUBSEQUENT INSTRUCTION.

Where cross-examining testimony of a witness as to a certain point was stricken out by a plenary ruling as not being proper impeachment, any ill effect of such testimony as to the adverse party was removed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178, 4184; Trial, Cent. Dig. § 977.]

5. WITNESSES 🔑323—ONE'S OWN WITNESS—IMPEACHMENT.

In action by passenger against street railroad for injuries by being thrown from the car because of rough track, where a witness for plaintiff failed to testify as expected that the track was rough and the movements of the car erratic, but denied those very things, it was permissible for plaintiff to impeach such testimony, under Code Civ. Proc. § 2049, as to impeaching one's own witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1096.]

6. TRIAL 🔑253(4) — DUTY TO PASSENGERS — INSTRUCTION.

In action for injuries to street railroad passenger, an instruction that "common carriers of passengers bind themselves to carry safely those whom they take into their cars, so far as human care and foresight will do so, that is, with the utmost care and vigilance of a very cautious person, and such carriers are responsible for any, even the slightest, negligence," preceded by an instruction that common carriers are required to do all that human care, vigilance, and foresight "reasonably can do under all the circumstances" to prevent accidents to passengers, correctly stated the law, and did not impute to the carrier the duties of an insurer nor cut off the carrier from the benefits of the law with reference either to contributory negligence or inevitable casualty.

7. CARRIERS 🔑321(23) — INJURY TO PASSENGERS—INSTRUCTIONS.

In action by passenger for injuries, where, although plaintiff had abandoned a count of negligence in starting the car, the gist of the negligence relied on was defendant's operation of the car over a track so rough that plaintiff was thrown from the car, instructions covering defendant's duty in the operation of its cars were properly given.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1335, 1336.]

8. TRIAL 🔑253(4) — INSTRUCTIONS IGNORING ISSUES.

In action by a passenger for injuries, an instruction on the care required by a passenger, stating that "it is no defense to this action that the plaintiff by her own act has contributed to her injury; it must appear that by her own fault she has so contributed"—was not objectionable as entirely excluding the defense of contributory negligence, but properly left for the jury's determination the question whether plaintiff's acts were negligent or not.

9. CARRIERS 🔑316(1)—INJURY TO PASSENGER—BURDEN OF PROOF.

Mere injury to a passenger does not place upon the carrier the duty of explanation, but the establishment of such injury, coupled with proof of coincident and unusual happening to the car, does cast upon defendant the burden of exculpation by inevitable casualty or some other cause which human care and foresight could not prevent, or by the contributory negligence of the passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283, 1285, 1294.]

10. TRIAL 🔑253(4)—INSTRUCTIONS—DAMAGES—IGNORING STATUTE.

In action for personal injuries, an instruction that "the law does not prescribe any fixed or definite rule of damages, but leaves their assessment to the common sense and unbiased judgment of the jurors," was not objectionable as ignoring Civ. Code, § 3283, allowing damages for detriment resulting after the commencement of an action in tort or certain to result in the future, since the statute does not more definitely prescribe the manner of assessment of such damages than does such instruction.

Department 2. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Hilda Rystinki against the Central California Traction Company. From judgment for plaintiff, defendant appeals. Affirmed.

Butler & Swisler, of Sacramento, for appellant. Welsh & Henry, of Sacramento, for respondent.

MELVIN, J. Plaintiff sued for damages for personal injuries received as alleged by being thrown from one of the electric street cars of defendant upon which she was traveling as a passenger. Judgment for $5,000 was awarded, and defendant has taken this appeal therefrom.

[1] The plaintiff sought to plead her cause of action in two counts of the second amended complaint, by the first of which her fall from the car and the consequent bodily injury were ascribed to the sudden starting and putting in violent motion the car from which plaintiff was about to alight, without giving her sufficient time to reach the ground safely. By the second count it was alleged, in substance, that plaintiff was thrown from the car and injured by reason of the operation of said car over a defective track and roadbed which caused it to "jerk and swing and sway back and forth." This part of the pleading was unsuccessfully attacked by general and special demurrers and the court's rulings thereon are assigned as errors by appellant upon the ground that it does not appear that plaintiff was thrown from the car by reason of the negligence set forth; that there is no announcement of any causal connection between defendant's negligent maintenance of a defective track and roadbed and the violent throwing of plaintiff to the ground. While the pleading might be made clearer, we think it does sufficiently set forth the manner of the injury and the negligence of defendant as the causative element thereof. The defective state of the track and roadbed is set forth quite in detail, and the complaint contains an averment that at and near the point where plaintiff was injured, the car, by reason of such condition, was caused to swing violently, etc. The pleading also contains the averments that:

> "By reason of the said insufficient, unsuitable, and unsafe and defective condition of said roadbed and track, as aforesaid, and the negligent excavation of gravel and dirt under and about the same, as aforesaid, thereby greatly weakening the same, * * * and causing the said car upon which plaintiff was as such passenger to violently jerk and swing and sway back and forth, all as aforesaid, * * * the said plaintiff, without any fault or negligence

on her part, was violently thrown from said car to the ground headfirst and thereby rendered unconscious, and sustaining great damage and injury."

This is followed by a somewhat minute description of the injuries.

[2, 3] At the trial plaintiff elected to rely upon the cause of action pleaded in the second count, whereupon defendant moved to dismiss the first count. The court did not at that time grant the motion, but said:

"I prefer to let the matter be retained and not dismissed at this time. We will pass on that later on."

The motion was not renewed. We do not see that the plaintiff was prejudiced by the court's action, even though the ruling was made in the presence of the jury. Moreover, the motion was waived by failure to renew it before the close of the trial. It is argued, however, that the court erred in admitting evidence properly relative only to the first cause of action and in giving instructions suitably applicable only to matters pertaining to that count. The testimony which, as appellant asserts, was erroneously considered, related to the conduct of the motorman and conductor. Plaintiff herself testified that, after she indicated to the conductor her desire to leave the car at Rose avenue, he pulled the strap attached to the bell and walked into the car; and that she did not know what he did there. Questions were propounded to the motorman (who was called as a witness by plaintiff) tending to show that some time before the car reached the place where plaintiff was injured the said motorman looked into the car and observed the conductor in conversation with a woman. The instructions to which appellant objects as prejudicial contain certain references to the responsibility of a corporation for the management of its cars, and it is argued that the testimony regarding the conduct of appellant's servants, coupled with these instructions, misled the jury into the belief that plaintiff was depending upon the first cause of action which had been abandoned. The trouble with this argument is that the indicated conduct of the motorman and the conductor was not negligent. Surely the motorman's glance into the car at a time prior to the accident was not negligence, or, if negligence, was not and could not have had any relation to plaintiff's injuries. Nor did the fact that at that remote period the conductor was conversing with a passenger indicate breach of duty toward plaintiff on his part because he was available to give the signal when she decided to have the car stopped. Entering the car after ringing the bell was not a negligent act on his part because it does not appear that he was in a position after going inside the car from which he could not see the passenger and give the signal to resume the trip after she might alight. Nor did the instructions relative to the duty of a corporation in operating its cars tend to mislead the jurors, because the case was clearly tried upon the theory not that defendant's servants caused plaintiff's fall from the car by their negligent starting of the car but that she was precipitated to the ground by its movement from side to side in consequence of the imperfect condition of the track and roadbed.

Plaintiff called as a witness Mr. Thum, who had been motorman on the car from which she was thrown. Some questions were asked of him relative to the conductor's conversation with a lady in the car as it was passing the race track some time before the accident. His answers did not satisfy plaintiff's counsel, and they were permitted to cross-examine their witness with reference to alleged statements made to them regarding that matter. This was improper, as was the introduction of impeaching testimony upon the same subject, to the effect that Thum had said to counsel in a conversation at his own home on a date designated that he had seen Johnson, the conductor, leaning over and talking to a blonde woman. The only real difference between the actual testimony of the witness and his purported statement to counsel was that on the stand he said he saw Johnson speaking to the lady, while in his statement, as quoted by the impeaching witnesses, he said Johnson was holding a conversation with her. The impeachment was quite as immaterial as was the testimony itself. But Thum was asked questions about the condition of the roadbed and track at the point where plaintiff was injured, and he was interrogated with reference to the jolting or jarring of the car just before the accident occurred. He replied, in substance, that the roadbed and track were all right at that place and that the car did not sway, jump, or jerk. Counsel were permitted to cross-examine him and to lay the foundation for impeachment by asking if he did not say to them at a time and place indicated and in the presence of persons named that just before plaintiff left the car it jerked, lurched, and wobbled and that on numerous occasions at that part of the road the roughness of the track had caused the trolley to be thrown off the wire. Witness denied making such statements. Subsequently a motion was made to strike out all of Mr. Thum's testimony on the ground that it was elicited in the course of a cross-examination which plaintiff's counsel were not properly permitted to conduct as the witness (so defendant's counsel argued) had stated nothing to the detriment of the plaintiff's case. In ruling on the motion the learned judge who presided at the trial called attention to the fact that witness testified in a damaging way to plaintiff's case when he said the car did not swing nor sway and that therefore impeachment regarding that matter was perfectly proper if witness had made different statements before the trial. Regarding the cross-examination of the witness upon the subject of the presence of one woman in the car, the court said:

> "In reference to the other point, he testified first rather vaguely about whether there were one or two women on the car. I examined him then myself and the witness stated there was one woman on the car. I asked him, do you state that is a fact that there was one woman on the car, and he said, 'Yes.' * * * I assume that, before they get through, they will prove that there were two women there in connection with their case. If they do not prove that, that part of their evidence, that part of the impeachment, contradictory statements will be stricken out."

[4, 5] Afterwards when Mr. Welsh, of plaintiff's counsel, took the stand to testify with reference to the interview which he and Mr. Henry, his colleague, had with Mr. Thum, the court said:

> "In view of the testimony appearing that counsel for plaintiff has not attempted to prove that there were two women on the car at the time of the accident, and it developing that was not part of their case, nor the theory upon which they base their right to recover, the testimony of the witness Thum that there was only one woman on the car at the time of the accident was not contrary to their theory and was not adverse testimony, and the impeachment to that extent will not be permitted. The testimony on that behalf will be stricken out; the remaining portion of the testimony, however, may stand, as to the condition of the track and so forth, remains in the case; so any testimony by yourself, Mr. Welsh, will be limited to that."

The argument made by appellant is that this ruling did not strike out nor limit the ill effect of that part of the testimony which tended to show that the conductor was talking to a woman and neglecting his business. There is no force in this contention. The ruling was plenary and removed from the consideration of the jurors all of the testimony regarding the presence of a woman other than the plaintiff in the car, and consequently it also took from the jury all statements referring to a supposed conversation between her and the conductor. Impeachment of the witness upon his testimony that there was no jar nor unusual motion of the car at the time of plaintiff's injury was perfectly proper. Undoubtedly it is the rule, sustained by such authorities as People v. Jacobs, 49 Cal. 384, People v. Creeks, 141 Cal. 529, 75 Pac. 101, and a score of others, that where a witness called by a party to an action has simply failed to testify as expected it is not permissible for the party calling him to prove that he had previously made statements which if sworn to at the trial would tend to support the case of the proponent of the witness. In order to justify such impeachment, the witness must give testimony against the party calling him. But that is just what Thum did. Called, and therefore indorsed by plaintiff, he not only failed to meet the expectation that he would say the track was rough and the movements of the car erratic, but he denied those very things, thereby entitling plaintiff to remove if possible, the impression that such testimony must have made. Section 2049, Code Civ. Proc.; Zipperlen v. Southern Pacific Co., 7 Cal. App. 206–214, 93 Pac. 1049.

[6] Appellant specifies as prejudicial error the giving of certain of the instructions. The court told the jury that:

> "Common carriers of passengers bind themselves to carry safely those whom they take into their cars, so far as human care and foresight will do so, that is, with the utmost care and vigilance of a very cautious person; and such carriers are responsible for any, even the slightest negligence."

By the instruction immediately preceding this one the jurors were informed that common carriers are required to do all that human care, vigilance, and foresight "reasonably can do under all the circumstances" to prevent accidents to passengers. Taken together, these instructions correctly state the law. They do not impute to the carrier the duties of an insurer, as appellant contends that they do, nor does the expression "responsible for any, even the slightest negligence," cut off appellant from the benefits of the law with reference either to contributory negligence or inevitable casualty. The degree of caution and care imposed upon a carrier of passengers is properly defined by the instruction. Treadwell v. Whittier, 80 Cal. 574–585, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175; Bosqui v. Sutro R. Co., 131 Cal. 390–401, 63 Pac. 682; Roberts v. Sierra Ry. Co., 14 Cal. App. 180–195, 111 Pac. 519, 527.

[7] Two other instructions are criticized, not because wrong in principle, but because they related in part to the duty of defendant in the management of the car—an issue which, according to appellant, had been abandoned. It is true that plaintiff had abandoned that count which related to defendant's alleged negligence in starting the car in such manner as to project plaintiff from the platform to the street, but the negligence averred in the other count did not exclude all questions regarding the operation of the car. The gist of the averred negligence was, indeed, the defendant's operation of its car over a track so rough and unsuitable that plaintiff a passenger, was thrown and injured. Therefore the instructions covering the duty of a common carrier in the operation of its cars were properly given.

[8] Another instruction contained the following as its opening sentence:

> "It is no defense to this action that the plaintiff by her own act has contributed to her injury; it must appear that by her own fault she has so contributed."

This language is followed by a statement of the rule requiring of a passenger only ordinary prudence, not very great care. Appellant's objection goes to the first sentence, which, as its counsel assert, informed the jury, in effect, that the defense of "contributory negligence" should be disregarded by them altogether. We discover no such vice in the quoted sentence. Indeed, it was very appropriate to the facts of this case as disclosed by the undisputed evidence. It was shown that plaintiff arose from her seat and prepared to alight from the car before reaching her destination. Assuming that she was thrown from the car by its unusual motion, it may be truly said that her acts of arising to her feet and leaving the part of the car in which she had been seated contributed in a sense to her injury, but it was for the jury to determine whether such acts were negligent or not, under all of the circumstances revealed by the evidence.

[9] The court gave the following instruction:

> "You are instructed that contributory negligence on the part of the plaintiff cannot be presumed from the mere fact of injury but must be proved. On the other hand, proof of the injury, *coupled with proof that it proceeded from a sudden, unusual or violent jerking, or swinging, or swaying of the car, while the plaintiff was preparing to alight,* casts upon the defendant, the burden of proving that the injury, was occasioned by inevitable casualty or some other cause which human care and foresight could not prevent, or by the contributory negligence of the plaintiff." (The italics are ours.)

With the exception of the italicized portion, this is the same instruction condemned by this department in Steele v. Pacific Electric Ry. Co., 168 Cal. 375-377, 143 Pac. 718; but the addition of the words in italics rescues the instruction from the vice of the court's direction to the jury which we there reviewed. It is true that the mere injury to the passenger does not place upon the carrier the duty of explanation but the establishment of such injury, coupled with proof of coincident and causal collision, derailment, or other unusual happening to the car does cast upon defendant the burden of exculpation as indicated by the instruction.

[10] The giving of two other instructions is assigned as error. By one of these the jurors were told that:

> "The law does not prescribe any fixed or definite rule of damages, but leaves their assessment to the common sense and unbiased judgment of the jurors."

The other instruction was in the form approved in Ryan v. Oakland Gaslight & Heat Co., 21 Cal. App. 14-22, 130 Pac. 693—a case in which this court denied a petition for transfer. This court has frequently approved the statement in Aldrich v. Palmer, 24 Cal. 513-516, that:

> "In actions for personal torts the law does not attempt to fix any precise rules for the admeasurement of damages, but, from the necessity of the case, leaves their assessment to the good sense and unbiased judgment of the jury."

It is argued, however, that the instruction was erroneous because it ignored section 3283 of the Civil Code, which does, as appellant insists, prescribe a fixed and definite rule for the assessment of damages for detriment resulting after the commencement of an action in tort or certain to result in the future. It is true that the cited section does enumerate certain injuries for which compensation may be awarded, but the manner of assessment of such damages is no more definitely prescribed than in the instruction criticized. That instruction merely assigned to the unbiased judgment of the jury the assessment of the amount of damages, if any, to be awarded.

Error is predicated upon the modification by the court of proposed instructions and refusal to give certain proposed charges. We have examined these assignments and are satisfied that they are without merit. The charge to the jury was full, clear, and fair, and defendant was not injured by any of the rulings regarding which complaint was made.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

175 Cal. 371

LEONARD v. JAFFRAY. (L. A. 3606.)

(Supreme Court of California. June 7, 1917.)

1. MUNICIPAL CORPORATIONS 🔑972(5)—TAXATION—AFFIDAVITS TO ASSESSMENT ROLL.

Under an ordinance requiring the assessor to "take and subscribe an affidavit in the assessment roll," and that the city clerk must deliver the corrected assessment roll to the council with "an affidavit thereto affixed, subscribed and sworn to by him," where such affidavits, although signed, were not properly sworn to, the city had no jurisdiction to sell property so assessed for nonpayment of the tax; the proper authentication of the equalized assessment roll being made prerequisite to all future proceedings.

2. MUNICIPAL CORPORATIONS 🔑972(5)—AFFIDAVIT TO ASSESSMENT ROLL.

Where an ordinance provided that the clerk's affidavit must be subscribed and sworn to and affixed to the corrected assessment roll, neither the prima facie evidence of the regularity of antecedent proceedings furnished by deed to the city nor the curative clause of the ordinance relating to informalities was available against a clear showing that the clerk failed to properly authenticate the corrected roll.

3. MUNICIPAL CORPORATIONS 🔑980(4)—SALE FOR TAXES—ORDINANCE—"SUBSTANTIAL."

In view of Los Angeles City Charter, § 46, requiring collection and enforcement of municipal taxes to be in substantially the same mode as in case of state and county taxes, and Pol. Code, § 3897, requiring notice of sale for state and county taxes for three successive weeks, an ordinance providing for sale for municipal taxes upon only ten days' notice was invalid; such ten days' notice not being a "substantial" compliance with the charter and Political Code, for the length of time during which a notice must be given is quite as substantial as the requirement that notice must be given at all.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2127.

For other definitions, see Words and Phrases, First and Second Series, Substantial.]

In Bank. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by R. W. Leonard against J. R. Jaffray. From judgment for plaintiff and order denying new trial, defendant appeals. Affirmed.

B. P. Welch and J. R. Jaffray, both of Los Angeles, for appellant. Crouch & Crouch and Chas. S. Conner, all of Los Angeles, for respondent.

MELVIN, J. Plaintiff sued to quiet title to the following described real property in the city of Los Angeles:

> "Lot 4, in Block 'H,' of Glassell's subdivision of part of lots 3, 6 and 7, in block 39, Hancock's survey as per map thereof on file in Book 6, page 138, of Miscellaneous Records, in the office of the county recorder of said county."

It was alleged that plaintiff was "the owner in fee and entitled to the possession of" the land. Defendant, Jaffray, answered, setting up his own possession and title, and also filed a cross-complaint to which plaintiff made answer. By his cross-complaint J. R. Jaffray asked to have his title to the property quieted as against Leonard's claims. The cause was tried partly upon stipulation and partly upon testimony and documentary proof. Judgment was in favor of plaintiff. From said judgment and from an order denying his motion for a new trial defendant and cross-complainant appeals. Some of the facts stipulated were that "R. N. Withnell was formerly the owner of said lot, and he transferred the title to his daughter, Grace E. Leonard, who died a widow, leaving no will, and leaving Richard W. Leonard her son and only heir at law, who is now the administrator of her estate"; that the city taxes upon the said lot for the year 1903 have never been paid except by way of sale of the lot; and that "certain proceedings were had in 1904 for the purpose of selling said lot to said city for nonpayment of said taxes of 1903, and in 1909 a deed was made to the city under such proceedings, there having been no redemption or repurchase of said lot from said city by any one." The purported deeds to the city and from the city to James R. Jaffray were stipulated into the record by copies, plaintiff admitting their execution, but reserving the right to make all legal objections to them. The final paragraph of the stipulation is as follows:

> "The right, title and interest of said James R. Jaffray in and to said lot is derived and deraigned through the several proceedings above mentioned and should it be made to appear that an essential element of such proceedings is wanting, and that the defect is incurable, then and in that case his title fails and he has no other interest in the lot than the amount he paid, provided such payment is found to be a legal claim against the same, and in case there has been a compliance with law in such proceedings, then and in that case all the right, title and interest of Richard W. Leonard or those through whom he claims, as administrator or in person, has been wholly divested and terminated, including all rights of redemption or repurchase from the city."

[1, 2] The most important question to be determined therefore is this: Did the city ever acquire title to the property through the tax proceedings? The court found the assessment for the year 1903 deficient and defective in this, that the assessor's affidavit as required by law was not attached to the assessment book. It was found that the assessment book contains what purports to be such affidavit in the form required by law and subscribed by the assessor, but it is not sworn to as in the statute required, before any officer entitled to administer an oath. The requirement of the ordinance under which the purported assessment of plaintiff's land was made is that on or before the first Monday of July in each year the assessor must "take and subscribe an affidavit in the assessment roll" in substantially a prescribed form. The ordinance further provides that the city clerk, who is ex officio clerk of the board of equalization, must record all changes, corrections, and orders made by the board, and on or before the last Monday of August must deliver the assessment roll so corrected to the council with "an affidavit thereto affixed, subscribed and sworn to by him" in a prescribed form. The required form was made out and signed by the clerk, but no jurat was attached to it. These omissions of the officers charged with the duty of authenticating the assessment were fatal to the acquiring of jurisdiction to sell the property to the city. Respondent depends upon the rule announced in Miller v. Kern County, 137 Cal. 516, 70 Pac. 549, and we can see no escape from the conclusion supported by that case that at least the proceedings following the clerk's omission properly to certify the equalized roll were invalid. It was said in that case that without the affidavit of the clerk affixed to the assessment book the auditor had no power to compute the taxes. True, the requirements of the ordinance were not exactly the same as those of the law considered in the Miller Case in that the roll was not passed to the auditor or other officer for extension of the levy after equalization, but the proper authentication of the equalized roll is none the less made prerequisite to all future proceedings. Neither the prima facie evidence of the regularity of the antecedent proceedings furnished by the deed to the city nor the curative clause of the ordinance relating to informalities is available against the clear showing that the clerk failed to authenticate the corrected roll as required by the ordinance. If the ordinance merely commanded that an affidavit should be taken and sworn to when the equalization of the taxes was completed, perhaps the appearance of the affidavit without a jurat might be cured by the presumption of regularity; but the ordinance requires that the affidavit must be subscribed and sworn to and affixed to the assessment roll. Without a proper jurat the writing in the record is not an affidavit at all, but amounts merely to a certificate. It is not even a statement on oath, and it entirely fails to measure up to the requirements of the statute. Metcalf v. Prescott, 10 Mont. 283–294, 25 Pac. 1037;

Cosner's Administrator v. Smith, 36 W. Va. 788, 15 S. E. 977; Gordon v. State, 29 Tex. App. 410, 16 S. W. 337.

It is to be noted that section 63 of the ordinance, which is called by counsel the "curative clause," is essentially the same as section 3885 of the Political Code, which was in effect when Miller v. Kern County, supra, was decided; yet a compliance with the terms of the statute requiring the subscription and attachment to the roll of an affidavit was held necessary in that case. Speaking of the affidavit of the clerk and that of the tax collector the learned commissioner who wrote the opinion in the Miller Case said:

> "These affidavits are in effect the certificate or authentication of the assessment as it leaves the county board of equalization and as made to conform to the requirements of the state board, and, we think, are essential to its validity."

[3] This court is also in accord with the contention of respondent that the ordinance, under which the attempt to sell the property for taxes was made, was in contravention of the charter of the city of Los Angeles. By this ordinance it was provided that before sale by the city of property which had been sold to it for municipal taxes the clerk should fix a date for such sale and give notice thereof by publication for at least ten days in a daily paper. The deed upon which appellant relies recites a publication for a period of only ten days. It also recites a posting for ten days, which is likewise in consonance with the ordinance. But the charter provides that the mode and manner of collecting delinquent municipal taxes and enforcing the tax lien shall "substantially be the same as the mode and manner at the time prescribed by law for the collection of state and county taxes." The same section of the charter (No. 46) contains the further provision that:

> "All such proceedings, sales, certificates and conveyances had, made and executed by them in pursuance thereof, shall be of like force, effect and validity as is or may hereafter be given by law to like proceedings and acts in the manner of the collection of state and county taxes in said county."

But by section 3897 of the Political Code the analogous notice concerning state and county taxes must be published in a newspaper for at least three successive weeks, and must be posted for at least the same period. The ordinance fails to measure up to the requirements of the charter provision. It is no answer to this point to say that when a taxing power has acquired private property by due process of law it may resell without notice to the former owner or may give such notice as in its discretion may seem proper. Appellant's position on this subject is met by the simple fact that the state has provided for notice and the manner of giving it. As Mr. Justice Lorigan said in delivering the opinion of this court in Smith v. Furlong, 160 Cal. 522–529, 117 Pac. 527, 530:

> "It is true, as said in Fox v. Wright, 152 Cal. 61, 91 Pac. 1005, that it is not necessary for the state after it has acquired the title to property under delinquent tax sales to provide for any notice to the delinquent owner that the state intends to sell the property; that it could provide for disposing of it at private sale. But the state has not pursued this course. It has provided that a sale shall be made by it after notice to the delinquent owner and provided how that notice shall be given."

Nor may it be justly said that the publication of the notice for ten days is a "substantial" compliance with the charter and the incorporated sections of the Political Code. The length of the time during which a notice must be given is quite as substantial as the requirement that notice must be given at all.

Appellant's counsel contend that without reference to the findings against the validity of the various proceedings through which he asserts title, nevertheless respondent should have no relief because he has traced title to the city through a deed resulting from delinquency in payment of valid taxes and has not proven any tender to the city of the amount for which he is delinquent. The title, as say counsel, stands in the city (unless conveyed by the city to defendant which plaintiff denies). Therefore, they argue, plaintiff under his own proof has no concern with defendant or his claims. As the proceedings leading up to the deed to the city were invalid there is no room for this contention.

Other findings of the court against the validity of the sale are analyzed in the briefs, but we need not discuss them because the errors to which we have adverted above were sufficient to prevent the acquirement of title by the city, appellant's alleged predecessor in interest, or in any view to make the attempted transfer to him of no effect.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

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175 Cal. 387

In re CARR'S ESTATE.

In re FUHRMAN et al.

(S. F. 8084.)

(Supreme Court of California. June 7, 1917.)

1. Appeal and Error 🔑173(6)—Objection Below.

On appeal from decree of final distribution based on compromise of contest of testator's will, it could not be contended that the stipulation of compromise was invalid because no power of attorney was introduced to prove the authority of one who signed as attorney in fact and at law for contestees, where the decree affirmatively showed that the attorney was in court at the hearing, and there was no objection at that time to the manner or sufficiency of proof of the compromise.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1088.]

2. Appeal and Error 🔑877(2)—Appeal by Executor.

An executor could not, on appeal from decree of distribution, contend that the court was without jurisdiction to distribute the assets of the estate except as directed in the will, since, as such executor, he had no interest in the manner of such distribution, being a mere stakeholder and not a party interested except in the appeal from that part of the judgment which denied him compensation for extraordinary services.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3563, 3564.]

3. Executors and Administrators 🔑497—Extra Compensation.

The trial court could not be said to have abused its discretion in denying an executor extra compensation for drawing an answer to contest of the will and in appearing at certain continuances of the hearing.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2117–2124.]

4. Appeal and Error 🔑151(6)—Parties Aggrieved.

Creditors of an estate of deceased beneficiary of a will of C., whose claims were not presented or litigated in the hearing on final distribution of C.'s estate under such will and a compromise of contest thereof, cannot appeal from the final distribution decree in C.'s estate, not being "parties aggrieved" within Code Civ. Proc. § 938.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 951, 952.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of William Joseph Carr, deceased. From judgment, order, and decree of distribution, Alfred Fuhrman, as executor, and others, appeal. Appeals of Alfred Fuhrman, as executor of the estate of Victory, of Alfred Fuhrman, as creditor of said estate, and the appeal of the city and county of San Francisco, dismissed. On appeal of Alfred Fuhrman as executor of the estate of Carr, judgment affirmed.

Alfred Fuhrman, Carl W. Mueller, Percy V. Long, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., all of San Francisco, for appellants. Adolphus E. Graupner, of San Francisco, for respondents. Alexander D. Keyes, of San Francisco, amicus curiæ. Walter Perry Johnson, of San Francisco, for devisees of Alice Victory.

MELVIN, J. These appeals are from a judgment, order, and decree of distribution in the estate of William Joseph Carr, deceased. Alfred Fuhrman appeals as executor of the last will of said Carr, as executor of the last will of Alice Victory, deceased, and individually as a creditor of the estate of Victory. The city and county of San Francisco appeals as a creditor of the latter estate.

William Joseph Carr died testate on December 5, 1914. After proceedings duly had in that behalf Alfred Fuhrman, Esq., an attorney of this court, was appointed executor and qualified. By the terms of the will the three sons of the testator, John J., William T., and Walter R. Carr, were bequeathed each $1; to Maud R. Carr there was a bequest of $250; and the residue was left to Alice Victory, aunt of the testator, who at the time of William Joseph Carr's death was residing at the City and County Relief Home in San Francisco. On May 14, 1915, the three sons of the testator filed their petition for contest of the will after probate, alleging that at the time of making the purported will William Joseph Carr was mentally incompetent to make testamentary disposition of his property. The executor filed an answer to this contest, and after the matter was at issue trial was postponed from time to time until the last day of February, 1916, when Mr. Fuhrman, as executor, filed his first and final account with an accompanying report and a petition for settlement of said account and for distribution. In the petition, after referring to the pending contest, he used the following language:

> "The said executor has now been informed that said contestants desire to withdraw and dismiss said petition and contest—and desire this estate to be closed, because they have effected a compromise with the heirs of Alice Victory, deceased, the residuary legatee of the above-named deceased."

It appeared, further, from the petition that Alice Victory had died on the 5th day of June, 1915, and that Mr. Fuhrman had been appointed and had qualified as executor of her estate. Hearing of the petition was duly had. At said hearing it appeared that the sons of William Joseph Carr had entered into an agreement with the two legatees of the estate of Alice Victory deceased, who were James Caldwell, a nephew, and Edward Finley, a friend. By the terms of this writing it was stipulated that for and in consideration of the dismissal of the contest, the court was asked to distribute one-half of the assets of the Carr estate to John J. and Walter R. Carr, from which was to be deducted $100 to be paid in settlement of an unallowed portion of an undertaker's claim and $250, the legacy to Maud R. Carr. The contest having been dismissed, the court made its decree distributing one half of the assets of the estate of William Joseph Carr to the estate of Alice Victory, deceased, and the other half to the former contestants, subject to the agreed deductions. The court also denied Mr. Fuhrman's request for extra compensation for extraordinary services.

[1] Appellant Fuhrman, in his various capacities, contends that the stipulation between the contestants in the estate of Carr and the legatees in the estate of Victory is worthless because no power of attorney was introduced to prove the authority of Mr. Johnson, who signed as attorney in fact and at law for Alice Victory's beneficiaries. This

contention is without merit. If any informality appears Mr. Fuhrman is not injured as he does not represent the persons apparently bound by Mr. Johnson's action. But the decree affirmatively shows that Mr. Johnson was present in court representing his clients and principals at the hearing, and there was no objection at that time on the part of any one to the manner or the sufficiency of the proof of the compromise.

[2, 3] It is next contended that the court was without jurisdiction to distribute the assets of the estate except as directed in the will. This objection is without merit. Alfred Fuhrman, as executor of the estate of Carr, has no interest in the manner of distribution of the assets of that estate. He is, as such executor, a party indifferent, and it is his duty to deliver the residue of the estate to the persons designated by the court. He is a mere stakeholder of the estate. Estate of Healy, 137 Cal. 474–478, 70 Pac. 455; McCabe v. Healy, 138 Cal. 81–90, 70 Pac. 1008; Estate of Murphy, 145 Cal. 464, 78 Pac. 960; Jones v. Lamont, 118 Cal. 499, 50 Pac. 766, 62 Am. St. Rep. 251; Estate of Williams, 122 Cal. 76, 54 Pac. 386. There is an exception to this rule in a case where the assets would be depleted by the ordered distribution to such an extent that the executor could not pay the debts of the estate or where a personal liability would be imposed upon him by reason of his obedience to the court's orders (Estate of Murphy, supra), but the exception does not cover the case before us. The executor of the Estate of Carr, therefore, is not a "party interested" except in the appeal from that part of the judgment which denies him compensation for extraordinary services. The personal services of the executor which were outside of the usual ones rendered in the administration of an estate consisted in the drawing of an answer to the contest and in appearing at certain continuances of the hearing. We cannot say that the court abused its discretion in holding that the executor was entitled to no extra compensation for this work.

[4] As executor of the estate of Victory or as creditor of that estate Mr. Fuhrman has no standing as an appellant from the decree in the Carr estate, nor has the city and county the right to appeal therein for the reason that their claims were not presented nor litigated in the hearing. Estate of McDermott, 127 Cal. 450–452, 59 Pac. 783; Estate of Crooks, 125 Cal. 459, 58 Pac. 89. They had no claims against that estate, and their appearance here is based upon the assumption that under no conditions could the court distribute any part of the assets of the Carr estate except literally, as provided by the will. This, as we have seen, is erroneous. The court had jurisdiction to make the decree and the appellants connected with the estate of Victory have no place in the record of the Carr estate. It does not even appear by any record which we are authorized to accept that claims were allowed against the estate of Victory, nor that said estate is insolvent. There is printed in the transcript a certificate by the clerk of the city and county of San Francisco that two claims had been allowed and approved by the judge in that estate, one in favor of Alfred Fuhrman for $32, and the other in favor of the city and county for $1,195; but there is nothing to show that by pleading or otherwise either the indebtedness or the alleged insolvency of Alice Victory's estate was ever called to the attention of the judge at the hearing of the petition for distribution in the matter of the estate of Carr. Therefore, under the authorities last above cited, we must hold that the executor and creditors of the Victory estate are not "parties aggrieved" within the meaning of section 938 of the Code of Civil Procedure.

Therefore the appeals of Alfred Fuhrman, as executor of the estate of Victory, of Alfred Fuhrman, as creditor of said estate, and the appeal of the city and county of San Francisco, are dismissed. As to Alfred Fuhrman, in his capacity as executor of the estate of Carr, the judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

175 Cal. 361

In re BROWNE'S ESTATE. (S. F. 7857.)

(Supreme Court of California. June 7, 1917.)

1. WILLS ⚷675—PRECATORY TRUST.

A will leaving the residue of testator's property to his son, "save and except I desire that he pay out of said property" certain sums to certain persons, did not create a precatory trust in favor of such persons.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1587–1589.]

2. WILLS ⚷675—PRECATORY TRUST.

Precatory words are not to be regarded as creating a trust unless it appear that the testator intended to impose an imperative obligation and to exclude the exercise of discretion on the part of the person to whom the recommendatory words are addressed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1587–1589.]

3. WILLS ⚷675—PRECATORY TRUST.

Where testator's desire that certain sums be given to certain persons is expressed, not to his executor, but to one of the beneficiaries under his will, it may be regarded only as a mere request, and not as partaking of the nature of a command.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1587–1589.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Thomas H. Browne, deceased. From a portion of decree of distribution, Cora McGarvey and another appeal. Affirmed.

R. F. Mogan and M. M. Getz, both of San Francisco, for appellants. Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for respondent.

MELVIN, J. Cora McGarvey and Edith Johns appeal from that portion of the decree of distribution by which the entire residue of the estate, consisting of about $32,200, was distributed absolutely to Clarence W. Browne, a son of the testator; the theory and contention of appellants being that the will of Thomas H. Browne created a precatory trust in their favor.

In the will, after making in direct and positive language eight certain specific bequests to his collateral relatives, the testator used the following language:

> "All the rest and residue of my property of every kind, character and nature whatsoever, whether real or personal, I give and bequeath unto my beloved son, Clarence W. Browne, save and except I desire that he pay out of said property to Miss Cora McGarvey, the sum of two hundred dollars ($200.00), and to Miss Edith Johns the sum of two hundred dollars ($200.00)."

[1-3] Clearly the words above quoted are not sufficient to create a precatory trust in favor of the appellants. Whatever may be the rule elsewhere, "it is the settled law in California that precatory words are not to be regarded as creating a trust unless it appear that the testator intended to impose an imperative obligation and to exclude the exercise of discretion on the part of the person to whom the recommendatory words are addressed." Estate of Purcell, 167 Cal. 176-179, 138 Pac. 704, 705. This rule is derived from and supported by numerous authorities, including Estate of Mitchell, 160 Cal. 618, 117 Pac. 774; Estate of Marti, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071; and Kauffman v. Gries, 141 Cal. 295, 74 Pac. 846. It is to be observed that the testator's desire is expressed not to his executor, but to one of the beneficiaries under his will. Under such circumstances it may only be regarded as a mere request, and not as partaking of the nature of a command. Estate of Marti, supra; Estate of Pforr, 144 Cal. 121, 77 Pac. 825.

The judgment of final distribution from which the appeal is taken is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

175 Cal. 377

CAMERON v. AH QUONG et al. (S. F. 7292.)

(Supreme Court of California. June 7, 1917.)

1. Pleading 🔑369(1) — Intervention — Election Between Causes of Action.

Under Code Civ. Proc. § 441, as to pleading several defenses, which applies as well to different counts in a complaint, and section 427, subd. 8, permitting joining causes of action growing out of the same transaction, intervener in ejectment need not elect between two causes of action in his intervention complaint, both asserting adverse possession, the second detailing the manner in which intervener entered and occupied, and, in addition to prayer for decree of the fee, asking for alternative relief by payment of intervener's mortgage thereon and taxes paid.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199, 1200, 1203, 1204.]

2. Executors and Administrators 🔑444(1) —Intervention—Complaint.

In ejectment by executor, where the complaint fully avers plaintiff's status as executor, such status need not be averred in intervention complaint; the latter complaint being essentially defensive to plaintiff's claim of title.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1813, 1814, 1837-1841.]

3. Ejectment 🔑50—Intervention—Pleading.

In ejectment by an executor, an intervener alleging adverse possession under mortgage need not plead compliance with Code Civ. Proc. §§ 1493, 1500, as to presenting claims against estates, he not suing the executor's estate upon the mortgage notes, although asking for alternative relief that they be paid as a condition of his surrender of possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 139, 145.]

4. Appeal and Error 🔑867(3)—Scope of Review—Insufficiency of Complaint.

The alleged insufficiency of complaint in intervention may not be considered on appeal from order denying new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3479.]

5. Appeal and Error 🔑1050(1)—Harmless Error—Admission of Evidence.

The admission in evidence of an assignment of mortgage executed by one purporting to act as attorney in fact, without proof of his power of attorney, was not prejudicial where no sufficient objection was made to failure formally to prove such authority, and it appeared that the assignment had been executed and acknowledged in due form before a notary public.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157.]

6. Evidence 🔑577—Testimony at Former Trial—Absence of Witness.

Under Code Civ. Proc. § 1870, subd. 8, allowing proof of the testimony in former action between the parties, of a witness out of the state, it was not abuse of discretion to admit transcript of testimony at such former trial of a Chinaman, where another Chinaman testified that such witness had departed for China nine years before, although the latter admitted that he was merely told of the former's departure.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2406.]

7. Mortgages 🔑214 — Consent of Mortgagor to Mortgagee's Possession.

That assignee of mortgages was put in possession of the mortgaged land by the assigning second mortgagee in 1895, and, as owner and holder of the two mortgages, which, together with the assignment, were of record, openly held it personally or by tenants until commencement of ejectment in 1903, sufficiently showed the mortgagor's consent to such possession.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 492-496.]

8. Mortgages 🔑214—Consent of Mortgagor to Mortgagee's Possession.

Consent of the mortgagor to possession of the mortgaged premises by the mortgagee may be shown by circumstances as well as by direct evidence of formal and declared acquiescence.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 492-496.]

9. **Mortgages** 🔑188—**Possession by Mortgagee.**

If a mortgagee obtain possession in any peaceful mode, he may retain it against the mortgagor or the latter's assignee until the mortgage debt is paid.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 469, 471–475, 479–481.]

10. **Mortgages** 🔑213 — **Ejectment by Mortgagor Against Mortgagee.**

Unless the mortgage debt is paid, a mortgagor may not maintain ejectment against his mortgagee who has obtained possession of the mortgaged premises in a peaceful mode.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 482–491, 1576.]

11. **Pleading** 🔑236(2)—**Amendment.**

Under Code Civ. Proc. § 472, as to amendments of course, it was not abuse of discretion to refuse to plaintiff in ejectment permission to amend his answer to complaint in intervention to plead limitations and that there had been no accounting by intervener for rents and profits of the property; the motion coming after the cause had been in litigation many years and had once been considered on appeal.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601.]

12. **Appeal and Error** 🔑1010(1)—**Sufficiency of Support by Findings.**

Where there are clear and sustained findings to uphold the judgment, this is sufficient, notwithstanding insufficiency of evidence to sustain immaterial findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3981, 4024.]

13. **Appeal and Error** 🔑231(8)—**Specific Objection.**

Plaintiff in ejectment, in appealing from judgment making certain mortgages a lien on his property, could not for the first time urge lack of formal evidence of their nonpayment, where his specifications of error failed to recite in what particulars the findings of nonpayment were insufficient, and the cause had evidently been tried on the theory the mortgages had not been paid.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1439; Trial, Cent. Dig. § 194.]

14. **Appeal and Error** 🔑867(4)—**Findings.**

The objection that a finding is not one of fact, but a conclusion of law, cannot be raised on appeal from an order denying motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3481.]

15. **Appeal and Error** 🔑867(4)—**Scope of Review—Conclusions of Law Not Supported by Findings.**

Contentions that certain conclusions of law are not supported by the findings are not available to one appealing from denial of motion for new trial; he not having proceeded under Code Civ. Proc. §§ 663, 663½, as to motions to vacate judgment because conclusions of law are not supported by findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3481.]

Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Ashley D. Cameron, executor, against Ah Quong; Chin Shin intervening. From denial of plaintiff's motion for new trial, he appeals. Affirmed.

Welles Whitmore, of San Francisco, for appellant. F. H. Short and F. E. Cook, both of Fresno (Carl E. Lindsay, of Fresno, of counsel), for respondents.

MELVIN, J. Plaintiff appeals from an order denying his motion for a new trial.

This is the second appeal in this case, the first having been decided by the District Court of Appeal of the Second District (Cameron v. Ah Quong, 8 Cal. App. 310, 96 Pac. 1025). The issues as originally framed and the judgment given are thus set out in the opinion of the District Court of Appeal:

> "Action in ejectment. The plaintiff alleges ownership of the lands in dispute and ouster by the defendant, and prays for restitution of said premises, for damages for withholding the same, and for the sum of $1,750 as the value of the rents and profits from January, 1898, to and including a portion of the year 1903.
>
> "The defendant, Ah Quong, answering the complaint, specifically denies the material averments thereof, and then pleads the bar of the statute of limitations.
>
> "Chin Shin intervened, and as a first cause of action sets up title to the lands in dispute by adverse possession, and alleges that the defendant, Ah Quong, holds possession of the same as his tenant; and as a second cause of action intervener alleges that he is the owner of two certain mortgages subsisting against the premises, and of which he acquired ownership by purchase from, and assignment by, the respective mortgagees, and that by reason of his said ownership of said mortgages the 'plaintiff is not entitled to the judgment in this action prayed for by him, or to any relief whatever.'
>
> "The plaintiff interposed an answer to the first cause of action set out in intervener's complaint, denying in detail the material allegations thereof, and moved to strike out the second count in said complaint on the ground, among others, that it 'does not allege possession or right of possession.' The court refused to grant the motion to strike out the alleged second cause of action, and the plaintiff made no answer thereto.
>
> "Upon the issues thus made up, a trial was had, and a judgment rendered that the plaintiff is the owner and entitled to the possession of the lands in controversy, and that he be given possession thereof, 'provided that before he shall be entitled to have actual possession or occupation of said lands and premises, or any part thereof, or any right to any writ or process out of this court to place him in possession thereof, he, said plaintiff, shall first pay to said intervener, said Chin Shin, the full amount of the principal sums and accrued interest due to said intervener under the terms and provisions of said two mortgages owned by said intervener and as set forth in the findings of the court herein,' etc."

The original judgment was reversed solely because the intervener failed to allege possession of the property which was the subject of the litigation.

When the cause went to the superior court for another trial the intervener filed his third amended complaint in intervention in which it was alleged that, with the consent of the mortgagors, the intervener more than five years prior to the commencement of this action entered into and continuously has since held possession of the land in dispute, that he has cultivated it, and that he has paid, satisfied, and discharged all taxes upon it. His pleading contains the further averment that he held the property under an agreement with the mortgagors that his possession should remain undisturbed until the payment and satisfaction of the mortgages, and that, if the said mortgages should not be paid and satisfied, the intervener should have, hold, and possess for himself the fee simple to the property.

Like its predecessors, this amended complaint included a plea of title by adverse possession in the second cause of action, and in the setting forth of both causes it was averred that defendant Ah Quong occupied the premises as the intervener's tenant.

The plaintiff answered the third amended complaint in intervention, denying the allegations therein contained with respect to possession, and making other denials which, as respondent insists, were so ambiguous as not to be real traverses of the averments which they were designed to meet—a contention which we will have occasion to discuss further.

The second trial resulted in a judgment that plaintiff was not entitled to recover any sum whatever against defendant or intervener by way of rents, profits, or damages, that the intervener was entitled to have paid to him the sums of $1,000 and $2,500, with interest on two certain notes secured by two described mortgages, and that he be maintained in full possession of the property until such payment and all of it be made. It was further adjudged that plaintiff should have and recover possession of the land in controversy provided he should first pay to the intervener the sums of money and interest thereon due under the terms of said mortgages.

[1] Appellant says that the two causes of action pleaded in the third amended complaint in intervention are antagonistic, and that intervener should have been compelled to elect upon which of them he intended to depend. Two motions seeking to have the court require such election were made by appellant. Both were denied by the court, and these rulings were correct. The two causes of action which were pleaded were not so antagonistic as to require the intervener to reject one of them before trial or previous to judgment. In the statement of each cause of action the intervener asserted that he had acquired title by adverse possession, but in the second he set forth in detail the manner in which he obtained entrance to the property and maintained his occupancy thereof. He asked for judgment decreeing that he was the owner in fee, but there was an alternative prayer that, if plaintiff's right to recovery of the land should be found to exist, the court should impose as a condition to intervener's surrender of the property, the payment by the plaintiff of the amounts due on the notes, secured by the mortgages, and the repayment of the taxes which the intervener had paid. Clearly the two causes of action arose out of the same transaction, and, even if they were antagonistic, the pleading would be governed by the provisions of section 441, Code of Civil Procedure. It is true that the cited section treats of the setting forth of inconsistent defenses, but the same rule has been held to apply to different counts in a complaint. Stockton Combined Harvester & Agricultural Works v. Glens Falls Insurance Co., 121 Cal. 167–171, 53 Pac. 565; The Code also expressly permits the joining of causes of action growing out of the same transaction (section 427, subd. 8, Code Civ. Proc.), and election will not be ordered by the court in such cases. Remy v. Olds, 4 Cal. Unrep. Cas. 240, 34 Pac. 216, 21 L. R. A. 645; Estrella Vineyard Co. v. Butler, 125 Cal. 232–234, 57 Pac. 980; Tanforan v. Tanforan, 159 Pac. 709–711.

[2-4] Appellant asserts that the pleading of intervener's second cause of action is of no validity because said complaint in intervention does not aver the presentation for allowance to Cameron's executor of a claim, based upon the two mortgages nor the rejection of such a claim, and because there is no allegation of Annie L. Cameron's death and the qualification of Ashley D. Cameron as executor of her will. The second contention is unsound because the appellant fully averred his status as an executor in his own pleading by which this action was inaugurated, and is scarcely becomes him to complain of the absence of a similar allegation from the complaint in intervention which in its essence is defensive to appellant's assertion of title in and right to possession of the land. There is no merit in the argument that respondent had no standing as a litigant in such an action as this until and unless he had complied with the provisions of sections 1493 and 1500 of the Code of Civil Procedure. The intervener has not sued for nor has he obtained judgment against the estate of Annie L. Cameron, deceased, upon the promissory notes set forth in his pleadings, nor has he asked or obtained a decree foreclosing the mortgages. On the contrary, the executor of that estate has a judgment against intervener, entitling said executor to possession of the land in controversy when he shall do equity by paying the amounts due on the mortgages. There was no demurrer to the complaint in intervention, and the cause was evidently conducted upon the same theories of the respective litigants as those which appeared in the original trial. Besides, the alleged insufficiency of the complaint may not be considered on an appeal from an order denying a motion for a new trial. Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Bode v. Lee, 102 Cal. 583, 36 Pac. 936; Rauer v. Fay, 128 Cal. 523, 61 Pac. 90; Swift v. Occidental Mining & Petroleum Co., 141 Cal. 161, 74 Pac. 700; Coburn v. California Portland Cement Co., 144 Cal. 81, 77 Pac. 771; Sharp

v. Bowie, 142 Cal. 462, 76 Pac. 62; Bell v. Southern Pacific Railroad Co., 144 Cal. 560–562, 77 Pac. 1124.

[5] Appellant calls special attention to the alleged error in admitting in evidence the purported assignment of the mortgage for $1,000 given by M. J. and J. W. Laymance to William Frisbie Lewis. The assignment of this mortgage to Chin Shin bears the name of "William Frisbie Lewis, by Irving C. Lewis, his attorney in fact." Appellant insists that the assignment was not admissible until after proof of the existence of Irving C. Lewis' power of attorney from William Frisbie Lewis. When the instrument with the assignment was offered this objection was not made. Appellant did object on the ground of irrelevance, etc., and on the further ground "that it does not appear to be an assignment by William Frisbie Lewis. It appears," said counsel, "to be an assignment by William Frisbie Lewis by Irving C. Lewis, his attorney in fact." That is just what it appeared to be, and counsel's objection did not amount to anything more than the statement of an obvious fact. He made no objection based upon failure formally to prove Irving C. Lewis' authority to act as attorney in fact. It did appear, however, that the assignment had been executed and acknowledged in due form before a notary public. Under these circumstances we cannot see that appellant was injured by the court's ruling.

Appellant's counsel discusses in his brief certain alleged errors in connection with the trial of the first cause of action, but, as the court found against respondent upon his alleged title by prescription, these matters have become immaterial to the discussion of the pending apeal.

Nor was the appellant injured by the admission in evidence of the power of attorney from respondent to Chin Bock Guy and Chin Kin Yow. After calling attention to the fact that this power of attorney was not used by Chin Bock Guy in leasing the premises to the defendant, Ah Quong, counsel asserts that its admission in evidence was prejudicial error without explaining why. There was no serious error in its admission.

[6] The court permitted the intervener to read in evidence the transcript of the testimony given at the former trial by Ah Quong. Appellant specifies this as error upon the ground that the proper foundation for the introduction of this testimony was not laid. The only witness upon the subject of Ah Quong's departure was Joe Dun, who upon direct examination testified positively that Ah Quong was in China. On cross-examination he said that Ah Quong had departed for China nine years before. Witness admitted that he neither accompanied Ah Quong nor saw him go on board the boat, but was told of his departure. While the proof of the absence of the witness from the state was not very strong, we cannot say that it was entirely insufficient to justify the ruling admitting the testimony. No absolute rule may be stated with reference to the sufficiency of the showing required to justify the introduction of a deposition or of testimony given at a former trial. 13 Cyc. 990. We cannot say that the court abused its discretion in admitting the testimony upon the proof of absence offered under the authority given by the eighth subdivision of section 1870 of the Code of Civil Procedure.

[7-10] The substance of appellant's motion for nonsuit, which was denied by the court, was the asserted failure of intervener to show that he was in possession of the property with the consent, approval, and knowledge of plaintiff. The motion was properly denied because the evidence was amply sufficient to show such possession. Intervener was put in possession by Mr. Chapman, one of the mortgagees, in 1895. He took the land as owner and holder of the two mortgages, which, together with the assignment were of record, and personally or by tenants he held the land openly until the commencement of this action in 1903. Consent of the mortgagor may be shown by circumstances as well as by direct evidence of formal and declared acquiescence, and it was fully proven here. If a mortgagee obtain possession in any peaceful mode, he may retain it against the mortgagor or the latter's assignee until the mortgage debt is paid. Cooke v. Cooper, 18 Or. 142, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. Rep. 709. And in California it is settled that a mortgagor may not maintain ejectment against his mortgagee unless the debt is paid. Spect v. Spect, 88 Cal. 437–443, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314; Faxon v. All Persons, 166 Cal. 707–720, 137 Pac. 919, L. R. A. 1916B, 1209; Raggio v. Palmtag, 155 Cal. 797, 103 Pac. 312. These and other authorities to the same effect were discussed in the opinion in Cameron v. Quong, supra (the former appeal in this case decided by the District Court of Appeal), and the court stated that the evidence appeared clearly to disclose that the equities of the case were decidedly with the intervener. Our examination of this record brings us to the same conclusion.

[11] Appellant's counsel applied during the trial for permission to amend his answer pleading the statute of limitations and setting up the fact that there had been no accounting for the rents and profits of the property. The motion was taken under advisement and was never the subject of a formal ruling by the court. But, even if we should regard the court's failure to act as tantamount to a denial of the motion, we cannot say that the court abused its discretion by such denial, because the motion came after the cause had been in litigation for many years and had once been considered on appeal. Section 472, Code of Civil Procedure, did not give appellant a right to file such an amendment as of course. Manha v. Union Fertilizer Company, 151 Cal.

581, 91 Pac. 393. There being no pleading by which an accounting of rents and profits by intervener was demanded, it follows that the court did not err by failing to decree such an accounting.

[12] Insufficiency of the evidence to sustain certain of the findings is specified by appellant. Most of them are immaterial findings upon which the judgment does not rest. For example, let us take the findings that the amount of rents and profits from 1898 is not the sum alleged or any other sum, and that the taxes were paid by the intervener. These were not material to the judgment as rendered. While some of the criticized findings may be characterized as "lame and inconclusive," there are clear and sustained finding to uphold the judgment. Such support is sufficient. American National Bank v. Donnellan, 170 Cal. 9–15, 148 Pac. 188.

[13] For the first time on appeal the argument is made that no evidence was offered at the trial regarding the nonpayment of the two mortgages. The complaint in intervention positively alleges nonpayment, and the denial is only upon information and belief. The cause was evidently tried upon the theory that the mortgages had not been paid. But appellant may not take advantage of any alleged lack of formal evidence of nonpayment because his specifications of error fail utterly to recite in what particulars the findings of nonpayment are insufficient. Heilbron v. Kings River, etc., Co., 76 Cal. 11, 17 Pac. 933; Green v. Green, 103 Cal. 108, 37 Pac. 188; Parker v. Reay, 76 Cal. 103, 18 Pac. 124; Anthony v. Jillson, 83 Cal. 296–299, 23 Pac. 419; Wise v. Wakefield, 118 Cal. 107–109, 50 Pac. 310; De Molera v. Martin, 120 Cal. 544, 52 Pac. 825.

[14] There was a finding that in 1899 Chin Shin began an action to foreclose the mortgage for $2,500, that in 1902 a judgment of dismissal was made and entered therein, but that said judgment was not a final adjudication of the rights of the parties. That there was such an action and that it was dismissed for failure to prosecute and because summons was not served within three years from the commencement thereof were facts appearing in evidence. The finding is attacked, however, as being not one of fact, but a conclusion of law. Even if it be conceded that this is a conclusion of law which is improperly labeled a finding, it is not for that reason vulnerable to attack on appeal from an order denying a motion for a new trial.

[15] The contentions that certain conclusions of law are not supported by the findings are not available to plaintiff on this appeal; for he did not proceed under the provisions of sections 663 and 663½ of the Code of Civil Procedure. Shafer v. Lacy, 121 Cal. 574, 54 Pac. 72; Patch v. Miller, 125 Cal. 240, 57 Pac. 986; Swift v. Occidental Mining and Petroleum Company, 141 Cal. 161, 74 Pac. 700.

The order denying appellant's motion for a new trial is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(175 Cal. 391)

WINCHESTER v. WINCHESTER.

(Sac. 2262.)

(Supreme Court of California. June 8, 1917. Rehearing Denied July 5, 1917.)

1. Husband and Wife 🔑267(1)—Community Property — Conveyance Without Wife's Consent.

Under the direct provisions of Civ. Code, § 172, a husband's deed of community property, made without consideration, is not binding upon his wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 929, 930, 936.]

2. Evidence 🔑390(5) — Parol Evidence — Deed.

While parol evidence is admissible under Code Civ. Proc. § 1962, subd. 2, to prove a deed's real consideration, yet it is inadmissible to show that a deed passing the fee title on its face was intended to reserve certain rents to the grantor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1726.]

3. Husband and Wife 🔑254 — Community Property—What Constitutes.

Property deeded to a husband upon his agreement to pay the grantor or his wife a specified annual sum, *held* a purchase, and not a gift, and the land becomes community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 897–899.]

Department 1. Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by Sarah A. Winchester against George E. Winchester. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

W. M. Boardman, of Susanville, and Louis P. Boardman, of San Francisco, for appellant. R. M. Rankin and Grover C. Julian, both of Susanville, for respondent.

SHAW, J. This is an action by the plaintiff Sarah A. Winchester, in her own behalf and as administratrix of the estate of L. E. Winchester, her husband, against the defendant to cancel a deed executed by her said husband during the marriage, purporting to convey to the defendant George E. Winchester a certain tract of land acquired by L. E. Winchester during the said marriage, and to declare that the plaintiff is the owner of said land. Judgment was given for the defendant. The plaintiff appeals from the judgment and from an order denying her motion for a new trial.

[1] The plaintiff and L. E. Winchester were married in 1884, and thereafter they lived together as husband and wife until the death of L. E. Winchester, on March 1, 1912.

L. E. Winchester acquired the land on November 21, 1906, by deed from his father, Elliot Winchester. The deed recited a consideration of $300. The conveyance by L. E. Winchester to George E. Winchester was made on February 29, 1912, without a valuable consideration, as a gift to George, and without the written consent of the plaintiff. It is the claim of the plaintiff that the land was community property, and that the deed of the husband thereof having been made without consideration, was not binding upon the wife, but may be avoided by her. This would be the effect of such a deed, under section 172 of the Civil Code. This action was brought to assert this claim.

[2] The defendant admitted the making of the deed of gift by L. E. Winchester to George E. Winchester without the consent in writing or otherwise of the wife, but asserted that the deed from Elliot Winchester to L. E. Winchester whereby the latter acquired title to the land was a gift from the grantor to the grantee, in consequence whereof said land became the separate property of L. E. Winchester instead of community property, wherefore, he says, the deed of gift by L. E. Winchester to him, being of the separate property of the husband, was valid and free from interference by the plaintiff as the surviving wife of L. E. Winchester. The question whether it was community property, or the separate property of L. E. Winchester, is the point at issue upon this appeal.

On November 21, 1906, Elliot Winchester and L. E. Winchester executed a contract in writing whereby L. E. Winchester agreed to pay to Elliot Winchester annually as long as the latter should live, the sum of $300, and in case the wife of said Elliot survived him, to pay said wife an additional sum of $300 after his death; in consideration whereof the said Elliot Winchester agreed to convey to L. E. Winchester the tract of land in controversy, in fee simple. Contemporaneously with the execution of this contract, and as a part of the same transaction, the deed was executed by Elliot Winchester to L. E. Winchester. Evidence was offered and admitted over the objection of the plaintiff to the effect that in the conversation between the parties leading up to and immediately preceding the execution of said contract and deed, the parol understanding was that Elliot Winchester should make a gift of the property to L. E. Winchester, but should reserve the rents and profits thereof, so long as Elliot lived, and that the contract and deed were executed to carry out this intention to make a gift and reserve the rents and profits. It was upon this evidence that the defendant based his claim that the conveyance from Elliot Winchester to the plaintiff's husband was a deed of gift, the effect whereof would be that the property became the separate estate of said husband, and not the community property of the marriage.

The defendant's theory is that, although the evidence was not admissible to vary the terms of the deed so as to change or defeat its effect as a conveyance of the title to the land, nevertheless it was properly admissible to contradict the recital of the deed as to the consideration thereof and to show the real consideration. If this were the only effect of the evidence it might have been competent. But it was not the only effect. Parol evidence is admissible to show that the true consideration of a contract was not that which the contract recites, that it was something different, either a different valuable consideration, or a good consideration such as love and affection, instead of the valuable consideration recited. Code of Civil Procedure, § 1962, subd. 2. But evidence of this character cannot be allowed, in the case of a deed, "when thereby the legal operation of the instrument to pass the entire interest according to the purpose therein designated would be defeated." Hendrick v. Crowley, 31 Cal. 475; Mowry v. Heney, 86 Cal. 475, 25 Pac. 17. The conveyance from Elliot Winchester to L. E. Winchester, being in form a grant, bargain, and sale deed, its legal effect, according to its terms, was to immediately pass from Elliot Winchester to L. E. Winchester the entire title in fee simple to the land described, the present absolute ownership thereof. Civil Code, §§ 1105, 762, 679. The fee-simple estate thus passed included the present absolute right to all the rents and profits, free from any and every claim of the grantor thereto. The effect of the evidence introduced, if it could have the effect intended by the respondent, would be that instead of the deed being a conveyance of the entire fee, it would be a conveyance with a reservation to the grantor, during his lifetime, of the rents and profits of the land conveyed, to the amount of $300 a year. To the extent of the reservation of the rents during the life of the grantor, which constituted a substantial part of the fee-simple estate which the deed by its terms purported to convey, the agreement shown by parol evidence would have defeated the conveyance. Under the rule above stated it was incompetent and inadmissible for that purpose. The court below erred in so far as its decision was based on this parol evidence. The rights depend on the effect of the deed and the agreement aforesaid.

[3] This writing was not a contract for the execution of a deed to L. E. Winchester as a gift with a reservation of rents during the lifetime of the grantor, or otherwise. It was a contract of purchase whereby L. E. Winchester agreed to pay to Elliot Winchester each year of the latter's life the sum of $300, and to the wife of Elliot, if she survived, an additional sum of $300, in consideration whereof Elliot Winchester agreed to convey the land in controversy to L. E. Winchester in fee simple. By the terms of the writings, therefore, and they are binding

upon the parties, it was not a deed of gift, but a purchase of land, for a valuable consideration, made during the existence of the marriage relation, and it was to be paid for and was paid for out of the earnings of the husband and wife during the marriage. It would therefore be community property. The fact that the payments may have been made out of the profits of the land would not alter the effect of the transaction in this respect. The profits derived from land so purchased would constitute earnings of the community, and would be community property.

The court should have concluded that the property was the community property of the spouses, and that the plaintiff was entitled to have the deed canceled in so far as her interests were concerned, and to have adjudged to her the interest to which she was entitled under the law by reason of the fact that the community real estate had been given away by the husband, during the marriage, without her written consent. Whether her right extends to the whole estate, or only to the share which she would take of the community property by inheritance, is a question not discussed, and which we cannot now consider.

The judgment and order are reversed.

We concur: SLOSS, J.; LAWLOR, J.

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175 Cal. 284

CITY OF SAN JOSE v. RAILROAD COMMISSION OF CALIFORNIA et al.

(S. F. 7961.)

(Supreme Court of California. June 4, 1917.)

1. RAILROADS 🔑99(5)—GRADE CROSSINGS — SEPARATION OF GRADES—POWER OF RAILROAD COMMISSION.

A city which had elected, in accordance with Const. art. 12, § 23, as to the Railroad Commission, and St. Ex. Sess. 1911, p. 168, as to such election, to transfer to the Railroad Commission the city's control over public utilities, could not claim that Public Utilities Act (St. Ex. Sess. 1911, p. 18) § 43, authorizing the Commission to prescribe the proportions in which the expense of grade separation at a railroad crossing shall be divided between the railroad and municipality, was unconstitutional as giving the Commission power to impose upon the city an obligation to pay money from its treasury, contrary to Const. art. 11, § 13, prohibiting the delegation to any commission of power to interfere with any municipal improvement, money or property, or Const. art. 11, § 6, as to state control of municipal affairs, since Const. art. 12, §§ 22, 23, by their plenary provisions, exclude all consideration of other parts of the Constitution conflicting with the Public Utilities Act, where the matters treated by that statute are cognate and germane to the subject of the regulation of public utilities, as is the matter of apportionment of the expense of a railroad crossing grade separation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 298, 300–303.]

2. CONSTITUTIONAL LAW 🔑309(1) — RAILROADS 🔑99(5)—DUE PROCESS—HEARING BEFORE RAILROAD COMMISSION.

Nor could such a city, where it had actually appeared and had a hearing before the Commission and opportunity for review, object that the omission of the statute in terms to provide for service of process or notice upon the city, being an omission to provide for due process, deprived the Commission of power to acquire jurisdiction over the city, since not only is such power to summon and hear parties interested necessarily involved in the judicial authority enjoyed by the Commission, but, by section 53 of the statute, power to prescribe rules of practice and procedure is conferred on the Commission.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Railroads, Cent. Dig. §§ 298, 300–303.]

3. RAILROADS 🔑99(5)—GRADE CROSSINGS—SEPARATION OF GRADES — ORDER OF RAILROAD COMMISSION.

The Railroad Commission's order of apportionment between city and railroad of grade separation expense was not invalid as failing to require the railroad to obtain a franchise from the city for such crossing as a prerequisite to grant of authority to cross such street, where the order did not assume to enumerate all the conditions with which the railroad must comply.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 298, 300–303.]

In Bank. Original application by the city of San Jose for writ of review against the Railroad Commission of the State of California and another. Writ of certiorari dismissed.

Earl Lamb, of San Jose, for petitioner. Douglas Brookman, of San Francisco, for respondent Railroad Commission. Henley C. Booth and George D. Squires, both of San Francisco, for respondent Southern Pac. Co.

MELVIN, J. Certiorari to review the order of the Railroad Commission in the matter of the Southern Pacific Company's application for permission to construct and maintain certain crossings in the city of San Jose. The Southern Pacific Company proposed to cross 35 streets and highways intersecting its contemplated route which it intends to construct for the greater part on its private right of way. The order of the Railroad Commission grants the railroad corporation permission to cross 34 of the streets and highways at grade. Regarding the thirty-fifth crossing at West Santa Clara street commonly known as "The Alameda" an order was made that the Southern Pacific Company might have permission to construct its tracks only upon condition that there should be a separation of grades. The city of San Jose seems to concede that if a crossing is proper at this point, the grades should be separated, but vigorous attack is made upon that part of the decision of the Railroad Commission, which is as follows:

"The expense of caring for its tracks during the course of construction and laying its tracks in the subway after its completion, together with all expenses incident thereto, shall be borne by San Jose Railroads. All other expense except that in connection with the track work of the Southern Pacific Company, shall be borne fifty (50) per cent. by Southern Pacific Company, thirty-five (35) per cent. by City of San Jose and fifteen (15) per cent. by Santa Clara County or the State Highway Commission, as the legal rights in the premises of the two latter parties may hereafter appear."

This order is attacked upon the grounds (1) that the Railroad Commission exceeded its authority and jurisdiction in determining that the city of San Jose should bear a proportion of the cost of this crossing; and (2) that the order is unlawful because it does not require, as a prerequisite to the granting of the permission to cross "The Alameda," that the railway corporation should obtain a franchise from the city of San Jose.

In accordance with the provisions of section 23, art. 12, of the Constitution and by the procedure furnished by the act of 1911 (Statutes Extra Session 1911, p. 168), San Jose has elected to transfer and has passed to the Railroad Commission the city's control over public utilities. Therefore, as counsel for the Railroad Commission reminds us, this proceeding does not present the issue of a conflict between state and municipal powers by which we were confronted in City of Los Angeles v. Central Trust Company of New York, 159 Pac. 1169. In his concurring opinion in that case, Mr. Justice Henshaw said:

> "Touching a public utility operating wholly within the corporate limits of a municipality, no reason can be perceived why its regulation and control might not, with propriety, be intrusted to the municipal authorities; but the condition is very different where the operations of the utility extend beyond the boundaries of a city and where its services are rendered to several, or to many other communities and cities. In such cases it is manifest that the welfare of all concerned (of the utility, of the public and of the state) is best conserved by placing the whole control under a single board or commission (in this state, the Railroad Commission) empowered to adjust all questions which may arise, in the light of all interests entitled to consideration."

[1] We have here, therefore, a surrender by the city of San Jose, under the Constitution and the appropriate statute of the control over public utilities which was formerly exercised by that municipality. In the exercise of that authority, so conferred, the Commission finds ample warrant for its order in section 43 of the Public Utilities Act:

> "(a) No public road, highway or street shall hereafter be constructed across the track of any railroad corporation at grade, nor shall the track of any railroad corporation be constructed across a public road, highway or street at grade, nor shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corporation at grade, nor shall the track of a street railroad corporation be constructed across the track of a railroad corporation at grade, without having first secured the permission of the Commission; provided, that this subsection shall not apply to the replacement of lawfully existing tracks. The Commission shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe.
>
> "(b) The Commission shall have the exclusive power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public road or highway by a railroad or street railroad and of a street by a railroad or vice versa, subject to the provisions of section 2694 of the Political Code, so far as applicable, and to alter or abolish any such crossing, and to require where, in its judgment, it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the state, county, municipality, or other public authority in interest."

But petitioner contends that this provision is unconstitutional in that it gives to the Railroad Commission power to impose upon the city of San Jose an obligation to pay money from its treasury. It is argued that section 13, art. 11 which prohibits the Legislature from delegating to any commission power to interfere in any way with any municipal improvement, money, or property, is a distinct limitation upon the Legislature which prohibits it from allowing the Railroad Commission to appropriate, in effect, money from the treasury of the city of San Jose. Section 6 of the same article is invoked as an inhibition against state control of municipal affairs. To the latter objection the obvious answer is that the people of the city by solemn and orderly election have surrendered their right to control in this sort of municipal affairs. That right has not been taken away by the Legislature, but by legislative permission has been vested by the people of San Jose in the Railroad Commission. Having thus abdicated their police powers with respect to the regulation of public utilities, the people of that city have lost such protection as might, under other circumstances, be afforded by the parts of the Constitution cited in their behalf because sections 22 and 23 of article 12, by their plenary provisions, exclude all considerations of other parts of the Constitution, if any there be, conflicting with or contradictory to the Public Utilities Act, if only the matters of which that statute treats are cognate and germane to the subject of regulation of public utilities. Pacific Telephone & Telegraph Co. v. Eshleman, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822. In the opinion in that case, which was prepared by Mr Justice Henshaw, the following language was used at page 658 of 166 Cal., at page 1125 of 137 Pac. (50 L. R. A. [N. S.] 652, Ann. Cas. 1915C, 822):

> "We regard the conclusion as irresistible that the Constitution of this state has in unmistakable language created a Commission having control of the public utilities of the state, and has author-

ized the Legislature to confer upon that Commission such powers as it may see fit, even to the destruction of the safeguards, privileges, and immunities guaranteed by the Constitution to all other kinds of property and its owners."

Upon the same subject, Mr. Justice Sloss, delivering the concurring opinion, said (166 Cal. 702, 137 Pac. 1143, 50 L. R. A. [N. S.] 652, Ann. Cas. 1915C, 822):

> "If the Railroad Commission has acted in conformity with the powers granted to it by the Legislature, the validity of its order cannot be questioned in this court or elsewhere under a claim of violation of any provision of the state Constitution other than the provisions relating to the Railroad Commission. This statement is, however, to be taken subject to the qualification that the powers conferred by the Legislature on the Railroad Commission must be such as are cognate and germane to the purposes for which the Railroad Commission was created; i. e., the regulation and control of public utilities."

That the control of the manner of constructing railroad crossings is a vital and material part of the regulation of railroads and is germane to that subject is too evident to need supporting argument. The right of apportionment of the cost by the Commission to the parties benefited by the crossing is a proper element of this cognate power. That a city receives benefits from a safety device such as that here contemplated may not be doubted. In Town of Polk v. Railroad Commission, 154 Wis. 523, 143 N.W. 191, the court was considering a question very like the one presented to us here. The Railroad Commission had made an order for the construction of an overhead crossing to span the tracks of a railroad. By the order the town was required to bear 10 per cent. of the cost of construction. This part of the order was attacked by the town on the ground that the duty of making crossings of highways safe rested upon the railroad corporation. The attack was unsuccessful, the court holding that "the Legislature in the exercise of its police power had a perfect right to enact the law," and, further, that it was "neither inequitable nor illegal to require the owners of the three public highways involved to contribute to the expense of the overhead crossing."

In a later case, Milwaukee v. Railroad Commission, 162 Wis. 127, 155 N.W. 948, the city of Milwaukee sought to have vacated and declared of no force an order of the Railroad Commission apportioning to the municipality a certain percentage of the cost of establishing separation of grades at designated crossings. The order was upheld, and in the opinion written by Mr. Chief Justice Winslow we find an answer to the argument advanced by the representative of San Jose in this proceeding that the railroad company creates the dangerous condition at street crossings, and that it should therefore bear the entire expense of removing the peril to the users of the highways by the establishment of separated grades. We quote from the opinion as follows:

> "The law seems to be the fruit of an honest and enlightened attempt on the part of the Legislature to deal equitably and fairly with a great municipal problem. Milwaukee has during the last half century become a great and prosperous city. Its greatness and prosperity have come because of its commerce, and its commerce has come largely because of its railroads. Without them Milwaukee as we know it today would not exist. The growth of the city and of the railroads has been coincident, interdependent, inseparable, and from this growth has arisen the great danger of the grade crossing. Why should not the expense of removing that danger be equitably shared by the different agencies whose joint growth has brought it about?"

The Court of Appeals of New York took occasion to express similar views. In re Erie Railroad Co., 208 N. Y. 486, 102 N. E. 562, was a proceeding in which the court was reviewing the action of the Public Service Commission in making an order which failed to recognize that part of the statute by which the Commission was directed to apportion the cost of crossings not at grade between the railroad, the municipality and the state. Upon this matter the court spoke, in part as follows:

> "We see no reason why equitably and properly the expense of a construction for avoiding a grade crossing by a new track, which is necessarily connected with and results in the elimination of an existing grade crossing, should not be divided between the two purposes thus accomplished, and properly apportioned so far as the latter feature, is concerned."

See, also, People ex rel. Town of Scarsdale v. Public Service Commission, 173 App. Div. 164, 159 N. Y. Supp. 48.

[2] Petitioner insists that as the statute does not in terms provide for service of process or notice of any sort upon the city, or that the city's rights be examined at any hearing, the Railroad Commission might well take the property of the municipal corporation without due or any process of law. It is said that the statutory omission deprives the Commission of the power to acquire jurisdiction of the city for the purpose of imposing liability for the cost of the improvement, and that as jurisdiction may not be imposed by consent, the argument of petitioner is not met by the fact that the city actually did have notice and was heard by the Commission before the judgment and award were made. We do not regard the omission to provide definite process to bring the city before the Commission at a hearing on the necessity for a safe crossing as being fatal to the acquirement of jurisdiction over the municipality by the Commission. The latter is both a court and an administrative tribunal. As a judicial body it has by implication all the powers necessary for the exercise of its duty. The city of San Jose does not complain that it had no day in court. It had notice to appear; actually did appear and was heard upon issue joined and evidence produced; and it had opportunity for review of the judgment. But aside from the power to summon and hear parties in interest, one which is necessarily involved in the

judicial authority enjoyed by the Commission, section 53 of the Public Utilities Act confers upon it power to prescribe rules of practice and procedure. Action has been taken under this authorization, and it is shown that in the controversy between the city and the public service corporation these rules were followed.

[3] Petitioner's remaining point is that the Commission acted in excess of its jurisdiction in failing as a prerequisite to the grant of any authority to the Southern Pacific Company to cross certain specified streets in the city of San Jose, to require the said company to obtain a franchise from the municipality for such crossing. There is no merit in this point. The order of the commission did not assume to enumerate all of the conditions with which the public service corporation must comply before being permitted to cross the streets in question. Whether or not a franchise to be granted by the city was requisite for the extension of the tracks across the streets, the Commission was not called upon, and we are not now called upon, in this proceeding, to determine. In the exercise of the police power conferred upon it, the Commission was merely deciding how the safety of the public should be best preserved when the crossings should be made, if the contemplated extension should be consummated. The order was prospective both in its terms and its scope.

The writ of certiorari is dismissed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.

33 Cal. App. 545

SHOENHAIR v. JONES. (Civ. 2228.)

(District Court of Appeal, Second District, California. April 27, 1917. Rehearing Denied by Supreme Court June 26, 1917.)

1. Bills and Notes 🔑523 — Action by Holder—Sufficiency of Evidence.

In action by holder of a note, evidence *held* sufficient to justify inference that title was regularly acquired by plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1822–1825.]

2. Bills and Notes 🔑209—Transfer Without Indorsement.

Where heirs of assignee of a note sent the note to plaintiff, it was not necessary that a formal indorsement or assignment in writing be executed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 423, 425–427, 497, 498, 501.]

3. Bills and Notes 🔑139(3)—Consideration—Surrender of Prior Note.

The surrender of a prior unpaid note is sufficient consideration for the making of a renewal note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 340, 350–354.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by George J. Shoenhair against S. A. T. Jones. Judgment for plaintiff, and defendant appeals. Affirmed.

Shepard & Alm, of Los Angeles, for appellant. Hanson, Hackler & Heath, of Los Angeles, for respondent.

JAMES, J. The suit was on a promissory note executed by the defendant to the plaintiff. The appeal is from the judgment entered in favor of the plaintiff, and is presented on the judgment roll and a brief bill of exceptions.

[1] The only point argued in the briefs is that raised by the appellant, who insists that the evidence was insufficient to support the finding of the superior court as to any consideration having been rendered to the de-

fendant in exchange for the making of the instrument sued upon. This defendant originally made her note payable to two persons named Gardner and Cowan, who assigned the same to Clara Wherry without recourse. Clara Wherry died, and this first note appeared in the hands of plaintiff who, after negotiation with the defendant, accepted the note here sued upon in lieu of the note made at the prior time, and surrendered the former note. The point in appellant's argument arises wholly upon the construction to be given to testimony furnished by the plaintiff. The plaintiff first testified that he was "the owner and holder of the note" and as to the amount which had been paid thereon, and that the note was made in consideration of the surrender of the prior note as before mentioned. He then, identifying that prior note which was shown to him, testified as follows:

> "That is the note which I surrendered to the defendant in this action in consideration of the execution and delivery of the note set forth in the complaint. At the time of the execution and delivery of the note set forth in the complaint Mrs. Clara Wherry was dead. * * * The estate of Clara Wherry was never probated and no executor or administrator of her estate was ever appointed. Mrs. Wherry gave me the note for $400 before she died, but she never indorsed or assigned the same to me. As a matter of fact the note had been in my possession during all the time that Mrs. Wherry owned the same and I was her agent, and held it as such. When Mrs. Wherry died I sent the note for $400 and the mortgage given to secure it to her relatives in the East; they sent it back to me."

[2, 3] We think the court was justified in inferring from this testimony that title to the note was regularly acquired by the plaintiff from Mrs. Wherry. It was not necessary that there should have been a formal indorsement or assignment executed in writing. Daniel on Negotiable Instruments, vol. 1, § 28 (last paragraph); Ogden on Negotiable Instruments, p. 98; Humboldt M. Co. v. N. W. Pac. Ry. Co., 166 Cal. 181, 135 Pac. 503. Assuming, as we think was properly decided, that the plaintiff was the legal owner and holder of the first note, it will not be necessary to cite authority to such an elementary proposition that the surrender of that note, which had not been paid, furnished full consideration for the making of the obligation here sued upon.

The judgment is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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33 Cal. App. 550

WHITE v. HAYWARD. (Civ. 2223.)

(District Court of Appeal, Second District, California. April 28, 1917.)

1. Exchange of Property 🔑8(4)—Misrepresentations — Reliance — Evidence — Sufficiency.

Evidence *held* to sustain finding that one party to an exchange of real property did not rely upon the representations made to her by the other party, but made an independent investigation for herself.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 17.]

2. Trial 🔑397(2)—Findings of Fact—Unnecessary Findings.

Where the matters which are found necessarily defeat the plaintiff's right of recovery, it is unnecessary that the findings should dispose of any further issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 941.]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Mary L. White against Homer T. Hayward. From an order denying motion for new trial after judgment for defendant, plaintiff appeals. Affirmed.

R. E. Bledsoe, of San Bernardino, for appellant. I. W. Bull and J. E. Burnham, both of Los Angeles, for respondent.

WORKS, Judge pro tem. This is an appeal from an order denying a motion for a new trial. The only questions presented are as to whether certain of the findings are in accord with the evidence and as to whether certain issues are found upon at all.

The action was brought to rescind an executed contract of exchange and for damages, the subjects of the exchange being certain real property of the appellant, situated in California, and certain notes held by the respondent and which were secured by mortgages on real property near Ft. Morgan, Colo. Judgment went for the respondent. The negotiations leading up to the trade were held at Pomona, Cal., and the rescission was asked because of certain misrepresentations claimed to have been made by respondent concerning the Colorado property, in his endeavor to bring about the exchange. The nature of these representations it is not necessary to mention, as the trial court found with appellant that they were not true. It was further found, however, that "plaintiff did not rely on each, all, or any of the representations made by the defendant," and it is to the question of the propriety of this finding that we must first give attention, as it is one of the findings assailed by appellant.

The appellant herself, speaking of her first interview with respondent on the subject of the proposed trade testified as follows:

> "He gave me the address of a bank at Ft. Morgan, and some real estate agents' names, but I do not remember the names. The bank, I think, was the First National. This was about the last of December, 1910, or the first of January, 1911, and I told Mr. Hayward I would investigate, and if I found the land and mortgages as represented, we would come to some agreement, and we agreed to meet at Mr. Burnham's office. * * * A short time after that, a week or two later, in answer to a telephone message, I went to Mr. Burnham's office, in Pomona, * * * and met Mr. Hayward again. In the meantime I had spoken to Mr. Kennedy, an officer in the bank at Pomona, where I do business, the First National, and had him write

to the Ft. Morgan bank as to the value of these securities. I do not remember whether I got any report from him about it before I agreed to the trade or not, but I never saw any letter he received. I remember getting some information some time that had come to Mr. Kennedy, but I don't remember just what it was, because before I had obtained it, either the trade was made or I had decided to make it. * * * When I went to Mr. Burnham's office, Mr. Hayward was there, or else he soon came in. I told him I had decided to make the trade, and we signed up an agreement."

On her cross-examination the appellant testified further:

> "At the time of our first meeting and just before he left Mr. Hayward told me to investigate the values of the mortgages and the lands described in them, and gave me the name of the First National Bank of Ft. Morgan, Colo., to write to, to ascertain the character of the lands and the values of the mortgages, and some weeks later it was agreed that 15 days more to investigate the character of the lands and the values of the mortgages should be given me."

The agreement signed at Mr. Burnham's office set forth the terms of the trade, and contained this provision:

> "Mary L. White to have 15 days to investigate values of property covered by said mortgages."

One of appellant's witnesses, who was present at her first interview with respondent, testified that Mrs. White "said that if she found the property was as he represented that she would make the trade."

The testimony produced on the part of the respondent amplifies what is above quoted from appellant's case, and but a small part of it need be mentioned, considering the extent to which appellant's own case gives support to the finding in question. Respondent says that his first interview with Mrs. White occurred in the early part of December. He then says, inter alia:

> "She asked for references, and on the back of another of my business cards I gave her the name of the First National Bank of Ft. Morgan, the Morgan County National Bank, the Home Savings Bank, Mr. Dunn and Mr. Layton, who were real estate men, and Mr. Farnsworth, who was the county treasurer."

He further says that their next meeting was about ten days later, and that appellant then said to him:

> "I have considered this proposition, and it looks reasonably favorable to me."

The parties met again, according to respondent, in the first week in January, at Mr. Burnham's office, the conference evidently being the same one which appellant says was held at that place. Mr. Hayward states what there occurred:

> "She said 'I am ready to trade with you.' I said to her, 'Mrs. White, have you made a thorough investigation of the Colorado property?' and she said, 'I have not received an answer to the last inquiry yet.' Then I said, 'I will put my property in escrow, leaving you the privilege of withdrawing this at any day or moment that you see fit, without even the thought of calling me up; if you find that the Colorado property is not as you expect, you may withdraw from this without any preliminaries at all. We will draw up the contract, and I will put my stuff in escrow that will bind me and not you.'"

It was then that the contract was drawn allowing appellant 15 days for further investigation as to the value of the Colorado property.

The record also shows that Mr. Kennedy, who is mentioned in the testimony of appellant, wrote to the First National Bank at Ft. Morgan concerning the Colorado property, and the letter is reproduced in the transcript. Mr. Kennedy testified:

> "We got an answer, and showed it to her. I think we gave her the letter. We asked as to the value of the lands, and the answer seemed satisfactory as to values and to Mrs. White."

[1] We have been at some pains to quote from the record, as the finding upon this particular question controls the case; but we need not go further, although there is other evidence in support of the finding. It is plain that Mrs. White desired to make an independent investigation in the premises, that, after a considerable time spent in negotiation and apparent investigation, she contracted for a further delay for the purpose of making additional inquiry, and that she expended that time in such inquiry. Under such circumstances, a finding that she did not rely upon the representations of respondent was amply justified, even though her testimony, as shown in the record, contains the statement that she did rely on them.

[2] There are five other findings of the trial court to which appellant takes exception, but what is found in them upon the issues which they purport to cover is of no moment, as such issues were upon matters subordinate to and which are controlled by the very proper finding that the appellant did not rely upon the representations made by respondent. "Where the matters which are found necessarily defeat the plaintiff's right of recovery, it is unnecessary that the findings should dispose of any further issues, as all other issues thereby become entirely immaterial." Smith v. Dubost, 148 Cal. 622, 84 Pac. 38.

The order is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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33 Cal. App. 554

CONKLIN v. WOODY. (Civ. 1839.)

(District Court of Appeal, Second District, California. April 28, 1917.)

1. COUNTIES 🔑54—POWERS OF BOARD OF SUPERVISORS—EMPLOYMENT OF COUNSEL—STATUTE.

Under Pol. Code, § 4041, subd. 16, authorizing boards of supervisors "to direct and control the prosecution" of suit "to which the county is a party, and, by a two-thirds vote of all the members, [to] employ counsel to assist the district attorney in conducting the same," such board may not delegate authority to the district attorney or any other person to make the employment, but must pass a resolution declaring its determination so to do and specifying the name of the person employed and the terms of the employment.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 71, 72.]

2. Counties 🔑113(5)—Powers of Board of Supervisors — Employment of Counsel — Statute.

Under Pol. Code, § 4041, subd. 16, it is beyond the power of a board of county supervisors to subject a county to any expense for the employment of counsel to act in criminal cases.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174, 179.]

3. Officers 🔑100(1)—Increase of Compensation—Constitutional Provisions.

The employment by a county board of supervisors of counsel to assist the district attorney in the prosecution of criminal cases would increase the compensation of the district attorney in violation of the Constitution.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152, 153, 155–157.]

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Mandamus by N. E. Conklin against S. A. Woody. From a judgment directing the issuance of a mandate against the defendant, he appeals. Reversed.

Matthew S. Platz, of Bakersfield, for appellant. N. E. Conklin, of Bakersfield, in pro. per.

JAMES, J. Appeal from a judgment directing the issuance of a mandate against the defendant requiring him as auditor of the county of Kern to draw a warrant in favor of the petitioner in payment for services and certain expenses incurred as described in the demand of petitioner filed and approved by the board of supervisors of said Kern county.

On the 2d day of March, 1915, the board of supervisors of Kern county, by more than a two-thirds vote, adopted the following resolution:

> "It appearing to the satisfaction of the board that the communication delivered to this board on the 10th day of February, 1915, from the district attorney, discloses the situation supported by facts that make it necessary, in order to have the cases now pending in our superior court and which were pending at the time the present district attorney entered upon his duties, promptly and diligently prosecuted, as the law requires, in connection with the handling of the current business of the county, that it will be necessary for the district attorney to incur expense in the employment of special prosecutors or counsel, and it further appearing from said communication and from facts within the knowledge of this board that action should be instituted for the recovery of penalty upon bonds given to the county on bail for present fugitives from justice and under liquor licenses revoked, and the board being of the opinion that it would be in the interest of the county to have this work done forthwith, and such expense incurred therefor, be it therefore resolved that the necessity for incurring of said expense exists, and that the district attorney be, and he is hereby, authorized to incur for the purpose of employing not exceeding three special prosecuting attorneys or counsel for a term or terms not to exceed three months, not to exceed $125 per month for each of such prosecutors or counsel, such services to be rendered in the prosecution of criminal cases and prosecuting of suits upon said bonds."

Pursuant to the authority alleged to have been conferred under this resolution, the district attorney employed petitioner, and he later filed his demand with the board of supervisors. The demand was itemized as required by law, the first item of which was for rental of an automobile in traveling from Bakersfield to Taft:

> "In investigation and searching for evidence in criminal case of People v. Aden, $10.00."

The second was of a like kind for automobile use to certain points in Kern county and itemized as being:

> "In case of People v. Reigan, expense of district attorney's office $15.00."

The last item was stated as follows:

> "To services as special prosecutor and counsel in prosecution of criminal cases and in prosecution of suits upon bonds, being bail bonds and liquor bonds, said claim being for services rendered for and during March, 1915, per resolution of the board of supervisors, $125.00."

By this appeal two questions are made as against the judgment: (1) That the board of supervisors was without power to delegate to the district attorney the right to employ special counsel for any purpose in either civil or criminal cases; (2) that the board of supervisors was without power to make any employment of special counsel, except for the purposes of suits to which the county was a party.

[1] Among the enumerated powers of boards of supervisors as contained in section 4041, subd. 16, Political Code, such boards are authorized "to direct and control the prosecution * * * of all suits to which the county is a party, and, by a two-thirds vote of all the members, may employ counsel to assist the district attorney in conducting the same." A provision in like terms has been contained in the various county government acts in force for many years. By this provision a board of supervisors is authorized to contract with outside counsel and employ such counsel for the purpose of assisting the district attorney in conducting "suits to which the county is a party." The authority is not given to the board to authorize some other person to make the employment. We apprehend that it would be essential, where such employment is made, that the board of supervisors pass a resolution declaring its determination so to do and specifying the name of the person employed and the terms of the employment. The resolution first recited herein does not purport to make an employment with any person for any of the purposes specified. Therefore we think that the claim as presented by petitioner was not one which the board was authorized to allow.

[2] For the purpose of considering the second point made, we may assume (our conclu-

sion being to the contrary, however) that the employment of petitioner by the district attorney was regular, and that the board of supervisors could in the manner attempted delegate its authority. There is the further limit placed upon the power of the board to be exercised in that direction, to wit, that it may only employ counsel to assist the district attorney in "suits to which the county is a party." County of Modoc v. Spencer, 103 Cal. 498, 37 Pac. 483. From the resolution as adopted by the board it appears that the employment intended to be authorized was a general one, and that it was intended to give the district attorney the right to have assistance at the cost of the county for the prosecution of criminal cases, as well as in suits to recover the penalty upon various bonds. It was beyond the power of the board of supervisors to subject the county to any expense for the employment of counsel to act in criminal cases.

[3] Moreover, by so doing the compensation of the district attorney would be increased, which is forbidden by the Constitution. The itemized claim filed by petitioner shows that the services for which he claimed compensation of $125 were services rendered in both criminal cases and in the prosecution of suits upon bail and "liquor" bonds. It may have been that the expense incurred for auto hire could have been properly allowed as contingent expense of the district attorney authorized to be paid by section 4307 of the Political Code, but the board of supervisors was not advised by the statements contained in the demand of petitioner as to how much of the $125 claimed was for services in criminal cases for the allowance of which no authority of law existed.

The judgment is reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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33 Cal. App. 566

STEPHENS et al. v. WEYL-ZUCKERMAN & CO. (Civ. 1559.)

(District Court of Appeal, Third District, California. May 2, 1917.)

1. SALES 🔑179(3)—DELAY IN DELIVERY—WAIVER OF RIGHT TO CLAIM DAMAGES.

By insisting upon delivery of goods, after seller's delay, failing to demand penalty, and accepting goods, the buyer did not waive right to recover damages for the delay, although by such action he might waive the right to rescind the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 458.]

2. SALES 🔑81(1) — CONSTRUCTION OF CONTRACT—TIME OF DELIVERY.

Where the seller expressly stipulated to complete construction of a boat "two weeks after arrival of the engine, but in no event later than June 1, 1914," time of delivery was of the essence of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 217.]

3. SALES 🔑150(3)—RECOVERY OF DAMAGES FOR DELAY IN DELIVERY—TIME OF ESSENCE OF CONTRACT.

A buyer's right to recover just compensation for delay in delivery after accepting goods is not affected by the fact that time was not of the essence of the contract in view of Civ. Code, § 1492, providing that where time is not of the essence of the contract, and where delay in performance is capable of exact compensation, an offer of performance accompanied by an offer of compensation, may be made at any time after it is due, but without prejudice to creditor's rights.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 356.]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by Theodore J. Stephens and another against Weyl-Zuckerman & Co. Judgment for plaintiffs, and defendant appeals. Reversed.

J. C. Campbell, Weaver, Shelton & Levy, of San Francisco, for appellant. Daniel V. Marceau, of Stockton, for respondents.

BURNETT, J. [1] The action is for the balance due for the construction by plaintiffs of a gasoline launch under an express contract requiring the payment by defendant of the sum of $1,550, and providing that the launch should be completed on June 1, 1914. The boat was not ready on time, but was accepted by defendant, which claimed, however, that it was entitled to a rebate or recoupment in consequence of the damage caused by the delay. It was, though, found by the court that there was a waiver of any such claim and the real controversy revolves around this consideration. The basis for the court's conclusion is found in these facts:

"Defendant, with knowledge of the fact that said launch would not be completed in the time specified by said contract, did not insist upon any penalty from plaintiffs but urged them to rush said launch to completion. That plaintiffs did rush said launch to completion. During the period prior to August 8, 1914, in which payments were made as hereinafter set forth, defendant did not at any time threaten plaintiffs for any penalty for their failure to deliver the boat on time but rather urged plaintiffs to complete the boat as soon as possible; that plaintiffs did complete the boat as soon as possible; that prior to August 8, 1914, defendant raised no objection as to the failure of plaintiffs to complete the same on June 1, 1914."

We think, however, that the learned trial judge failed to distinguish between the right to rescind or abandon the contract and the right to insist upon compensation for the damage caused by the delay. The former was undoubtedly waived, but the other legal privilege was unaffected by the acts detailed in said finding. The distinction between the two methods of redress as to waiver is quite clearly shown by the authorities. In Crocker-Wheeler Co. v. Varick Co., 43 Misc. Rep. 645, 88 N. Y. Supp. 412, the subject of litigation was a contract to furnish and install two elevators. The trial judge held that the conduct of defendant "in urging plaintiff to continue and hurry completion of the work and finally accepting the same when performed and paying therefor a large part of the stipulated price thereof" was a waiver of damages for the failure to complete the work within the prescribed time. It was determined, however, by the appellate division that the defendant waived simply any right it might have asserted to plead the delay as a defense to an action for the agreed price, the court saying as to the other question:

> "It did not, however, thereby waive its right to counterclaim for any actual damage it might have suffered by reason of the delay. * * * The error into which the court below fell was in treating defendants' acquiescence in the completion of the contract as a waiver of damages for nonfulfillment, instead of only a waiver of any defense to a claim for the contract price."

In Howard et al. v. Thompson Lumber Co., 106 Ky. 566, 50 S. W. 1092, appellant agreed to build a tramway and haul logs for appellee. Compensation was to be paid as the work progressed, but a certain percentage thereof was to be retained and appellants' rights thereto forfeited if they did not perform as agreed. In an action by appellants, the defense of tardy performance was pleaded and appellee responded by alleging a waiver. In the course of the opinion it was stated that after the failure to furnish the logs within the time agreed upon, appellee "continued to receive and pay for the logs delivered and urged defendants to go on with their contract." The court, after quoting from Lawson on Contracts, declared:

> "Appellee, in accepting the logs actually delivered, and paying therefor, and in urging and encouraging appellants to go ahead with the work, waived its right to claim the forfeiture of the 10 per cent. on monthly settlements and the 75 cents per thousand feet for failure to complete the tramway, and appellants are entitled to maintain this action to recover the amount due them under the contract for logs actually delivered; but appellee is entitled to recoup by way of set-off or counterclaim damages sustained on account of the failure of appellants to keep their contract, unless such failure was occasioned by the fault of appellee."

The Supreme Court of this state declared the same principle in Bryson v. McCone, 121 Cal. 153, 53 Pac. 637, as follows:

> "But consent on the part of plaintiff that defendants might continue the work after the stipulated time was not a waiver of damages or of the breach. Upon the breach plaintiff, not being himself in default, had the right to rescind or permit the defendants to complete the work and sue for damages occasioned by the default."

It was similarly held by the Supreme Court of Michigan in Buick Motor Co. v. Reid Mfg. Co., 150 Mich. 118, 113 N. W. 591, wherein the defendant urgently insisted upon the delivery of the goods contracted for after the stipulated time had expired; by the Supreme Court of the United States in Phillips & Co. v. Seymour, 91 U. S. 646, 23 L. Ed. 341, wherein it was stated that upon a contract for the sale of personal property to be delivered upon a certain day it might be received afterward and the vendor could recover for it, but that the vendee might recoup by setting up a cross-demand for damages for the delay; by the Supreme Court of Michigan in Pittsburgh Co. v. Scully, 145 Mich. 229, 108 N. W. 503, wherein it was held that defendant, by receiving and paying for coal that was not promptly shipped, did not waive the claim for damages because the coal was not promptly delivered. Many other cases to the same effect are cited by appellant, and they seem to recognize the rule as of general acceptance. The justice of this view is affirmed in Page on Contracts, vol. 3, p. 2320, upon the ground that:

> "The party not in default is often constrained by his necessities to take what he can get under his contract when he can get it. Such conduct does not and should not operate as a waiver of the right of action for damages."

We can perceive no just ground for holding that any of the facts recited by the court, or all combined, should operate as a waiver of the right to claim whatever damages accrued to appellant by reason of the failure on the part of respondents to keep their engagement. Assuredly, the failure to demand a penalty or to use threatening or acrimonious language is no evidence of a relinquishment of this right. The effort to induce respondents to complete the work as speedily as possible and the payment of the several installments as they were due were entirely consistent with the purpose of claiming whatever might be due defendant under the contract. It was the duty of appellant to make the payments as called for, and its urgency as to the completion was evidence of good faith and a desire to save respondents as well as appellant from unnecessary loss.

Some cases are cited by respondents which, it is claimed, support the view of the lower court, but upon examination they appear disappointing and inadequate for the purpose. In Eyster v. Parrott, 83 Ill. 517, it seems the only waiver related to "the right to demand a forfeiture of the work already done" and the court allowed the defendant the damages which he had suffered by reason of the delay in completing the building. The question of the right to recover damages for delay did not arise in Paddock v. Stout, 121 Ill. 571, 13 N. E. 182, Tidwell v. Southern Engine Works, 87 Ark. 52, 112 S. W. 154, or Stiewel v. Lally, 89 Ark. 195, 115 S. W. 1134. The right to recover damages for delay was recognized in Davis v. Fish, 1 G. Greene (Iowa) 406, 48 Am. Dec. 387, but it was held that certain considerations were too remote and speculative to be regarded in determining the loss. Therein it was stated:

> "But the rule is settled beyond question, that if a job of work is of some use and value to the employer, or vendee, though improperly done, or not within the stipulated time, still the workman or vendor is entitled to recover as much as the work is reasonably worth, making such reasonable allowance as the cir-

cumstances may require. * * * In connection with this point it may be appropriately observed that in case of a breach of such specific contract, if the injured party can protect himself from damage, he is bound to do so if practicable, at a moderate expense, or by ordinary efforts; and he can charge the delinquent party for such expense and efforts only, and for the damages which could not be prevented by the exercise of such diligence."

The decision in Medart, etc., Co. v. Dubuque, etc., Co., 121 Iowa, 244, 96 N. W. 770, turned upon an agreed settlement of the claim for damages evidenced by a complete payment, but it was held that partial payment and acceptance alone did not constitute a waiver of the claim. Baldwain v. Foss, 71 Iowa, 389, 32 N. W. 389, decided that:

> "If a note that has been obtained by fraud is voluntarily paid by the maker with full knowledge of all the facts, he cannot recover the amount so paid."

The soundness of that decision could hardly be questioned. In Reid v. Field, 83 Va. 26, 1 S. E. 395, it was held that defendant by executing his note for the full amount due had waived his claim for an equitable set-off for damages caused by the delay in delivering the merchandise. The gist of the decision in Sirch E. & T. Laboratories v. Garbutt, 13 Cal. App. 435, 110 Pac. 140, was to the effect that having accepted the work, knowing it was defective, and having paid for it, the defendant could not recover the money paid. The point involved herein was not considered in that case. A question similar to the one before us arose, however, in the subsequent case of Machinery & Electrical Co. v. Y. M. C. A., 22 Cal. App. 416, 134 Pac. 724, and the same court declared:

> "It is well settled that an owner may receive and use a structure built for him by a contractor without necessarily waiving his right to offset damages occasioned by defects or imperfect completion against the contract price."

It will be noticed that none of the cases cited by respondents is directly in point. As to those holding that full payment constitutes a waiver of damages for delay, it may be said, also, that the weight of authority seems to be the other way. We content ourselves as to this with a citation of the cases appearing in appellant's brief: Johnson v. Baltimore Glass Co., 74 Kan. 762, 88 Pac. 52, 7 L. R. A. (N. S.) 1114, 11 Ann. Cas. 505; Industrial Works v. Mitchell, 114 Mich. 29, 72 N. W. 25; Clydebang, etc., Co. v. Castenada, A. C. 1905, 6 (decided by the House of Lords); North Alaska, etc., Co. v. Hobbs, Wall & Co., 159 Cal. 380, 113 Pac. 870, 120 Pac. 27, 35 L. R. A. (N. S.) 501; Gilmore v. Williams, 162 Mass. 351, 38 N. E. 976. There is, indeed, a sentence in the opinion of this court in Mannix v. Wilson, 18 Cal. App. 601, 123 Pac. 981, that seems encouraging to respondents, but if read with the context it will not be so understood.

[2, 3] As to whether time was of the essence of the contract there would seem to be little doubt in view of the positive agreement that the boat was to be completed "two weeks after arrival of engine, but in no event later than June 1, 1914." But, as pointed out by appellant, this does not affect the question involved herein, but only the consideration whether one party can regard the contract as broken or forfeited by the failure of the other to perform on the specific day. Even if time is not of the essence, the aggrieved party is entitled to just compensation for the delay. Civ. Code, § 1492. We do not mean to hold that it may not be shown that appellant waived its claim for any damage in consequence of the delay, but we are satisfied that the facts found by the court below are not sufficient to justify such conclusion.

In the event of another trial if respondents claim a waiver they should set it up with due formality by permission of the court, that the issue may be unquestionably presented for determination.

The judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

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33 Cal. App. 561

MILLOGLAV v. ZACHARIAS. (Civ. 2035.)

(District Court of Appeal, First District, California. May 2, 1917. Rehearing Denied by Supreme Court June 30, 1917.)

1. TRUSTS 🔑74—RESULTING—REPUGNANT PROVISIONS—STATUTE.

Where the plaintiff furnishes the purchase price of land on which a trust is sought to be impressed, taking title in the name of defendant in trust for himself, a condition of the agreement that the defendant shall not sell or incumber the property is not repugnant to the trust, since the trust which is presumed to result under these circumstances by the terms of Civ. Code, § 853, is necessarily one by which the grantee is bound not to sell or incumber the property to the injury of the person for whose benefit the trust was presumed to arise, and such a condition is not invalid because the parties had expressly agreed that such should be the effect of the trust relation.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 105, 106.]

2. TRUSTS 🔑81(1)—CONSTRUCTIVE—BREACH OF ORAL AGREEMENT TO SUPPORT.

Where plaintiff, relying on the confidential relation between himself and defendant, buys land and causes it to be conveyed to defendant relying on her promise to support him in her home to be established therein for the balance of his natural life, if she violates her promise the property is impressed with a trust arising out of her actual or constructive fraud.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 115.]

3. TRUSTS 🔑374—DECREE—ADJUSTMENT OF EQUITIES.

Where defendant, contrary to an agreement to support plaintiff in a home erected on land which she held in trust for him, incumbered the property and appropriated the proceeds, the court may, in an action to enforce such trust, provide that defendant pay plaintiff such pro-

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ceeds less the amount contributed by her to the equipment of the home.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 607–612.]

Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Action by N. P. Milloglav against Lydia Zacharias. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Stoney, Rouleau, Stoney & Armstrong, of San Francisco, for appellant. Rose & Silverstein, of Oakland, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff in an action to have declared a trust in his favor arising out of the facts set forth in his complaint. The appeal is taken upon the judgment roll without a bill of exceptions, and hence the appellant's contentions are limited to two: First, that the judgment is not supported by the pleadings; and, second, that it is not justified by the findings of fact and conclusions of law in the case.

The complaint is in two counts, in the first of which it is alleged in substance that the plaintiff, who is the father of the defendant, furnished the purchase price of the lands upon which a trust is sought to be impressed, and that the title was taken in the name of the defendant in trust for and for the benefit of the plaintiff and with the understanding that she was not to incumber or sell the property; that in violation of said understanding the defendant has already incumbered said property by a deed of trust to secure her promissory note in the sum of $2,000 borrowed money, which she has wrongfully appropriated to her own use; and it is further averred that she threatens to convey and dispose of the property to some person or persons unknown to the plaintiff for the purpose of cheating and defrauding the plaintiff out of his right, title, and interest in the said property.

It is contended by the appellant that the first count of the plaintiff's complaint does not state a cause of action for the reason, as she urges, that the trust alleged therein to have been created is an express trust; and, since the condition of the trust agreement was that the grantee of the title would not sell or incumber the property, this condition, being hostile to the grant, is void. In support of this contention, the appellant strongly relies upon the cases of Prey v. Stanley, 110 Cal. 423, 42 Pac. 908, and Ripperdan v. Weldy, 149 Cal. 667, 87 Pac. 276.

[1] We cannot give our support to the appellant's contention, nor to the application to this cause of the foregoing cases upon which she relies. The averments of the first count of plaintiff's complaint as above summarized bring this case clearly within the terms of section 853 of the Civil Code, which provides that:

"When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

The trust which would be presumed to so result would of necessity be one by which the grantee would be bound not to sell or incumber the property to the injury of the person for whose benefit the trust was presumed to arise; and the mere fact that the parties had understood or agreed that such should be the effect and terms of the trust relation would not in any way militate against the creation or validity of the trust which came into being under the terms of the foregoing section of the Civil Code. The cases above referred to and relied upon by the appellant have no application to such a state of facts as is presented by the first count of the complaint in this case. They refer to cases where a fee-simple title has by the act and intent of the parties passed to the grantee, and where an attempt was made in restraint of alienation to impose a condition repugnant to the interest created by the conveyance of the property. But no such situation is presented by the case at bar according to the averments of the first count of plaintiff's complaint. We think therefore that the appellant's objection to the sufficiency of the first count of the complaint herein is not well taken.

The appellant makes a similar objection to the second count of the complaint. The averments of this count are in substance that prior to the 22d day of September, 1913, the plaintiff was approached by the defendant with the proposition that if he would purchase the property in question herein and cause the same to be conveyed to the defendant, she would care for, support, and maintain him in her home to be established thereon for the balance of his natural life, and would not sell or incumber or otherwise dispose of said property or any portion thereof; and that, relying upon these promises of the defendant, the plaintiff did supply the sum of $4,500 as the purchase price of said property and caused the same to be conveyed to said defendant; but that, notwithstanding her promise and agreement, she refuses to prepare his meals or otherwise care for him as she had agreed to do, and has incumbered the property for a debt of her own in the sum of $2,000, and has further threatened to convey or dispose of the same for the purpose of defrauding the plaintiff out of his right, title, and interest therein.

At the time of the trial of the action, the court permitted both counts of the plaintiff's complaint to be amended so as to conform with the proofs by the insertion in each of an averment to the effect that the plaintiff had great confidence and trust in the defendant arising out of the relation between them, and relying upon said confidence, and fully believing that the defendant would hold said property in trust for plaintiff as agreed, the plaintiff had directed said conveyance to be made to the defendant.

[2] We are able to perceive no material difference in these two counts of the plaintiff's complaint in so far as they each aver facts from which a resulting trust would arise in favor of plaintiff. It is true that the second count in the complaint amplifies somewhat the terms and requirements of such trust by the addition of the provisions calling for the care and maintenance of the plaintiff in the home of the defendant upon the purchased property. These added conditions are quite common in trusts of this character and are not hostile to them; and we are of the opinion that the averments of this second count in plaintiff's complaint, taken in connection with the later amendment thereto, averring the existence of a confidential relation between the parties, upon which the plaintiff relied, in investing the defendant with the apparent title to the property in question, bring this case within the range of those authorities in this state which deal with the subject of trusts arising out of actual or constructive fraud on the part of those persons who are invested with apparent but not real ownership of the property. Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; Id., 90 Cal. 323, 27 Pac. 186; Alaniz v. Casenave, 91 Cal. 41, 27 Pac. 521; Odell v. Moss, 130 Cal. 352, 62 Pac. 555; Jones v. Jones, 140 Cal. 587, 74 Pac. 143; Lauricella v. Lauricella, 161 Cal. 61, 118 Pac. 430. Under these authorities we are satisfied that the complaint herein in both its counts, and especially as amended at the trial, states a cause of action.

[3] The final contention of the appellant is that the findings do not support the judgment. The findings reveal a somewhat different state of facts from those averred in the complaint, and they are also somewhat prolix and detailed in an apparent effort on the part of the trial court to make them responsive to the averments and denials of the defendant's cross-complaint and to the averments of the answer thereto. Without rehearsing these matters in detail, it may be said that the main divergence of the findings of the trial court from the averments of plaintiff's complaint springs from a finding to the effect that the defendant had contributed the sum of $850, which she had placed in the hands of the plaintiff to be used in the establishment of the home of the parties, and which may have been used in buying the furniture therefor, since the court expressly finds that the purchase price of the real estate did not consist of moneys belonging to the defendant. The court undertook to equalize these matters in its judgment by providing therein that the defendant should pay over to the plaintiff the sum received by the incumbrance of the property less whatever credit she would be entitled to by reason of her contribution to the equipment of the home. We think this sort of adjustment of the monetary affairs of the parties was fully within the discretion of a court of equity. While the court does not make an express finding upon the subject of fraud on the part of the defendant, it does find the facts from which the implication of fraud would necessarily arise; and we are otherwise of the opinion that the findings of the court, taken as a whole, are responsive to the issues in the case, and that they support the conclusions of law and the judgment based thereon.

It follows that the judgment should be affirmed, and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

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33 Cal. App. 536

ROBINSON v. RISPIN et al. (Civ. 1618.)

(District Court of Appeal, Third District, California. April 26, 1917.)

1. Mines and Minerals 🔑109—Contracts—Well-Digging Contract.

In contractor's damage suit for landowner's breach of contract to drill not less than 2,000 feet and not less than two nor more than four wells, a 400-foot well accepted by the landowner need not be credited with 1,000 feet.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 214.]

2. Damages 🔑40(2)—Profits — Well-Digging Contract.

Profits to be earned from digging oil wells are not too speculative and remote to be a basis for damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 74–78.]

3. Mines and Minerals 🔑109—Contracts—Breach—Sufficiency of Evidence.

Plaintiff contractor's testimony that defendant landowners did not supply him with casing, fuel, and water to be used in digging oil wells sustains a finding that defendants' default prevented plaintiff from completing the work.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 214.]

4. Corporations 🔑243(3) — Liability on Stock—Trustee.

Under the direct provisions of Civ. Code, § 322, a minor's trustee holding corporate stock is personally liable on such stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 947.]

5. Corporations 🔑171 — Stockholders—Evidence.

Plaintiff may prove that defendants were corporate stockholders by their testimony, especially where plaintiff's efforts to have the corporation's books produced pursuant to Code Civ. Proc. § 1000, met persistent opposition.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 633–636.]

6. Assignments 🔑107 — Contracts — Assignee's Liability.

While the mere assignment of an executory contract does not make the assignee liable to the other party, yet, where the contract is fully performed, the benefit inures solely to the assignee, and he recognizes the contract as binding, he is liable to the other party equally with his assignor.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 186, 187.]

7. NOVATION ⚷12 — SUFFICIENCY OF EVIDENCE.

A defendant's testimony that a corporation agreed to assume the obligations of his contract, etc., *held* sufficient to sustain a finding of novation.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 12.]

8. NOVATION ⚷12—EVIDENCE.

Under the direct provisions of Civ. Code, § 1531, subd. 2, a novation may be established by showing the substitution of a new debtor in place of the old one.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 12.]

9. NOVATION ⚷12—PAROL EVIDENCE.

Parol evidence is admissible to establish a novation in a written contract.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 12.]

Appeal from Superior Court, City and County of San Francisco; William D. Dehy, Judge.

Action by E. W. Robinson against H. A. Rispin and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed, and new trial ordered as to defendant Rispin, and affirmed in other respects.

Boutwell Dunlap and John E. Alexander, both of San Francisco, for appellants. R. H. Cross, of San Francisco, for respondent.

BURNETT, J. On November 10, 1910, plaintiff and defendant Rispin entered into a written agreement for the drilling of certain oil wells in Kern county. Robinson agreed to furnish the tools and labor and drill two or more wells for which Rispin agreed to pay him $4.50 for each vertical foot drilled. Rispin was "to furnish all necessary fuel, water, tubing, and casing at the well being drilled," and Robinson agreed to do the work according to certain specifications "in a thoroughly workmanlike manner under the instructions of said Rispin," and it was further provided that Robinson should not be compelled to drill to a depth exceeding 1,000 feet in any one hole, and "that this contract shall cover a total of not less than 2,000 feet of drilling and not less than two nor more than four wells, and that there shall be no unnecessary delays by either party, either in the drilling of the wells or the furnishing of casing, fuel and water." On December 23, 1910, after Robinson had moved his crew and appliances to the land where the work was to be done, but before he had actually begun drilling, Rispin assigned all his right, title, and interest in said land (which he held under option agreements) and all his interest under said agreement with Robinson to the defendant corporation, Lost Hills Central Oil Company. The court found that the defendant corporation accepted the assignment and the benefits and obligations arising from the agreement with Robinson, with full knowledge of all the facts relating thereto, and the work thereafter proceeded under its directions and instructions. The work was begun on December 28th, and after innumerable delays, which the court found were caused by the failure of the corporation to furnish the necessary casing, fuel, and water, he succeeded, on or about the 23d day of February, 1911, in reaching a depth of 400 feet and it was mutually agreed that the well known as "well No. 1" should be abandoned as an oil well and should be converted into and used as a water well for further operations on the property. Plaintiff was thereupon paid $1,800 for the said 400 feet, and he moved his drilling appliances to another point on the land, and he proceeded to drill well No. 2 until at the end of June, 1911, he had reached a depth of 907 feet. It was found that he could proceed no further by reason of the failure of appellants to furnish the necessary casing, and hence he ceased the drilling operations. After waiting until November 25, 1911, for defendants to furnish the casing to enable him to proceed with the work he brought suit to recover the amount due him for the work actually done, for the damages which he had sustained by reason of defendants' breach of their agreement to furnish him with the requisite fuel, water, and casing, and damages for their refusal to permit him to go on and complete the drilling to the extent of the 2,000 minimum feet provided in the contract. The court's judgment was in favor of plaintiff in the aggregate sum of $6,421.25 against the defendants Rispin and Lost Hills Central Oil Company and a several judgment against Benjamin Goodwin, A. B. Smith, H. A. Rispin, and J. S. Ourish as stockholders of said corporation, for the sum of $1,589.41 each.

At the trial appellants made common cause, and they were represented by the same attorney. On the appeal another attorney appears for Rispin, and he and the other appellants assume a somewhat antagonistic attitude as to the proper theory of the case. However, they are in accord in urging several grounds for a reversal of the judgment and order denying the motion for a new trial, and these will first receive attention.

Plaintiff was awarded the sum of $1,529.25 for the loss of the profits which he would have made if permitted to complete the contract. As to the various objections to the particular finding some brief suggestions may be submitted.

[1] The court was not bound to consider the 400-foot well as though it had been drilled to the depth of 1,000 feet. There was no agreement to that effect, according to the testimony of plaintiff, and in the original contract the number of feet actually drilled was the important consideration. The parties did not even contemplate that any well should be of definite depth, but there was a limit to the number that should be developed. There was no greater reason for crediting this particular well with 1,000 feet than for so con-

sidering the other one of 907 feet. In view of the testimony of plaintiff that well "No. 1" was accepted as complete to be used for supplying water, and that it was not through any fault of his that it was drilled no deeper, the court was justified in the number of feet it allowed for said work.

[2] As to damages, the rule is, no doubt, that those of a special nature must be pleaded. General damages are said to be the natural and necessary result of the act complained of, while special are the natural, but not the necessary, consequence of such act. It has been held, however, that the loss of profits on a contract of this kind is the necessary consequence of a breach, and therefore it is not required to be specially pleaded. Tahoe Ice Co. v. Union Ice Co., 109 Cal. 249, 41 Pac. 1020; Germain Fruit Co. v. Armsby Co., 153 Cal. 585, 96 Pac. 319. Nor are such profits too speculative and remote to be a basis for damages. This consideration is thoroughly discussed in Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62, and it is sufficient to quote therefrom the following sentence:

> "But where the prospective profits are the natural and direct consequences of the breach of the contract, they may be recovered; and he who breaks the contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages."

[3] Appellants are equally at fault in the contention that plaintiff failed to show that he was prevented by the defendants from completing the work. We need not quote from the record, but we deem it sufficient to say that plaintiff testified positively that defendants failed to supply him with the casing, fuel, and water as they agreed, and therefore it was impossible for him to continue the work. Furthermore, he testified that they abandoned the enterprise and requested him to come to San Francisco to assist them in disposing of defendants' interest in the land. Plaintiff's case did not rest upon the theory that he was prevented by the failure of defendants to pay him what was due, and therefore the doctrine of the case of Cox v. McLaughlin, 54 Cal. 605, has no application. It is rather an instance of the failure to furnish material which was to be used in the work and which was made a condition precedent to the performance by plaintiff, and it is governed by the principle expounded and applied in Alderson v. Houston, 154 Cal. 3, 96 Pac. 884.

As to the damages caused by delay, it may be said also that support for the finding is contained in the record. It is pointed out in respondent's brief, and it is not controverted in the final brief for appellants.

[4, 5] There was a dispute as to the number of shares of stock in defendant corporation held by some of the other defendants. However, the finding of the court in that respect seems abundantly supported. There was no controversy as to the number of shares outstanding and that said defendants were stockholders. It was admitted by the answer that Ourish owned 25,000 shares. Rispin and Goodwin admitted on the stand that each owned the same number. Smith's testimony showed also that he was liable for 25,000 shares, as he admitted that this number stood in his name as trustee for his son, a minor of the age of 16 years. Section 322, Civ. Code. We can see no valid objection to the method adopted for the proof of these facts. They were matters peculiarly within the knowledge of defendants, and they were competent witnesses to testify as to the number of shares owned by each. Indeed, plaintiff endeavored to have the books of the corporation produced, that the matter might be set at rest, but he encountered serious and persistent opposition. Steps were taken for this purpose as provided by section 1000 of the Code of Civil Procedure, but we need not follow them in detail. Appellants may have acted in good faith, but they seemed strongly averse to a complete inspection by respondent of the records involved in the controversy. We think, under the circumstances, that the court was justified in holding that its order in reference to an inspection of the books had not been complied with and in assuming the facts to be as claimed by plaintiff. However, aside from this, the evidence was sufficient to support the finding.

We have thus noticed the foregoing contentions, although we would probably be justified in concluding that they had been abandoned by appellants; as no reference is made to any of them in the closing briefs.

We come now to the points where appellants diverge and to which the closing arguments are addressed.

The contention of the corporation defendant, the Lost Hills Central Oil Company, is that it never assumed any liability under the contract made by Robinson and Rispin. There can be no doubt, however, that the record supports the finding of the court to the effect that Rispin transferred, set over, and assigned all his right, title, and interest, under the agreement made by him with Robinson, to the defendant corporation, this transfer having been made on December 23, 1910, while the contract was wholly executory; that the defendant corporation voluntarily accepted the assignment and the benefits and obligations arising from the transaction and the agreement with Robinson, with full knowledge of all the facts relating thereto, and thereafter requested Robinson to perform the work stipulated under and pursuant to the terms of that agreement. The evidence is epitomized in the brief of respondent, but it is not necessary to repeat it here.

[6, 7] The case seems to fall clearly within the principle of Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574, 25 Pac. 52, 10 L. R. A. 369, 21 Am. St. Rep. 63; Anderson v. De Urioste, 96 Cal. 404, 31 Pac. 266; Freze

v. Moore, 1 Cal. App. 587, 82 Pac. 542; and section 1589 of the Civil Code. Of course, as suggested by respondent, the mere assignment of the rights under an executory contract would not make the assignee liable to the other contracting party. Such was the case of Lisenby v. Newton, 120 Cal. 521, 52 Pac. 813, 65 Am. St. Rep. 203. But where, after the assignment is made, the executory provisions of the contract are fully performed, the benefit inuring solely to the assignee, and where by his actions he holds himself out as personally liable and recognizes the original contract as binding upon him, he is liable to the other party equally with the assignor. Such is this case, as was Jones v. Allert, 161 Cal. 234, 118 Pac. 794. Indeed, there is much evidence in the record that the corporation was the real party in interest, Rispin being a mere intermediary. Furthermore, we may say that, if the court had found that there was a novation, the substitution of the corporation for Rispin with the intention of releasing the latter from liability, the finding would be supported. There is much in the record tending to this view. It will be sufficient to refer to a portion of the testimony of Rispin. He said: That he presented to the directors of Lost Hills Central Oil Company the contract between him and Robinson, and that they directed him what to do under the contract; that the corporation paid Robinson what was due under the agreement; that there was an understanding that the corporation was to assume the obligations of the contract; "that it would take my place in the contract with Mr. Robinson; that the contract would be practically between Mr. Robinson and the corporation, and not with myself;" and that he notified Mr. Robinson that the corporation had assumed the contract. In fact, appellants attempted to go further and show that at the time of the execution of the said contract between Robinson and Rispin it was understood and agreed that the corporation, when formed, should be substituted for Rispin. That attempt involves what appellant Rispin claims was a prejudicially erroneous ruling of the court. The purpose of the questions addressed to the witness was stated by counsel as follows:

> "I wish to show by Mr. Rispin and to follow that testimony up that at and subsequent to the time when this contract was executed, on November 10, 1910, there was a distinct agreement between Mr. Rispin and Mr. Robinson, an agreement incidental to the agreement of November 10, 1910, to the effect that that agreement as signed was to be assumed by a corporation which Mr. Rispin was at that time organizing, and that the corporation would take over and assume the liability under that contract; that there was an agreement between them to that effect. And following that I wish to show that that agreement was fully and completely executed and carried out, and that the liability was assumed by the corporation; that the liability of the corporation was assented to by Mr. Robinson, and that Mr. Robinson looked to the corporation as the party liable and released Mr. Rispin from all obligations because of the writing which was introduced by plaintiff here as the contract; further that all the facts and circumstances surrounding the case are proper to be shown in order that the judge may properly construe the instrument in question; and further that the evidence of what transpired at that time would be admissible upon the ground of showing lack of consideration as far as Mr. Rispin was concerned. Those matters, I believe, are fully set forth in the allegations of the answer, sufficient to have them admitted as evidence. If there is any question in the mind of the court that these matters are not fully set forth in the answer of Mr. Rispin so that this evidence should be admitted, I then ask for leave to amend so that those matters can be fully shown."

[8, 9] The court, however, regarded it as an effort to vary the terms of the written instrument, and would not permit the questions to be answered. In this we think the court erred. The purpose was not to vary the terms of the contract, but to show a collateral agreement that the contract should be assumed by another. There is no doubt a novation could be shown by proving the substitution of another party for Rispin in the contract. Section 1531, Civ. Code, subd. 2. In order to prove this, there must be, of course, evidence of an agreement to that effect. Plaintiff must have consented to it in order to constitute a novation. That he so agreed at the time of the execution of the original contract would naturally be a significant circumstance in the chain of proof relied upon to establish the novation. Proof of the substitution is not required to be in writing, but may consist of parol evidence. If it was not permissible to show such an agreement at the time the written contract was executed, it could not be shown at all. The same objection could be made as to a question addressed to any subsequent agreement between the parties as at the time the written contract was executed. Upon respondent's theory the novation could not be proven unless it was embodied in a written instrument. This, however, is not the law, and the contention of respondent is based upon an erroneous conception of the rule as to varying the terms of a written instrument. In Farmers' Nat. Gold Bank v. Stover, 60 Cal. 389, defendant attempted to prove that plaintiff had agreed that a certain note and mortgage was taken by plaintiff as substitution for and in full payment of the note sued on. The evidence was admitted and thereafter excluded. The Supreme Court said:

> "This was error. The evidence which was admitted and afterwards excluded tended to prove that the bank had accepted the individual note and mortgage of Stover as a substitute for the note in suit, for the purpose of extinguishing the obligation arising from it, or of releasing the parties to it who had become insolvent. If the note and mortgage were, in fact, taken as a substitute for the note in dispute, with the intent of extinguishing the obligation of it, or releasing the parties to it, the transaction constituted a defense by way of novation, under sections 1530, 1531, 1532, of the Civil Code; and the defendants were entitled to have it presented to the consideration of the jury upon the evidence adduced to sustain it."

As to the sufficiency of the pleadings to present the issue, the Supreme Court therein approved Kirstein v. Madden, 38 Cal. 158, and Stringer v. Davis, 30 Cal. 318, wherein it was held that the trial court, if application should be made therefor, should allow such amendments to be made as will enable the court to try and determine the cause on the merits.

In Guidery v. Green, 95 Cal. 630, it was held that parol evidence offered for the purpose of showing that a subsequent written contract, which it is claimed superseded and annulled a prior written contract upon which the other is based, had been executed upon the consideration and agreement that the prior contract should be canceled and all claims of the plaintiff against the defendant thereunder waived, is not incompetent as having the effect to vary or contradict the terms of either of the written instruments or to add any terms thereto. Said the court:

> "Such evidence is as admissible as is oral testimony that the terms of a written agreement have been fully performed by the parties, or that the instrument evidencing such agreement has itself been canceled and destroyed by the concurrent act of both parties. In either case the object and effect of such evidence is not to change any of the terms of the contract, but to show that the contract has no longer any existence, and therefore cannot be made the basis of an action."

So here the purpose was to show that said agreement no longer had any existence as between the original parties, but that it had been superseded by a contract between plaintiff and the corporation. That the terms and conditions of the contract remained the same, that practically the only change was the substitution of another obligor, manifestly presents no different legal aspect from the case where an entirely different contract has been substituted.

If the rule is to be applied as claimed by respondent, then no effect could be given to that portion of section 1698 of the Civil Code which provides that:

> "A contract in writing may be altered * * * by an executed oral agreement."

Such executed agreement could not be shown for the reason that it would be in effect to permit parol evidence to vary the terms of a written instrument. That a novation had been effected was one of the important defenses relied upon by appellant Rispin, and we think he should have been afforded the fullest opportunity to establish it.

As to the appellant corporation we may suggest that its attitude here appears quite inconsistent with its position at the trial. Therein all of the defendants, as we have stated, were represented by the same attorney, who insisted, as we have seen, that there was a complete novation, that the corporation had been substituted in the original contract for Rispin, and it complained somewhat bitterly because it was denied the privilege of making that clear to the court. It is true also that the motion for a new trial was joint and not several, and there is a joint appeal from the judgment. However, no point is made as to this, and we think justice requires that the judgment against Rispin for the sum of $6,421.25 should be reversed, and a new trial had upon the issue whether he was released from liability upon the contract by virtue of said alleged novation, and that the judgment and order should be affirmed in all other respects. It is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

33 Cal. App. 557

MANOR v. DUNFIELD. (Civ. 1638.)

(District Court of Appeal, Third District, California. April 30, 1917.)

1. TROVER AND CONVERSION 🔑40(1) — POSSESSION OF PLAINTIFF—ILLEGAL TAKING—KNOWLEDGE OF DEFENDANT — SUFFICIENCY OF EVIDENCE.

In suit for conversion of an automobile, evidence *held* to justify findings that plaintiff was in the possession and entitled to the possession of the machine when it was delivered to defendant by plaintiff's employé, that it was illegally taken from plaintiff, and that defendant had knowledge or the means of acquiring knowledge of plaintiff's claim to its possession.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 232, 240, 244.]

2. PLEDGES 🔑11 — POSSESSION — CLAIMS OF CREDITORS—STATUTE.

Where plaintiff was in possession of an automobile through his employé, the driver of his auto-stage line, he had such possession as to protect himself against the claims of creditors, as contemplated by Civ. Code, § 3440, providing what transfers are presumed to be fraudulent, though the possession came to plaintiff by his employé's pledging the car with him.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 28–35.]

3. PLEDGES 🔑43—PLEDGOR'S TRANSFER OF INTEREST—EFFECT ON PLEDGEE.

Where plaintiff's employé, driver of an auto-stage line, pledged an automobile with plaintiff, and thereafter had control over the car entirely by virtue of his employment and under plaintiff's direction, the employé had no right to deprive plaintiff of the possession of the machine, and his attempted transfer of his interest to a third person had no effect on plaintiff's claim to the car.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 102.]

4. NOVATION 🔑5—CONTRACT OF SALE.

Where plaintiff assumed the obligation of his employé under the latter's contract to buy an automobile, and the substitution was recognized by the seller of the car, there was a complete novation, and plaintiff was entitled to the rights and subject to the liabilities of the sale, which was conditional.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 5.]

5. SALES 🔑467—CONDITIONAL SALE—RIGHT TO POSSESSION.

The vendee of personalty under a conditional sale contract is entitled to possession until he loses the right by virtue of his violation of some provision of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1354, 1358–1364.]

6. SALES 🔑480(4)—CONTRACT—PERFORMANCE —PRESUMPTION.

It is presumed that the successor by novation of the buyer of an automobile by conditional sale contract will make the final payment on the car.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1444, 1445.]

7. SALES 🔑480(1) — CONDITIONAL SALE — FAILURE TO COMPLETE CONTRACT—PENALTY.

If the successor by novation of the buyer of an automobile by conditional sale contract does not complete his contract by paying for the car, he is liable to the penalty of forfeiture.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1440, 1442, 1446.]

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by J. A. Manor against J. D. Dunfield. From a judgment for plaintiff, defendant appeals. Affirmed.

Millington & Millington, of Colusa, for appellant. U. W. Brown and Harmon M. Albery, both of Colusa, for respondent.

BURNETT, J. One F. E. Partain entered into a contract with one G. L. Sanders for the purchase of a Ford automobile. Afterward by agreement a Rambler machine was substituted for the Ford. There is no doubt that the said Sanders was the owner of the Ford, and there is sufficient circumstantial evidence that he was also the owner of the Rambler, although the direct evidence is to the effect that the latter belonged to Sanders Bros. This is of no importance, however, as it is indisputable that both G. L. Sanders and Sanders Bros. agreed to the substitution of one machine for the other. The Ford machine was delivered to Partain, but, on account of his failure to meet the payments called for by the contract of sale, G. L. Sanders again took possession of it. Partain and plaintiff then entered into an agreement, whereby the latter was to pay Sanders what was due, and the machine was to be turned over to plaintiff and used by him on his auto-stage line. It was further agreed that the machine was to be restored to Partain whenever he repaid plaintiff the amount of money so advanced to Sanders. Plaintiff then made arrangements with G. L. Sanders to pay him the amount due, the sum of $108.40; Sanders understanding that the machine was to be turned over to plaintiff. There was some question as to the form of the receipt offered by Sanders, so he was informed that the money was in the bank and he could get it when he gave a proper receipt. Before the payment was made, plaintiff was injured and was thereafter in a sanatorium for some time. While there he had his brother pay Sanders $133.40, the amount due at that time on the machine. This payment was made on September 11th. On September 15th, Partain, who was working for plaintiff, driving his automobiles on his stage line, traded said Ford machine for the Rambler. Plaintiff knew nothing of this until the 1st of October, when Partain brought it to plaintiff's house and turned it over to him. From the time of the trade or substitution of one machine for the other, the Rambler was used on plaintiff's auto-stage line, driven by plaintiff's drivers, and had on it his stage sign and license number. Furthermore, it was stored in a garage in Colusa in the name of and by plaintiff, and bills against the same were charged to him, and he had possession of the machine until November 13, 1916. On November 1st, Partain quit working for plaintiff, and the Rambler remained in possession of the latter. On November 11th, plaintiff met G. L. Sanders and said to him that he had the money for the November payment on the machine, but that he had some money coming in the following week and he could make the whole payment on Wednesday, to which Sanders consented, telling plaintiff that the Rambler was his and for him to take it; the car standing near at that time. However, before the following Wednesday, namely, on November 13th, Partain went to the garage, took possession of the machine, drove it away, and thereafter assigned all his interest under the contract with Sanders to Dunfield and directed the bill of sale to be made to him. The bill of sale was so executed by Sanders Bros. and G. L. Sanders; but, before its execution, one Jake Whalen, manager of plaintiff's stage line, in the presence of defendant, his attorney, and Partain, demanded possession of the machine, showing the attorney an order for its possession he had from G. L. Sanders. Defendant heard the order read over the phone to Sanders. Whalen stated the reason he obtained the order was on account of the fact that Partain had run off with the car to Arbuckle. Said order was dated November 5th and prior to the said agreement between plaintiff and G. L. Sanders as to the final payment, and defendant knew that Whalen was in the employ of plaintiff. Partain did not repay to plaintiff any portion of the money the latter had paid to Sanders, nor did he offer to do so. On November 15th, plaintiff demanded of defendant the possession of the machine, but it was refused and the suit followed.

[1] The foregoing statement embodies a fair inference from the evidence, and the facts thus appearing justified the findings of the court that plaintiff was in the possession and entitled to the possession of the machine at the time it was delivered to defendant, that it was illegally taken from him, and that defendant had knowledge or the means of acquiring knowledge of plaintiff's claim to the possession of it.

[2-5] No extended consideration of the situation seems necessary. The facts are not complicated, and the legal principles involved are rudimentary and familiar. As between plaintiff and Partain there was a pledge of the machine which was to continue until

plaintiff was repaid the amount of money that he advanced to Sanders. In that respect the case falls within the provisions of section 2986 of the Civil Code. There was the necessary agreement between the parties, an actual delivery of the property, and a visible, unequivocal, and continued change of possession. By nothing said or done had plaintiff forfeited or yielded his right to said possession. Plaintiff's possession was such as to satisfy the requirement even of absolute ownership and to protect against the claims of creditors as contemplated by section 3440 of the Civil Code. That Partain had some degree of control over the machine is of no moment, since it was entirely by virtue of his employment and under the direction of plaintiff that he was authorized to use the machine. Any other use or assumption of control by him was a violation of his agreement with plaintiff. As a legal proposition, therefore, it is altogether clear that Partain had no right to deprive plaintiff of the possession of the machine, and his attempted transfer of his interest to defendant had no effect whatever upon plaintiff's claim. As to the relation of plaintiff and G. L. Sanders, there was a complete novation. Plaintiff assumed the obligation of Partain under the contract of sale, and his substitution was recognized by Sanders. The agreement between plaintiff and Partain was ratified by Sanders, who accepted plaintiff as the debtor instead of Partain. Hence plaintiff was entitled to the rights and subject to the liabilities of the conditional sale. He was not in default, and there had been no declared forfeiture at the time he was deprived of the possession of the machine. It follows that even the owner could not take the property away from him, for it will not be disputed that the vendee is entitled to the possession until he loses the right by virtue of his violation of some provision of the contract. Indeed, as far as G. L. Sanders is concerned it could probably be held that by reason of his express agreement with plaintiff he could not question the latter's ownership of the property. Sanders Bros., for reasons already stated, are equally bound with the father.

The only theory upon which defendant could hold the property would, manifestly, be that he was an innocent purchaser for value without notice. We think it not unreasonable to conclude, however, that he had knowledge of the contract with plaintiff and that the arrangement with him was for the purpose of defeating plaintiff's claim. At any rate, there was sufficient evidence that defendant was put upon inquiry, and he ought to have found out, if he did not, that the machine was wrongfully taken from the possession of plaintiff.

[6, 7] It may be suggested that, under the view taken by the court, complete justice may be done to all the parties. It was found, not that plaintiff was the owner of the machine, but entitled to the possession of it by reason of the pledge. To become the owner he must make the final payment. It is presumed he will do this, and thus may appellant be reimbursed for his payment. It is no violent presumption to assume that the machine is not as valuable as it was; but if plaintiff does not complete his contract he is liable, of course, to the penalty of forfeiture. Even Partain, no doubt, will be accorded ample opportunity to redeem the machine so that he may become the proud owner, not of the somewhat lowly Ford, but of the more pretentious Rambler.

We have not quoted from the decisions cited; but, if interesting suggestions concerning the legal questions more or less involved herein are desired, we may refer to Stevens v. Irwin, 15 Cal. 503, 76 Am. Dec. 500; Goldstein v. Hart, 30 Cal. 372; George v. Pierce, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53; and Stevinson v. Joy, 164 Cal. 279, 128 Pac. 751.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

175 Cal. 395

CONLIN v. STUDEBAKER BROS. CO. OF CALIFORNIA et al. (L. A. 3980.)

(Supreme Court of California. June 8, 1917.)

1. Judgment 🔑250 — Relief Authorized —Sales.

A judgment allowing plaintiff buyer to retain a purchased automobile, and restoring to him the entire consideration paid therefor, is erroneous.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 436.]

2. Sales 🔑398 — Rescission — Amount of Recovery.

Upon rescission of a sales contract, neither of defendant sellers should be required to return more than he actually received, since a rescission action contemplates that the parties be placed in their former position.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1137–1139.]

3. Sales 🔑114—Buyer's Remedies—Election.

A defrauded buyer may elect to rescind the sales contract, or to affirm it and recover damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 288.]

4. Sales 🔑52(4)—Buyer's Action for Damages—Admissibility of Evidence.

Where the buyer, in an action to rescind a sales contract, claimed the batteries in the purchased automobile were old, evidence contradicting this claim is admissible.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 129–135.]

Department 1. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by C. D. Conlin against the Studebaker Bros. Company of California and L. E. Dresbach. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed.

Horace S. Wilson and George C. Mansfield, both of Los Angeles, for appellants. Chas. S. McKelvey, of Los Angeles, for respondent.

SLOSS, J. Plaintiff alleged in his complaint that the defendants had sold him an electric automobile, for which he had paid $1,700 as follows: $300 in cash and a note for $300 to the defendant, Studebaker Bros. Company of California, and 204 shares of stock of the Peerless Brick & Artificial Stone Company, of the agreed value of $1,100, transferred to the defendant Dresbach. It was alleged that the defendants had falsely represented that the automobile was new and in first-class condition; that the plaintiff, upon learning that the machine was, in fact, old and in poor condition, had notified the defendants that he rescinded his contract, and demanded the return of the consideration paid by him, offering to return the automobile. The demand and offer being refused, he brought this action. The defendants answered, denying many of the allegations of the complaint, and filed a cross-complaint, alleging that the automobile had been put in the hands of the plaintiff under a contract of conditional sale, under which title was to remain in the Studebaker Bros. Company until the note for $300 was paid. The plaintiff having refused payment of said note, the cross-complainants demanded judgment for the recovery of the automobile, or its value, fixed at $1,700. The court found in favor of plaintiff's allegations regarding fraud and rescission. It found that the title was not to remain in the Studebaker Bros. Company until the note was paid, and that said company was not the owner of the automobile, or entitled to the possession thereof, "except on the rescission of the contract with plaintiff." An amendment to plaintiff's complaint, filed after the findings were made, alleges that the 204 shares of stock transferred to the defendant Dresbach had become valueless through no fault of the plaintiff. There is no finding on this allegation. The judgment was that plaintiff's promissory note for $300 be returned to him, and that he have judgment against both defendants for the $300 paid by him, and for $1,100, the agreed value of the 204 shares of stock. The defendants appeal from the judgment and from an order denying their motion for a new trial.

[1] The judgment is open to objection on several grounds. The facts of the transaction were these: Dresbach had bought the automobile from Studebaker Bros. Company, and still owed $600 on the purchase price. He then made a sale to the plaintiff, the agreement being that the plaintiff was to pay him $1,100, and was to pay the Studebaker Bros. Company the $600 still owing to them. Accordingly the 204 shares of stock agreed to be worth $1,100 were transferred to Dresbach, and the Studebaker Bros. Company received $300 in cash and the plaintiff's note for $300. A written agreement of conditional sale was made between Studebaker Bros. Company and the plaintiff. While the complaint alleges, and the court finds, that plaintiff has suffered damage in the sum of $1,700, the action and the judgment are both based upon the theory of a rescission, rather than of an action for damages for fraud. By the judgment there is restored to the plaintiff the entire consideration which he had given for the automobile; that is, his note for $300, the $300 paid by him in cash, and the equivalent in money of the 204 shares of stock, which, as alleged in the amendment to the complaint, had become worthless. But there is no provision in the judgment for the return to the defendants, or either of them, of the automobile itself. So far as the judgment goes, the plaintiff gets back the purchase price paid by him for the automobile and keeps the automobile too. Such a judg-

ment cannot stand. In decreeing the rescission of a contract the court—

> "requires equity at the hands of the complaining party as well as from the defendant, and * * * will place the parties in statu quo by requiring the plaintiff to restore to the defendant everything of value which the plaintiff has received under the contract." 18 Enc. Pl. & Pr. 858; Sanchez v. McMahon, 35 Cal. 218; Kelley v. Owens, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797.

It is no answer to this objection to say that the plaintiff, in his complaint and at the trial, asserted his willingness to make a return of the purchased property. It appeared from the evidence that it remained in his possession, and the defendants were entitled to some security for its return beyond the mere expression of plaintiff's willingness to restore it. The judgment should have made the return of the consideration conditional upon the placing of the automobile in the possession of the defendants.

[2, 3] Furthermore, the judgment is erroneous, in that it makes both defendants liable for the return of the entire consideration, although only a part of it had gone to each of them. Studebaker Bros. Company had received (in addition to plaintiff's note) the $300, and Dresbach the shares of stock worth $1,100. Upon a rescission, which contemplates that the parties are to be placed in statu quo, neither defendant should be required to return anything more than that which was obtained by him. If the action had been one for damages for deceit, the two defendants, if jointly connected with the alleged wrong, would both have been liable for the full amount of all damages. But, as we have said, the action was not of that character. The party defrauded may elect to rescind the contract, or to affirm it and claim damages. He cannot do both at the same time. 20 Cyc. 88; Westerfeld v. N. Y. Life Ins. Co., 129 Cal. 68, 58 Pac. 92, 61 Pac. 667. Here he has elected the former remedy.

[4] Of the alleged errors in rulings on evidence, only one is important enough to require notice. The court should have permitted the defendants to introduce the evidence offered by them on the question whether the batteries in the automobile were new. The plaintiff's main ground of complaint was that the machine was equipped with old batteries. The defendants were clearly within their rights in endeavoring to contradict the testimony which had been offered by the plaintiff on this point.

Other points are made, but the foregoing are sufficient to dispose of the appeal, and to direct the course of proceedings upon the new trial which must be had.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; VICTOR E. SHAW, Judge pro tem.

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175 Cal. 354

In re ALLEN'S ESTATE.

ALLEN v. UNION TRUST & SAVINGS BANK OF PASADENA.

(L. A. 4714.)

(Supreme Court of California. June 7, 1917.)

Appeal and Error ⚷635(3)—Record—Failure to Set Forth All the Evidence.

An order denying a petition, under Code Civ. Proc. § 1723, to obtain a decree declaring that the homestead of petitioner's deceased had vested in herself, will be affirmed, where the record does not contain all the evidence given at the trial on which the court found that the homestead had been abandoned, and appellant did not request a transcript under section 953a.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2779, 2829.]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Clark P. Allen, deceased. Hattie E. Allen, widow, appeals, adversely to Union Trust & Savings Bank of Pasadena, guardian of George E. Allen, from an order denying her petition to obtain a decree that the homestead of herself and her deceased husband had vested in herself. Affirmed.

Charles Lantz, of Los Angeles, for appellant. Hahn & Hahn, of Los Angeles, for respondent.

SHAW, J. The appeal here presented is from an order denying the petition of Hattie E. Allen, as the widow of the decedent, under section 1723 of the Code of Civil Procedure, to obtain a decree declaring that the homestead of herself and said decedent, declared and filed by her alone, during their marriage, upon a certain lot of land, said lot being her separate property, has vested in her as the surviving spouse. Opposition to her petition was made by the respondent as guardian of the child of the decedent, and also as executor of the estate of the decedent. Thereupon there was a trial of the cause, evidence oral and documentary was introduced, the court made findings to the effect that the declaration of homestead on the lot had been duly filed as alleged, and that subsequently, during said marriage, the petitioner and Clark P. Allen, her husband, abandoned the homestead by executing, acknowledging, and causing to be duly recorded their deed conveying said lot in fee to Harriet E. Winslow. Thereupon the order was made denying the petition.

The record does not set forth the evidence given at the trial upon which the court found that the homestead had been abandoned. The clerk and the judge of the superior court each certify that the record contains true copies of certain documents on file in the cause; but the certificates do not state that these comprise all the documents used at the hearing, or that no other evidence was intro-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

duced. The findings state that oral testimony was given. It does not appear that the appellant ever gave to the clerk the notice required by section 953a of the Code of Civil Procedure, specifying the papers to be included in the transcript, or requesting a transcript of the testimony. Hence there is no affirmative showing that she was entitled to a reporter's transcript of the testimony, or to a clerk's transcript of papers on file. Schmitt v. White, 172 Cal. 559, 158 Pac. 216; Pierce v. Works, 171 Cal. 687, 154 Pac. 852; Hibernia S. & L. S. v. Doran, 161 Cal. 118, 118 Pac. 526. There is no bill of exceptions. All presumptions are in favor of the action of the court below. Error must be affirmatively shown by the record. The finding that the homestead was abandoned is sufficient to defeat the petitioner's claim and to support the order appealed from.

The order is affirmed.

We concur: VICTOR E. SHAW, Judge pro tem; SLOSS, J.

175 Cal. 356

In re ALLEN'S ESTATE. (L. A. 4964.)

(Supreme Court of California. June 7, 1917.)

1. APPEAL AND ERROR 🔑117—ORDERS APPEALABLE—ORDERS IN PROBATE.

An order denying appellant's motion, under Code Civ. Proc. § 473, to be relieved from the consequences of her failure to propose a bill of exceptions within the time allowed, is not appealable, as it does not come within the single exception to the rule that the appellate jurisdiction of the Supreme Court in probate matters extends only to such orders and judgments as are specified in section 963, subd. 3.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 805–812.]

2. APPEAL AND ERROR 🔑82(1)—APPEALABLE ORDER—STATUTE—CONSTRUCTION.

The provision of Code Civ. Proc. § 963, subd. 2, that an appeal may be taken from a special order made after final judgment, has no application to probate proceedings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 517.]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Clark P. Allen, deceased. Hattie E. Allen, widow, appealed from an order denying her petition for a decree adjudging that a homestead had vested in her. The decree was affirmed, and she appeals from an order denying her motion, under Code Civ. Proc. § 473, to be relieved from the consequences of her failure to propose her bill of exceptions within the time allowed. Appeal dismissed.

Charles Lantz and Howard F. Shepherd, both of Los Angeles, for appellant. Hahn & Hahn, of Los Angeles, for respondent.

SLOSS, J. Hattie E. Allen, widow of the decedent, appealed from an order denying her petition for a decree that a homestead had vested in her. We have just given judgment affirming the order. Estate of Allen (L. A. No. 4714) 165 Pac. 1010. The opinion filed on that appeal shows that no reporter's transcript or bill of exceptions was brought up. The present appeal has to do with the petitioner's effort to secure such bill of exceptions. It appears that, for some reason, she failed to propose her bill within the time allowed, and then, upon due notice, applied to the court, under section 473 of the Code of Civil Procedure, for relief from the consequences of such failure. Her motion was based upon the ground of excusable neglect. The court denied the motion, and from the order of denial the widow now appeals.

[1] The appeal cannot be considered. The order sought to be reviewed is not one from which an appeal lies. We have very recently (Estate of Spafford, 165 Pac. 1) had occasion to reaffirm the well-settled rule that the appellate jurisdiction in probate matters extends only to such orders and judgments as are specified in the third subdivision of section 963 of the Code of Civil Procedure (Estate of Calahan, 60 Cal. 232; Estate of Lutz, 67 Cal. 457, 8 Pac. 39; Estate of Wiard, 83 Cal. 619, 24 Pac. 45; Estate of Wittmeier, 118 Cal. 255, 50 Pac. 393; Estate of Cahill, 142 Cal. 628, 76 Pac. 383). This rule is subject to the limitation that an appeal will lie from an order granting or denying a motion for a new trial, in those proceedings in probate in which such motion is proper. Estate of Bauquier, 88 Cal. 302, 26 Pac. 178, 532; In re Walkerly, 94 Cal. 352, 29 Pac. 719; In re Spencer, 96 Cal. 448, 31 Pac. 453. But, with this exception, subdivision 3 is the only part of section 963 to which resort may be had in determining what orders or judgments in probate may be made the subject of an appeal.

[2] The provision of subdivision 2 that an appeal may be taken from a special order made after final judgment has no application to probate proceedings. Estate of Walkerly, supra; Estate of Smith, 98 Cal. 636, 33 Pac. 744; Iversen v. Superior Court, 115 Cal. 27, 46 Pac. 817; Estate of Cahill, supra. The order here in question is not embraced within the terms of subdivision 3 of section 963.

Counsel for appellant cites a number of cases, of which Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332, is an example, in which this court has entertained appeals from orders granting or refusing the relief which was here sought. None of these, however, was a proceeding in probate. All were civil actions, and the order was therefore appealable as a "special order made after final judgment." Code Civ. Proc. § 963, subd. 2.

The appeal is dismissed.

We concur: SHAW, J.; VICTOR E. SHAW, Judge pro tem.

33 Cal. App. 296

GRACA v. RODRIGUES. (S. F. 8247.)

(Supreme Court of California. May 21, 1917.)

1. ASSIGNMENTS 🔑27—CONTRACTS ASSIGNABLE—COVENANT.

A covenant or obligation entered into with one buying a business, binding the seller to refrain from engaging in a like business within specified territorial limits, is assignable.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 40.]

2. GOOD WILL 🔑6(1)—COVENANT IN RESTRAINT OF TRADE—PERSONS ENTITLED TO ENFORCE.

Civ. Code, § 1673, providing that every contract restraining the exercise of a lawful business except as otherwise provided shall be void, and section 1674, providing that one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified territory so long as the buyer or any person deriving title to the good will from him carries on a like business therein, do not limit a covenant in restraint of trade to a person deriving title directly from the original buyer, but permit an assignee of the buyer's assignee to rely on and enforce such a covenant.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. § 2.]

In Bank. Appeal from Superior Court, Alameda County; W. M. Conley, Judge.

Action by A. F. Graca against Frank Rodrigues. From judgment for defendant, plaintiff appeals. Reversed, with directions.

The following is the opinion of Kerrigan, J., in the District Court of Appeals, in which Lennon, P. J., and Richards, J., concurred:

This is an appeal taken on the judgment roll from the judgment sustaining the defendant's demurrer to plaintiff's amended complaint, the order sustaining the demurrer being made without leave to the plaintiff to amend.

The purpose of the action is to restrain the defendant from conducting a grocery business within a certain locality in the city of Oakland, contrary to an express covenant by him not to engage in a like business within that area. The complaint alleges that the defendant, the original owner of the business, agreed with his immediate covenantees, their executors, administrators and assigns, not thereafter to open or conduct any other grocery store or grocery business within a certain specified limited area; that thereafter said covenantees sold and transferred the grocery store and the good will thereof to one Luz, and assigned and transferred to him the bill of sale and the covenant and agreement just referred to; that Luz on or about February 26, 1916, sold, and delivered the said grocery business together with the good will thereof to the plaintiff, and assigned and transferred to the plaintiff said bill of sale and agreement of defendant. It thus appears from the face of the complaint that the plaintiff is the assignee of an assignee of the original covenantee of the defendant; and for this reason the defendant asserts that the complaint fails to state or show a cause of action in the plaintiff. It is argued in support of the defendant's contention that the action is one to enforce a covenant which is void for the reason that it is in restraint of trade, and does not come within the exception to section 1673 of the Civil Code provided in the section following. Those two sections read, respectively, as follows:

"Sec. 1673. Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided for by the next two sections, is to that extent void.

"Sec. 1674. One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified city, county, or a part thereof, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein."

It is argued that under the provisions of these sections the limit to which a covenant in restraint of trade can be carried is in favor of a person deriving title directly from the original purchaser. This position is sustained by the case of Johnston v. Blanchard, 16 Cal. App. 328, 116 Pac. 975, in which the court says: "While appellant does not direct our attention to the fact or make any point thereon, reference to the judgment discloses that it is erroneous in this, that by its terms defendant is enjoined from engaging in or carrying on the business * * * in the county of Los Angeles * * * so long as plaintiff, 'or his successors or assignees,' continue in business." After quoting section 1674, Civil Code, the court, continuing, says: "Under the provision of this section of the Code, plaintiff, who derived his title to the good will of the business by a transfer from W. W. Lee, who was the buyer from defendant, is entitled to have the contract enforced for his protection so long as he carries on a like business in the county, but such right cannot be extended to his successors or assigns. It therefore follows that the judgment, in so far as it has reference to the successors or assignees of plaintiff, is unwarranted and to that extent erroneous."

[1, 2] With diffidence and reluctance we disagree with this view of the law. Good will is an important and valuable incident to a business which the law recognizes and protects. With a business it may be sold or mortgaged, and is property transferable like other property. Civ. Code, § 993. A covenant or obligation entered into with a buyer to refrain from engaging in a like business within specified territorial limits is assignable. Cal. Steam Navigation Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511. Such contract and good will are valid when held by the assignee of a purchaser even if no reference is made therein to the successors and assigns of the purchaser. 12 R. C. L. 991. In Swanson v. Kirby, 98 Ga. 586, 26 S. E. 71, it appeared that the defendant had sold out his business as a ticket broker to the plaintiff, and had contracted not to open another ticket business in the city of Atlanta without his consent. The purchaser transferred the contract to a third party, who sold the business to another, and the latter entered into partnership with the plaintiff, the original purchaser from the defendant. This partnership was later dissolved and the plaintiff continued in the business alone. It was held that the benefit of the contract not to engage in the ticket business without the consent of the plaintiff passed to the purchaser with each transfer of the business. An examination of the authorities discloses that the law generally provides that the good will of a business may be sold with the business and assigned through successive transfers without limit. We do not believe that the Legislature of this state, when enacting section 1674, intended to adopt a different rule. We can conceive of no good reason why it should have done so, or why the assignee of an assignee of a purchaser of the good will of a business is not as much entitled to protection as any of his predecessors in interest. We think under a reasonable construction of this section that he is so entitled. It is often said that contracts in restraint of trade should be strictly construed;

that they are against public policy, and therefore presumably bad; and that their provisions should not be extended by construction or implication so as to favor persons desiring to enforce them beyond what their terms would clearly require. Perhaps the modern rule is that such contracts should be construed without any adverse bias. 24 Am. & Eng. Ency. of Law, 857; Herriman v. Menzies, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81. However that may be, under the contract here in question the defendant, as vendor, did intend to bind himself in favor of his immediate purchaser and the latter's successive transferees; and the only question that we are called upon to consider is whether the parties to the contract under the sections above quoted have the power to so contract. Construing the sections liberally, as required by the Code of this state, we think the benefit of the covenant of the contract not to engage in the grocery business within the designated limited area passed to the purchasers with each transfer of the business.

The judgment is reversed, with directions to the trial court to overrule the demurrer and permit the defendant to answer.

On resubmission, Lennon, P. J., filed the following:

The judgment is reversed, with directions to the trial court to overrule the demurrer and permit the defendant to answer, for the reasons stated in an opinion filed March 1, 1917, which opinion is hereby adopted as the opinion of the court following the resubmission of the cause, and said opinion is hereby ordered refiled as of this date.

A. Q. Lomba and W. W. Moreland, both of Oakland, for appellant. Gonsalves & Keller, of Oakland, for respondent.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District is denied.

The opinion is in conflict with what was said by the District Court of Appeal of the Second Appellate District as to the proper construction of section 1674 in Johnston v. Blanchard, 16 Cal. App. at page 328, 116 Pac. 973, as is shown by the opinion in this case. We are satisfied that the opinion in this case correctly states the law on the point discussed, and that what was said thereon in Johnston v. Blanchard, supra, must be disapproved.

(175 Cal. 358)

FRESNO TRACTION CO. v. ATCHISON, T. & S. F. RY. CO. (S. F. 7070.)

(Supreme Court of California. June 7, 1917. Rehearing Denied July 5, 1917.)

1. NEGLIGENCE 🔑6 — WHAT CONSTITUTES — NONCOMPLIANCE WITH STATUTE.

Failure to perform duty imposed by law is sufficient evidence of negligence, though the person damaged had knowledge of such failure prior to the accident.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 8.]

2. NEGLIGENCE 🔑56(3) — NONCOMPLIANCE WITH STATUTE—PROXIMATE CAUSE.

No action for damages can be founded on negligence from failure to perform a duty imposed by a statute, unless such negligence directly contributed to the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 70.]

3. RAILROADS 🔑297(4) — DISOBEDIENCE OF ORDINANCE—EVIDENCE.

The rule that proof of disobedience of an ordinance constitutes proof of negligence per se is not altered by the fact that the corporation, bound under the ordinance to maintain a safety device, proves its continued disobedience.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 947.]

4. RAILROADS 🔑297(4)—VIOLATION OF ORDINANCE—PROXIMATE CAUSE—PROOF.

Evidence that the owners of intersecting railway tracks by mutual consent discontinued the use of safety gates required by a city ordinance, and substituted a system of signals by watchmen, conclusively showed that the negligence involved in disobedience of the ordinance was not the proximate cause of a subsequent collision.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 947.]

5. RAILROADS 🔑345(3)—EVIDENCE ADMISSIBLE UNDER PLEADING—ORDINANCE.

In an action by one railway company against another for damages from a collision, due to violation of an ordinance requiring the maintenance of safety gates, the ordinance and proof of its violation were admissible under general allegations of the complaint.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1115.]

Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Fresno Traction Company against the Atchison, Topeka & Santa Fé Railway Company. From judgment for plaintiff, and denial of new trial, defendant appeals. Affirmed.

U. T. Clotfelter, of Los Angeles, James Gallagher, of Fresno, and A. H. Van Cott, of Los Angeles, for appellant. Short & Sutherland and Everts & Ewing, all of Fresno (Carl E. Lindsay, of Fresno, of counsel), for respondent.

MELVIN, J. Defendant appeals from a judgment for $3,000 by way of damages and from an order denying its motion for a new trial. The cause was tried before a jury. Plaintiff and defendant are transportation companies. Their tracks intersect at a street crossing in the city of Fresno, and at that place, in the nighttime, one of defendant's trains backed into a car belonging to plaintiff, causing the damages for which judgment was given.

The complaint alleged that the injury to the property of the plaintiff was caused by the negligence of defendant's employés in the operation of a freight train. It was specifically charged that defendant's servants were negligent because of the failure to maintain lights upon the rear end of the train which backed into plaintiff's electric car, by reason of the neglect to ring the bell or blow the whistle of the locomotive, and owing also to the fact that a watchman employed by defendant and stationed near the point of intersection of the tracks gave the motorman and conductor of plaintiff's car a signal that a safe crossing might be made. There was also the general allegation, usual in such complaints, that the collision was wholly caused by the carelessness and negligence of the defendant, and without any fault on the part or behalf of plaintiff. The answer denied the acts of negligence specifically set forth in the complaint, and pleaded as a distinct defense that the collision was caused solely and proximately by the negligence of plaintiff's servants.

The principal contentions on behalf of defendant in favor of a reversal (and the only ones requiring discussion by this court) are made in connection with the admission in evidence of an ordinance of the city of Fresno and certain instructions with reference to that by-law given by the court to the jury. This ordinance required the maintenance and operation of safety gates by defendant at the crossing where the accident occurred, and it was shown by the evidence that, in obedience to the mandate of the law, defendant had erected such gates; but because it was shown without contradiction that for several months preceding the collision defendant had ceased to operate the gates, and that this fact was known to plaintiff, and particularly to the motorman in charge of the car which was demolished, it is argued that the ordinary rule with reference to negligence imputable to a defendant by its violation of a statute has no application to the case at bar, and that the introduction of the ordinance and the giving of instructions based thereon amounted to error, entitling the Atchison, Topeka & Santa Fé Railway Company to a new trial.

[1, 2] We do not agree with this contention. It is the settled law of California that the failure of any person to perform a duty imposed by law is sufficient evidence of negligence. But no action for damages may be founded upon such negligence unless it directly contributed to the injury. McKune v. Santa Clara Valley Mill & Lumber Co., 110 Cal. 480–486, 42 Pac. 980; Cragg v. Los Angeles Trust Co., 154 Cal. 663–667, 98 Pac. 1063, 16 Ann. Cas. 1061; Stein v. United Railroads, 159 Cal. 368–371, 113 Pac. 663; Simoneau v. Pacific Electric Ry. Co., 166 Cal. 264–269, 136 Pac. 544, 49 L. R. A. (N. S.) 737; Fenn v. Clark, 11 Cal. App. 79–81, 103 Pac. 944; Scragg v. Sallee, 24 Cal. App. 133–143, 140 Pac. 706; Slaughter v. Goldberg, Bowen & Company, 26 Cal. App. 318–327, 147 Pac. 90.

[3-5] The rule of law that proof of disobedience of an ordinance constitutes proof of negligence per se is not altered by the fact that the corporation bound under that ordinance to maintain a device intended for the safety of the public proves its continued disobedience to the law. This, of course, will not be disputed, nor will any one deny the right of the legislative body having proper police power to prescribe such automatic appliances rather than the constant attendance of watchmen. Safety gates rarely get out of order and never get drunk or careless. If, however, by mutual consent of the owners of intersecting tracks, use of the safety gates has been discontinued, and a system of signals by watchmen has been substituted, those facts, if proven, constitute a complete showing that the negligence involved in the violation of the law was not the proximate cause of any collision. But it does not follow by any means that, where the negligence of the defendant, in a case like this, is averred generally as well as specifically, the court is in error in admitting the violated ordinance, and in stating to the jury the law substantially as it is expressed in the foregoing citations. The ordinance and its violation became relevant under the general averments of the complaint. Such a matter is essentially one of evidence, and not of pleading. Cragg v. Los Angeles Trust Co., supra; Connell v. Harris, 23 Cal. App. 537, 138 Pac. 949.

As the ordinance was properly received in evidence, it was permissible for the court to instruct the jury upon the law of negligence as declared by our decisions. This was done. That failure to comply with an ordinance such as the one introduced in evidence would be negligence on the part of defendant was stated to the jury; but the jurors were also told that upon the plaintiff was placed the burden of proving by a preponderance of the evidence that "the sole proximate cause of the collision * * * was the negligence of the employés of the said defendant." Taken all together, the instructions fairly stated the law to the jury, and we cannot see that defendant was prejudiced. The motorman in charge of plaintiff's electric car testified unequivocally that he knew of the disuse of the safety gates for several months immediately preceding the collision. The conclusion is almost inevitable, therefore, that the verdict was founded upon other elements of negligence, which were supported by abundant evidence tending to establish also their proximate relation to the destruction of the plaintiff's car.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

175 Cal. 401

SCHWARZ & GOTTLIEB, Inc., et al. v. MARCUSE et al. (S. F. 6991.)

(Supreme Court of California. June 8, 1917. Rehearing Denied July 5, 1917.)

1. PARTNERSHIP 🔑64—RIGHT TO SUE—FICTITIOUS NAME.

An action was not maintainable by P. H. M. and E. W. M. under the designation of M. & Son, without filing the certificate contemplated by Civ. Code, §§ 2466, 2468, prohibiting any partnership from doing business or maintaining an action under a fictitious name without having first filed a certificate with the clerk of the county showing the names of the persons interested as partners.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 87–91.]

2. MECHANICS' LIENS 🔑121—NOTICE—ESTOPPEL.

In view of the fact that Code Civ. Proc. §§ 1187, 1190, give several starting points for the filing of a mechanic's or a materialman's lien, any one of which may be equivalent to "a completion," not "the" completion, of a building, the owner is estopped to deny the timeliness of a notice, where it is filed within 90 days of completion or abandonment, unless such period is lessened by his act in giving the formal notice provided for by the statute, even though the lien claimant has previously filed and afterwards abandoned a claim filed within 30 days of completion or abandonment of work.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 164.]

Angellotti, C. J., and Sloss, J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Consolidated actions by Schwarz & Gottlieb, Incorporated, and others against Felix Marcuse and others. From judgment for defendants, plaintiffs appeal. Affirmed as to part of appellants and reversed as to part.

Henry A. Jacobs, of San Francisco, for appellants. Alexander D. Keyes, of San Francisco, for respondents.

MELVIN, J. The case was decided upon appeal by the District Court of the Third Appellate District and was transferred to this court for the purpose of a further consideration of two of the points involved.

[1] The first of these questions was whether or not P. H. Murphy and E. W. Murphy could maintain an action under the designation of P. H. Murphy & Son without filing the certificate contemplated by sections 2466 and 2468 of the Civil Code. If this were a question unaffected by Californian precedent we might, perhaps, hold that the partnership had the right and capacity to sue, but in view of the decisions of this court, and particularly the opinion in the case of North v. Moore, 135 Cal. 621, 67 Pac. 1037 (decided in 1902), in which it was held that "Abrams Bros." was not a designation showing the names of persons interested as partners, we are satisfied that the opinion of the District Court of Appeal written by Mr. Presiding Justice Chipman correctly states the law. Supplementing his comments upon Axe v. Tolbert, 179 Mich. 556–566, 146 N. W. 418, we may say that the statement of the court in that case is not entirely supported by the citations made. The first of these (Castle Bros. v. Graham, 87 App. Div. 97, 84 N. Y. Supp. 120; s. c., 180 N. Y. 553, 73 N. E. 1120) is in absolute conflict with North v. Moore, and is therefore not authoritative in California. The two Californian cases cited by the Michigan Supreme Court (Pendleton v. Cline, 85 Cal. 142, 24 Pac. 659 and Carlock v. Cagnacci, 88 Cal. 600, 26 Pac. 597) involve partnerships in which suit was brought in each instance by partners using their names, but not their initials. Bovee v. De Jong, 22 S. D. 163, 116 N. W. 83, was exactly like the two cases last discussed, and was decided upon their authority. Guiterman v. Wishon, 21 Mont. 458, 54 Pac. 566, was a case in which "Guiterman Bros." was held a sufficient designation of the names of the partners. This also is of no value as authority in this state, owing to the later decision of North v. Moore. Patterson v. Byers, 17 Okl. 633, 89 Pac. 1114, 10 Ann. Cas. 810, the last case cited by the Supreme Court of Michigan in the Axe Case, announces the remarkable conclusion that "Patterson Furniture Company" shows that there is a company composed of persons whose surname is Patterson; and that "it further shows that there are no other members of the firm except those whose surname is Patterson." Evidently the learned justice who wrote that opinion overlooked the fact that commonly the title "Patterson Furniture Company" might indicate a corporation or copartnership in which the stockholders or members might or might not be Pattersons. It will thus be seen that neither by its reasoning nor its cited authority is Axe v. Tolbert of convincing weight.

Upon the appeals of P. H. Murphy & Son and of William A. Fagan we adopt the opinion of the learned district court of appeal as follows:

"Several actions to enforce laborers' and materialmen's liens were consolidated. Of these, the following plaintiffs appeal from the judgment, namely: P. H. Murphy & Son, William A. Fagan, Pope & Talbot (a corporation). There is an appeal also by plaintiffs H. W. B. Taylor and Henry Walter, but the finding as to them is not challenged and the judgment must be affirmed.

"The Claim of P. H. Murphy & Son.

"Respondents assign two grounds in support of the judgment against the claim of P. H. Murphy & Son: First, that the firm name of P. H. Murphy & Son does not show the names of the persons interested in the partnership, and, as it was admitted that P. H. Murphy & Son had not filed with the clerk of the county in which was their principal place of business the certificate required by section 2466 of the Civil Code, they were forbidden by section 2468 of the same Code to maintain the action; second, that the lien was filed too late or at the wrong time.

"Upon the first of these grounds the court made the following finding: 'That at the date of the filing of the complaint in action No. 47202 and during all the times therein mentioned and continuously ever since the date of the filing of the last-mentioned complaint, the plaintiffs P. H. Murphy and E. W. Murphy were partners transacting business in the state of California under a designation not showing the names of the persons interested as partners in such business, to wit, under the designation of P. H. Murphy & Son. That a certificate stating the names in full of all the members of such partnership and their places of residence was never filed with the clerk of the county in which the principal place of business of such partnership was situated during all the times mentioned in the last-mentioned complaint and in these findings, and that such certificate was not published in a newspaper published in such county or elsewhere, and that the contract and transaction upon which the causes of action of the plaintiffs P. H. Murphy and E. W. Murphy, hereinbefore referred to, are based, were made and had under said partnership name of P. H. Murphy & Son, and for that reason the said plaintiffs P. H. Murphy and E. W. Murphy cannot maintain any action on said contract or transaction.'

"P. H. Murphy testified: 'The firm of P. H. Murphy & Son is a copartnership composed of myself and my son, E. W. Murphy. There are no other members of the firm. We are transacting business in this state. No certificate of copartnership * * * has been filed in the office of the county clerk of the city and county of San Francisco, or has any such certificate been filed elsewhere. The name of my son who is my partner is Edward William; he is not my only son; I have two others.'

"Section 2466 of the Civil Code reads as follows: 'Except as otherwise provided in the next section every person transacting business in this state under a fictitious name and every partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the county in which his or its principal place of business is situated, a certificate, stating the name in full and the place of residence of such person and stating the names in full of all the members of such partnership and their places of residence. Such certificate must be published once a week for four successive weeks, in a newspaper published in the county, if there be one, and if there be none in such county, then in a newspaper in an adjoining county.'

"Section 2468 as amended provides: '* * * No person doing business under a fictitious name, or his assignee or assignees, nor any persons doing business as partners contrary to the provisions of this article, or their assignee or assignees, shall maintain any action upon or on account of any contract or contracts made, or transactions had, under such fictitious name, or in their partnership name, in any court of this state until the certificate has been filed and the publication has been made as herein required.'

"The Supreme Court, in North v. Moore, 135 Cal. 621, 67 Pac. 1037, said: '"Abrams Bros." cannot be said to be a designation "showing the names of the persons interested as partners." The firm name might apply equally to a partnership composed of two or more, and might embrace all or only some of the brothers of the name of Abrams. The statute clearly defeats their right to maintain the action against Moore, and leaves them without any right to be heard on this appeal.'

"In Nicholson & Co. v. Auburn G. M. & M. Co., 6 Cal. App. 547, 92 Pac. 651, it was held, as also in Byers v. Bourret, 64 Cal. 73, 28 Pac. 61, that Nicholson & Co. in the former, and J. D. Byers & Co. in the latter, case was not a designation showing the names of the persons interested as partners in the business. Trudel v. Butori, 19 Cal. App. 584, 127 Pac. 76, cited by appellant, is not in point. There the claim of F. X. Trudel & Son was assigned to plaintiff in whose favor judgment was entered, and it was held, on the authority of Gray v. Wells, 118 Cal. 11, 50 Pac. 23, that the assignee could maintain the action. The statute was amended in 1911 (Stats. 1911, p. 441), probably because of this decision, making the section applicable to assignees of persons doing business as partners contrary to the provisions of the article, which was not the case prior to the amendment. Section 2468, Civ. Code. Pendleton v. Cline, 85 Cal. 142, 24 Pac. 659, and McLean v. Crow, 88 Cal. 644, 26 Pac. 596, are cited by appellants. In the Pendleton Case it was held that the firm name of Pendleton & Williams was not fictitious, and that 'it was true as far as it went,' and fell short only in not showing the full names of all the partners; that the reason underlying the statute for all practical purposes 'is satisfied by information as to the surnames of the partners.' McLean v. Crow followed this rule.

"In the case of Axe v. Tolbert, 179 Mich. 556, 146 N. W. 418, a contract was entered into in which 'Wm. Axe & Son' were mentioned 'as party of the second part,' the contract relating to an option given second party to purchase certain land. The action was brought by 'Wm. Axe and another, partners as Wm. Axe & Son.' It was urged as a defense 'that plaintiffs had no standing in court for the reason they do not show that they had filed with the county clerk a proper certificate setting forth the names of the members of the firm in compliance with Act No. 101, Pub. Acts 1907.' It appeared that 'no mention was made of this defense in the plea and notice filed.' This, under our decisions, would have been sufficient to justify the court in disregarding the defense, for it has been held that the failure to file the required certificate must be taken advantage of, as matter of defense, by answer or plea in abatement, and will otherwise be deemed waived. Phillips v. Goldtree, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451; Carlock v. Cagnacci, 88 Cal. 600, 26 Pac. 597. It was not necessary to the decision in the Axe Case that the statute should be construed as it was. The court, however, stated that the firm name was not 'an assumed or fictitious name in contemplation of the statute. * * * It gives the full name of the head of the firm, and plainly discloses the identity of the other member. Persons doing business with the firm would be advised who the members were and whom to hold responsible.' The court cites, among others, the cases in 85 and 88 Cal., supra, which, as has been shown, are quite different from the Axe Case, for there the surnames of all the partners were given. The statute in the Axe Case is not before us, and it may refer to 'an assumed or fictitious name.' Our statute deals, not only with fictitious names, but refers also to a name which does not 'show the names of all the persons interested as partners.'

"We cannot accept the reasoning in the Axe Case. The name P. H. Murphy & Son may not be fictitious in the sense of the statute, nor is it claimed so to be by respondents. What they claim is that 'the designation does not show the name of E. W. Murphy.' There were other sons of P. H. Murphy besides E. W., the partner. Respondents in their brief say: 'The word "son" may have been a family name. There is a well known text-book written by a lawyer named Son, "Son on Corporations." In the San Francisco directory we find the firm name "Kingsley & Son," a firm composed of Ampro A. Kingsley and Emma Son. The most that can be said of the name of P. H. Murphy & Son is that it suggests the probability that the partner referred to as Son bears the same name as the partner referred to as Murphy. But the designation does not show the name of Murphy more than once, whereas the statute requires it to show the name of Murphy twice in order to comply with section 2466.' It seems to us our Supreme Court went as far as we should go, without frittering away the statute, in holding, as it did in Pendleton v. Cline and McLean v. Crow, supra, that where the surnames appear the full names are not required. Here, however, we are asked to hold that 'Son' in the designation of the firm not only means Murphy, but a particular son of P. H. Murphy, to wit, E. W. Murphy, whereas in fact he had two other sons. The designation of P. H. Murphy & Son, it is true, as was said in the Axe Case, 'gives the full name of the head of the firm,' but it does not 'plainly or at all disclose the name of the other member,' as was held in that case. It is not sufficient to identify the head of the firm alone. The statute expressly says, where the business is conducted under 'a designation not showing the names of the persons interested as partners in such business,' the certificate must be filed. We can, in applying the statute, see no difference between the designation 'Abrams Bros.' (North v. Moore, supra), and the designation 'P. H. Murphy & Son.' The identity of the partners or partner is not shown in either case.

"Defendants in their answer alleged that P. H. Murphy and E. W. Murphy were a partnership transacting business in this state under a designation not showing the names of the persons interested as partners in such business, to wit: Under the designation of 'P. H. Murphy & Son,' and further alleging 'that a certificate stating the names in full of all the members of such partnership and their places of residence was never filed with the clerk of the county,' etc. This answer was filed long before the trial. At the trial, and after the evidence had been given upon the question, counsel 'requested the court, in the event that the court should decide that plaintiffs were such a partnership as would be included under section 2466 of the Civil Code, that a continuance be granted in the trial for the purpose of permitting plaintiffs P. H. Murphy and E. W. Murphy to comply with the provisions of sections 2466 and 2468 of the Civil Code by filing the certificate required and publishing the same, and that the trial of the action thereupon proceed.' It is now urged that the court erred in not complying with this request. Whether the court, against defendants' objection, at this stage of the trial could have granted such request we do not decide, but that it was a matter within its discretion we have no doubt; and we cannot say that its discretion was abused. We think the plaintiffs could not maintain the action, and hence it is not necessary to discuss the second ground urged in support of the judgment.

"The William A. Fagan Claim.

"The court found 'that the plaintiff William A. Fagan was a person transacting business in the state of California under a fictitious name, to wit, the name of Panama Electric Company, and that the said plaintiff never filed in the office of the county clerk * * * a certificate stating the name in full and the place of residence of said William A. Fagan, who was then and there a person transacting business under said fictitious name of Panama Electric Company, and never published such certificate in any newspaper. That the contract and transactions upon which the plaintiff William A. Fagan based his complaint in the said action No. 47202 were in fact contracts made between the plaintiff William A. Fagan, doing business under the fictitious name of Panama Electric Company with the defendant, Felix Marcuse (the contractor), and were in fact transactions had by the said plaintiff under the said fictitious name, and for that reason the said William A. Fagan cannot maintain any action on said contract or transactions.'

"It appeared that Henry Walter and H. W. B. Taylor filed and published a certificate in which they stated that they were partners doing business under the firm name of Panama Electric Company, and that Walter and Taylor were the only members of the firm. Fagan explained in his testimony the reason for this being done as follows: 'The reason Mr. Taylor and Mr. Walter became members of the Panama Electric Company is this: I am a member of local No. 6 of the Electrical Workers, and therefore cannot work on contracts. I asked Taylor and Walter if I might use their names, thus allowing me to work on contracts, and they said I could without giving them any compensation.' Fagan testified further: 'Q. What interest did the Panama Electric Company have in the contract in question? A. All interest. Q. What are the facts of the relation between yourself and the Panama Electric Company with reference to this particular contract and the work done? A. I own the Panama Electric Company; in fact the Panama Electric Company is William A. Fagan. * * * Q. Had the Panama Electric Company received any compensation or any amount for the work done on that building? A. The Panama Electric Company received $300 on account of the work done on that building. Q. When I state Panama Electric Company I mean Taylor and Walter. A. They have earned nothing. I received $300. Total amount I claimed is $650.50. Balance of $350.50 has not been paid.' On cross-examination he testified: 'Q. Mr. Fagan, as I understand you, during the time the Waldmann building was being put up you were doing business as a contractor under the name of Panama Electric Company. You had no partners? A. Legally I think I had. Q. Did you divide the profits? A. No. Q. Did you divide the expenses? A. No. Q. Between you and them the understanding was that it was only their names that were to be used, and that all losses were to be borne by you and you were to get all the profits? A. Yes. Taylor and Walter had no financial interest in the Panama Electric Company; did no work and had no work to be done; purchased no materials and supplied no materials; all done by me alone.'

"As set forth in the complaint the order given by the contractor, Marcuse, under which the work was done was as follows: 'San Francisco, Cal., May 3, 1912. Panama Electric Co., 426—24th Avenue, San Francisco—Gentlemen: You can go ahead with electric wiring at Golden Gate and Pierce at $612.00 as arranged today. Building will be ready in about ten days. Yours truly, Felix Marcuse.'

"We quote from appellant's brief: 'The contention of appellant is that the contract was entered into by Panama Electric Company as the agent of William A. Fagan, although the work was actually performed by William A. Fagan, and that it was not necessary for said William A. Fagan to file such certificate as required by the provisions of sections 2466–2468 of the Civil Code, in order to maintain this action. * * * If H. W. B. Taylor and Henry Walter were willing to enter into contracts for William A. Fagan in order to permit plaintiff Fagan to carry on business, they are the persons to complain, and not defendants herein. The defendants were not injured in any manner by the agreement entered into between Fagan and H. W. B. Taylor and Henry Walter.'

"We cannot accede to this view of Fagan's relation to the Panama Electric Company. He testified that he and the company were identical; that he is the company. If he was the company how could it be his agent in a legal sense, i. e., a distinct and separate entity, acting for him and in his stead? We understand the statute to require, not only that the names of the persons comprising the fictitious partnership must be stated, but truthfully stated. A person should not be permitted to do business under a fictitious name and be protected by a certificate that falsely represents the names of the partners to be some other persons. The very object of the statute would be thwarted if such evasion of the statute were countenanced. The court found, and it is not disputed, that Taylor and Walter had nothing to do with the contract or the building. If they represented the Panama Electric Company, it was a false as well as fictitious company. The real and true Panama Electric Company was Fagan, and as he filed no certificate he cannot maintain the action."

Pope & Talbot Claim.

Regarding the claim of Pope & Talbot a new question arises, but it is one in the solution of which we are aided by a decision of this court given since this matter was discussed by the District Court of Appeal. The essential facts and the question to be decided are well set forth by the District Court of Appeal, and we adopt that part of the opinion as follows:

"Pope & Talbot filed two claims of lien, the first on November 9, 1912; the second on December 27, 1912. Both claims were sufficient in form and substantially identical. Plaintiff failed to foreclose the first claim of lien, but brought an action to foreclose the second lien on March 14, 1913, within 90 days after the filing of the second claim of lien. The court found that, on October 17, 1912, the owners 'began to occupy and use the said building and entered into the occupation and use of the said building on the last-mentioned date, and that such occupation and use of the said building by the defendants (the owners) continued ever since said last-mentioned date; that the said occupation and use * * * has been open, notorious and continuous; * * * that none of the materials referred to in any of the said complaints and no part of the labor therein referred to were furnished after the 17th day of October, 1912; that on the 26th day of October, 1912, all labor upon the said contract between the defendants (the owners) and the said defendant Marcuse (contractor) ceased, and that no labor upon the last-mentioned contract or upon the last-mentioned building has been performed since the last-mentioned date; that at the time when the said labor ceased the last-mentioned contract was not completed, and never was completed; that within 40 days after cessation of labor upon the said contract, to wit, on the 30th day of November, 1912, the defendants (owners) filed for record in the office of the said recorder a notice setting forth the date on which such cessation of labor occurred, to wit, the 26th day of October, 1912, together with their names and the nature of their title and a description of the property sufficient for identification, to wit, the property referred to in the said complaints; that the said notice was verified by the defendants (owners).'

"The court found that: 'The claim of lien filed by the said plaintiff, Pope & Talbot, for recordation the 9th day of November, 1912, was in all respects valid, but that the action to foreclose the lien of said Pope & Talbot was commenced on the 14th day of March, 1913, more than 90 days after the said claim of lien was filed on the 9th day of November, 1912.' The court also found that Pope & Talbot filed another claim of lien 'for the same demand as that for which the said claim of lien on the 9th day of November, 1912, * * * and was precisely similar to that filed on the 9th day of November 1912,' except that it set forth that defendants [the owners] had, on November 30, 1912, filed a notice of cessation of labor upon the said building, and except one or two other statements not necessary to be stated. The court further found that the cause of action of Pope & Talbot 'is barred by the provisions of section 1190 of the Code of Civil Procedure.'

"Appellants contend that, the owners having recorded a notice of the cessation of labor showing, among other facts, that the contractor had, on the 26th day of October, 1912, abandoned the contract, this notice gave appellant the right to file a second claim of lien, and that respondents are estopped from questioning the validity of the second claim of lien. Defendants contend that 'by filing their claim of lien upon November 9, 1912, Pope & Talbot perfected their lien, and that their time to foreclose commenced then to run. They could not, by filing a second claim on the 27th day of December, 1913, extend by 48 the 90-day period which the law gave them in which to commence their action of foreclosure. Their lien, and their only lien, is therefore barred by the statute of limitations, and is not saved by the fact that a second claim of lien was thereafter filed.'

"Plaintiffs now contend that defendants, the owners, 'are estopped from questioning the validity of the second claim of lien, as the defendants are necessarily barred by their voluntary act in recording a notice of cessation.' "

It is true that, as Mr. Phillips says in his work on Mechanics' Liens:

"Where the law allows 90 days for filing a lien, and 90 days after filing in which to bring suit, and a good lien is filed, the second 90 days begins to run, and the time cannot be extended by amending or filing a new lien, though within the original 90 days." Phillips on Mechanics' Liens, § 323.

The text is supported by Battle v. McArthur (C. C.) 49 Fed. 715, and Mulloy v. Lawrence, 31 Mo. 583, is also to the same effect. In both of these cases the courts were construing a statute of the state of Missouri which gives to a railroad contractor a lien which must be filed within 90 days next after the completion of the work. It was properly held that the filing of one lien under the Missouri statute set in motion the statute of limitations, and that unless suit was brought within 90 days thereafter the lien ceased to exist by the express provisions of the law. But in California we have a very different statute which must be carefully examined in connection with the facts here presented. That is section 1187, Code of Civil Procedure, which in part, is as follows:

"Every original contractor, claiming the benefit of this chapter, within sixty days after the completion of his contract, and every person save the original contractor claiming the benefit of this chapter, within thirty days after he has ceased to labor or has ceased to furnish materials, or both; or at his option, within thirty days after the completion of the original contract, if any, under which he was employed, must file for record with the county recorder of the county or city and county in which such property or some part thereof is situated, a claim of lien. * * * In all cases any of the following shall be deemed equivalent to a completion for all the purposes of this chapter: The occupation or use of a building, improvement, or structure, by the owner, or his representative; or the acceptance by said owner or said agent, of said building, improvement, or structure, or cessation from labor for thirty days upon any contract or upon any building, improvement or structure or the alteration, addition to, or repair thereof; the filing of the notice hereinafter provided for. The owner may

> within ten days after completion of any contract, or within forty days after cessation from labor thereon, file for record in the office of the county recorder of the county where the property is situated, a notice setting forth the date when the same was completed, or on which cessation from labor occurred. * * * In case such notice be not so filed then the said owner and all persons deraigning title from or claiming any interest through him shall be estopped in any proceedings for the foreclosure of any lien provided for in this chapter from maintaining any defense therein based on the ground that said lien was not filed within the time provided in this chapter; provided, that all claims of lien must be filed within ninety days after the completion of any building, improvement or structure, or the alteration, addition or repair thereto."

In the recent case of Hughes Manufacturing & Lumber Co. v. Hathaway, 161 Pac. 1159, in which a petition for rehearing was denied on January 15, 1917, the court decided, after a review of said section 1187, Code of Civil Procedure, that a claim filed within 30 days after formal notice of completion by the owner (and, of course, the same rule would apply where notice of cessation from work was given) might be foreclosed as if filed within 30 days after the actual completion of the building (and, of course, the same principle is applicable in a case where the contractor had ceased to perform work and the statutory notice had been given). There were not successive liens filed in that case, as here, one prior and one subsequent to the owner's notice of completion, but the purpose and spirit of the statute were reviewed by Mr. Justice Shaw, in part, as follows:

> "The 10 days allowed for filing the notice of completion of such a contract begins to run at the time of its actual completion by the contractor. The lien claimant for materials furnished or labor done under such contract may not know the time of actual completion thereof, and the statute intends that he need not inquire diligently concerning it. He may watch the files of the county recorder and rely on the filing of the notice of completion, which, for the purpose of his time to file his claim of lien, is deemed to be the equivalent of the completion of the original contract under which he claims, and he may then file his claim within 30 days after the filing of such notice.
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> "If no notice of completion is filed, the claimant is only required to see that his claim is filed before the expiration of the period of 90 days after the completion of the building, that is, of the building as a whole, as provided in the last clause of the section. If his claim is filed within that period and also within 30 days after the filing of the notice of completion of the contract under which he claims, he may rest secure that it is filed in time. If he files the claim within 90 days after completion of the building, and the owner fails to file a notice of the completion of the original contract under which the lien is claimed, within 10 days after its actual completion or 40 days after cessation of labor thereon, the claimant may rely on the estoppel created by the statute to prevent the owner from disputing the timely filing of the action."

[2] The statute gives several starting points for the filing of the mechanic's or materialman's notice of lien, any one of which may be equivalent to "*a completion*"—not *the* completion—of the building. Unless the period is lessened by the owner's act in giving the formal notice, provided by the statute, of completion or cessation from the work, he is estopped to deny its timeliness if it be filed within 90 days of completion or abandonment. If Pope & Talbot had chosen to refrain from filing any claim at all until after the owner's act of giving notice of cessation from work, undoubtedly the claim of December 27th would have been entirely available, and the owner might not complain. How, then, is he injured by the abandonment of the original claim and the filing of a new one timed by his own act which by the statute is made "equivalent to a completion"? We can discover nothing operating to his detriment. The first claim of lien was not available against him at the time of the suit because of the limitation of section 1190 of the Code of Civil Procedure, but even if it had been, no court would permit two recoveries for the same items. Under the statute a lien claimant may select any one of several times as "equivalent to a completion." It is our opinion that these periods are not each exclusive of all of the others, or that action by the lien claimant, measured from one period, forecloses him from all resort to the other rights to which he may be entitled under section 1187. Nor do we conclude that because he has filed his claim within 30 days of actual completion or abandonment of work on the building he has inexorably set in motion the limiting restraint of section 1190, Code of Civil Procedure, against all of his rights. Rather do we regard each of those times and circumstances "equivalent to a completion" as setting in motion a new period for the filing of a claim, and that the limitation expressed in section 1190 applies to each of such claims as such, and not to all rights which the claimant may possibly enjoy under any one of them.

The judgment is affirmed as to all appellants except Pope & Talbot. As to that corporation, plaintiff and appellant, it is reversed.

We concur: SHAW, J.; HENSHAW, J.; LORIGAN, J.

ANGELLOTTI, C. J. I concur in the opinion and judgment, in so far as the affirmance as to all the appellants except Pope & Talbot is concerned.

I dissent from that portion of our judgment which reverses the judgment of the superior court as to appellant Pope & Talbot. It seems clear to me that, upon the facts stated in the opinion as to the claim of such appellant, the superior court correctly held that the cause of action for enforcement of the lien was barred by the provision of section 1190, Code of Civil Procedure. The lien of that claimant was fully perfected by the first filing, that of November 9, 1912, and, by express provision of the section, the property subject thereto was absolutely freed therefrom by the failure to commence enforcement proceedings in the proper court within 90 days thereafter. That our statute, as held in Hughes Mfg., etc., Co. v. Hathaway, 161 Pac. 1159, authorizes a lien claimant to select any one of several events as equivalent to the completion, within a certain time from which he must perfect his lien by filing his claim, appears to me to be altogether immaterial to the question here involved. Of course, as there held, he may select, at his option, any one of the events so prescribed. But he has only one lien. And when, whatever selection as to date of completion he may make, he has perfected that lien by the filing of a proper claim, the statute (section 1190, Code Civ. Proc.) begins to run against the lien itself, rendering it ineffectual for any purpose at the expiration of 90 days in the event that no action is instituted within that time for its enforcement.

SLOSS, J. I agree with the views expressed by the Chief Justice relative to the claim of Pope & Talbot.

I wish to express, in addition, my dissent from the court's decision on the claim of P. H. Murphy & Son. In my judgment, the firm name "P. H. Murphy and Son" showed "the names of the persons interested as partners," within the fair meaning of section 2466 of the Civil Code. I see no good reason for giving the section the strict interpretation adopted by the court. Anyone dealing with a firm called "P. H. Murphy & Son" would naturally assume (as was the fact here) that the firm was composed of two men named Murphy, P. H. Murphy being the father, and the other member his son. This assumption would be correct in all but very unusual cases. The partnership designation, therefore, disclosed the surnames of the partners, and this, we have held, is sufficient. Pendleton v. Cline, 85 Cal. 142, 24 Pac. 659; McLean v. Crow, 88 Cal. 644, 26 Pac. 596.

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33 Cal. App. 586

MAYBURY RANCH CO. v. DEVENNEY.

(Civ. 1823.)

(District Court of Appeal, Second District, California. May 7, 1917.)

PRINCIPAL AND AGENT 🔑103(12)—IMPLIED AUTHORITY—PURCHASE OF REAL ESTATE.

Where an agent is authorized to use his principal's check to bind a bargain for purchase of land by him, purchaser may assume that agent possesses authority to make contract for the purchase of land, which does not entitle his principal to a deed and a showing of clear title until the full amount of the purchase price has been paid, and is not put upon notice of any limitation on his authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 290.]

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by the Maybury Ranch Company against William Devenney, substituted for Orange County Title Company. Judgment for defendant, and plaintiff appeals. Affirmed.

A. L. Rowland and R. S. Parker, both of Pasadena, for appellant. Williams & Rutan, of Santa Ana, for respondent.

JAMES, J. Plaintiff appeals from a judgment adverse to it and from an order denying a motion for new trial. The suit was brought against the defendant corporation to recover the sum of $500 as money alleged to have been received from and for the use of the plaintiff. The defendant being an escrow holder, William Devenney was substituted in its place, upon the defendant paying into court the amount of money involved in the controversy. The case proceeded to trial as against Devenney, who is respondent herein.

Prior to October, 1913, one Cook was a person well known to the plaintiff corporation; he had served in their employ as superintendent of ranch properties, and on one occasion had acted as agent in the sale of 40 acres of land belonging to the plaintiff. Devenney controlled in some quality of ownership 189 acres of land located in the county of Orange, which was considered to be suitable for the growing of sugar beets. The plaintiff company desired to acquire this land, and were told by Cook that he could secure it at a price of $300 per acre. The president and vice president of the plaintiff corporation had visited and viewed the land and were satisfied with it. On about the 13th of October, 1913, the vice president of the plaintiff company delivered to Cook, on behalf of the company, his personal check for the sum of $500, with direction to Cook to use the money to bind the bargain on the purchase of the property mentioned; the direction being, however, that this money was to be paid into the Orange County Title Company in escrow, pending the bringing down of the title and the making of a contract of purchase. Cook followed the direction given him, and deposited the money with the title company, and secured a contract from Devenney and persons interested with him, which contract was drawn by the escrow officer of the title company. The contract so drawn provided for an initial payment of $7,000 to be made, the $500 being a part thereof, the remaining $6,500 to be paid within 20 days; and thereafter the balance of the purchase price was to be paid at the rate of $5,000 per year, with interest. The contract did not in terms entitle the vendee to a deed and a showing of clear title until the full amount of the purchase price had been paid. The plaintiff, through its officers, after the deposit had been made and the contract executed, insisted that it was entitled to have a deed given it and to give a mortgage back and have a clear title shown upon the completion of the first payment of $7,000. In the evidence of these officers given at the trial they denied any authority in Cook to stipulate for any other conditions as to payments, deed, mortgage, and title. They tendered the $6,500 to the title company and made demand for a deed, which demand was refused as not being within the terms of the contract. This action was then brought. There was some testimony given by the escrow officer of the title company from which the court might have properly concluded that when the demand for a deed was made by the plaintiff, plaintiff's contention was rather upon the matter of the construction of the contract as made than upon the contention of any lack of authority in Cook to close the deal upon the terms so embodied in the contract. It did appear in evidence that Cook was to receive a commission from Devenney (the escrow instructions so recited), and by fair inference from the evidence it may be said that the plaintiff's officers were advised of that fact. In delivering the check for $500 to Cook it seems very clear that the plaintiff was not making a payment to Cook as the agent of the vendor; the money was delivered to Cook to be by him deposited with the title company to close the transaction. That for such purposes Cook acted as the agent for the plaintiff can hardly be denied. Being authorized to deposit the money and so close the deal, we think that Devenney had the right to assume that Cook possessed all authority necessary to complete the transaction in the way it was. Devenney was not put upon notice of any limitation on the authority of Cook. The money was paid on account of the purchase price and a receipt taken therefor from the vendor and a contract drawn binding the vendor to convey upon terms which were indicated by Cook to be satisfactory to the vendee. Under such condition of the evidence we think the trial court was justified in denying to the plaintiff judgment for the recovery of the $500.

The judgment and order are affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(33 Cal. App. 547)

THOMAS et al. v. CITY OF PETALUMA.
(Civ. 2048.)

(District Court of Appeal, First District, California. April 28, 1917.)

1. Municipal Corporations 🔑301—Street Improvement—Necessity of Ordinance.

In view of charter, providing that, in absence of procedure for carrying out any granted or implied power, the general law of the state should be followed, where not inconsistent with express provisions of the charter, a city could authorize street improvements as provided by charter without enacting an ordinance relating thereto, although by another section of the charter the council was granted power to pass street ordinances not in conflict with state law, since the passing of such an ordinance would be useless, where the state law was applicable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 802.]

2. Municipal Corporations 🔑294(4) — Street Improvement — Republication of Notices—Cure of Error in Description.

Although street improvement notices did not refer to the proper official city map, the error was harmless, where a correct republication of the notices was made.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 783, 791.]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Proceeding to determine difference and controversy between J. S. Thomas and others and the City of Petaluma in respect to validity of proceedings for performance of street improvement work. Judgment sustaining validity of proceedings, and J. S. Thomas and others appeal. Affirmed.

W. F. Cowan, of Santa Rosa, for appellants. G. P. Hall, City Atty., of Petaluma, for respondent.

RICHARDS, J. This is a proceeding instituted in the superior court of Sonoma county to determine the difference and controversy between the parties named therein in respect to the validity of certain proceedings for the doing of street work in and by the city of Petaluma, whereby the property of the appellants herein was sought to be charged with their proportion of the expense incident to such work. The sole question presented upon this appeal involves the legality of the procedure adopted and pursued by the said municipal corporation in doing the street work in question.

The city proceeded under the provisions of the act of the Legislature approved March 6, 1889 (St. 1889, p. 70); and it is conceded by the appellants that the procedure prescribed in this state law was correctly followed out in making said improvements except in certain respects to be hereafter noted.

[1] The main contention of the appellants is that prior to entering upon the work of such street improvement under said state law the city of Petaluma failed to adopt an ordinance electing to proceed under said law and adopting its procedure as the one to be followed in making said improvements. This contention on the part of the appellants is based upon the terms of section 21 of article 3 of the charter of the city of Petaluma, which reads as follows:

> "The council shall have the power by ordinance which shall not be in conflict with any street (state) law now on the statutes of the state of California or which in the future will be placed on the statutes of this state, and such ordinance may embrace all the powers as are

> granted by any state law now in existence or which shall be in the future in existence.
>
> "To establish and change the grade and lay out, open, extend, widen, change, pave, repave or otherwise improve all public streets and highways and public places, construct sewers, drains and culverts, to plant trees, construct parking, and to remove shrubs and weeds, or cause objectionable shrubs and weeds or any manner of uncleanliness or obstruction to be removed, and compel the owner of the property to pay for such removal, to levy special assessments to defray the whole or any part of the cost of such work or improvements; also to provide for the repair, cleaning and sprinkling of such streets and public places."

Our attention is, however, called by the respondents to section 68 of article 3 of the city charter, which reads as follows:

> "In the absence of any procedure for carrying out or effectuating any granted or implied power or authority, the general law of this state, where applicable and where not inconsistent with any express provision of this charter, shall prevail and shall be followed."

It seems clear to us, when these two sections of the city charter of Petaluma are read together, as they must be, that no preliminary ordinance was necessary to entitle the city authorities to proceed immediately under the state law in making the street improvement under review. The city charter did not itself embrace a procedure for the doing of such work; and the only requirement of section 21 of article 3 of its charter is that when this character of work is to be done it should be done by ordinances not in conflict with state laws. The particular state law adopted by the city for the purposes of this work provides that the contemplated improvement shall have its inception in an ordinance of the city, for such the resolution of intention is, as required by said state law. The passage of an additional ordinance by the city resolving to adopt this ordinance required by the state law would be the doing of an idle act; and any construction of section 21 of article 3 of the charter which would require the doing of such act would do violence to the intendments of section 68 of article 3 of the same charter. We find no merit, therefore, in the appellants' contention in this regard.

[2] As to the further point made by the appellants to the effect that there were certain specified defects in the proceedings of the city council in the course of doing the work in question, we find that these all turn upon the question as to whether the references for purposes of description contained in certain notices published during an early stage in the proceedings were to the proper city official map. The record, however, shows that whatever mistakes were made by the city officials in this respect were speedily discovered, and were, we think, sufficiently rectified by republication of the notices in question for the statutory period containing the corrected references to the proper official map. There is no merit, therefore, in the several points urged by appellants predicated upon this corrected error.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

33 Cal. App. 595

WARD v. GOETZ et al. (Civ. 1812.)

(District Court of Appeal, Second District, California. May 9, 1917.)

1. HUSBAND AND WIFE 🔑279(2) — SETTLEMENT AGREEMENT—WAIVER OF RIGHTS.

A letter, written by the attorney of a divorced wife to the attorney of the husband, promising to procure from such wife an agreement releasing the husband from liability for back payments of alimony under a property settlement made at the close of former litigation if the husband's attorney would agree to a continuance in another case between the parties in another state, was not a waiver of the wife's right to alimony installments under the settlement agreement.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1057.]

2. STIPULATIONS 🔑7—STATEMENTS OF COUNSEL.

In an action to recover upon a bond for payment of alimony installments under a settlement contract, a statement by the counsel for the defendant that the only question in the case was whether or not plaintiff had waived further payment, and the response of plaintiff's counsel, "All right," amounted to a stipulation that the only question to be tried was whether the plaintiff waived her right to monthly installments from and after a date named.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 14.]

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Margaret Ward, formerly Margaret Ward Goetz, against Harry X. Goetz and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Ben S. Hunter and Emmett W. Miller, both of Los Angeles, for appellants. Alfred F. MacDonald, of Los Angeles, for respondent.

WORKS, Judge pro tem. This is an appeal from the judgment. The appellant Goetz and the respondent were formerly husband and wife. Some time prior to February 16, 1911, the respondent commenced an action for separate maintenance against her husband. On the date mentioned, the two entered into an agreement to live apart, the instrument also providing for a dismissal of the maintenance suit and for the payment by the husband to the wife of the sum of $50 each month, so long as they should remain married. As a part of the same transaction, the appellant Goetz, as principal, and the appellant Nebeker, as surety, executed to respondent a bond in the sum of $1,000, securing the payment of the monthly installments. In December, 1913, respondent obtained a divorce by decree of a Nevada court, and her maiden name of Ward was restored to her. With the payment of January, 1913, Goetz ceased meeting the installments agreed by him to be paid to his wife, and this action was commenced to recover on the bond for the payments due from that time forward. The plaintiff had judgment.

[1] The first contention made by the appellants is that Miss Ward has waived her right to collect the installments and that she is estopped to claim them. It appears that there was pending in California a suit for divorce brought by the husband at the same time that the Nevada action was in the courts of that state. One C. N. Gary, a Nevada lawyer, was counsel for the wife in the action in that jurisdiction. At a certain stage of the Nevada litigation, Gary became fearful that the California case might first reach a conclusion and wrote Ben S. Hunter, Goetz's California lawyer, as follows:

> "I will procure from Marguerite W. Goetz and deliver in escrow an agreement that in the event that a continuance for two days be stipulated in the action of Goetz v. Goetz pending in the Sup. Ct. of L. A. County, California, she will release Harry X. Goetz from all liability for back payments or alimony under the property settlement made at the close of the former litigation."

After the writing of this communication, Gary had a conference with Hunter in Los Angeles about the proposed continuance of the California case, and a continuance was then had, although there was no agreement delivered in escrow, or ever entered into, by Miss Ward releasing Goetz from his liability to pay the monthly installments. Nevertheless, it is claimed that a waiver and an estoppel arose against respondent because of the granting of the continuance, following upon the letter from Gary and the conference between him and Hunter. It is not necessary to proceed to the discussion of legal questions in connection with the claims of waiver and estoppel. We need not be concerned as to whether Gary had authority to act for Miss Ward in the premises. The letter certainly was not a waiver of her right to the installments, granting that he had such authority. Whether a waiver resulted from the conference between Gary and Hunter, again granting Gary's authority, depends upon what was said there, and the finding of the trial court is with respondent on that question. That finding is amply supported by the testimony of Gary, and Hunter did not take the stand. As to the question of estoppel, it is enough to say that no estoppel was pleaded. Carpenter v. Markham, 172 Cal. 112, 155 Pac. 644.

[2] The trial court found that the parties had stipulated in open court "that the only issue to be tried was whether the plaintiff had waived her right to said monthly payments from and after the 10th day of January, 1913," and exception is taken to the finding as not supported by the evidence. The point is without merit. Soon after the trial commenced and immediately after respondent had testified that Goetz's last payment to her was the one due on the day mentioned in the finding, counsel for appellants volunteered the following statement:

> "There is only one question, as I understand, and that is whether she has waived future payments. The fact that the agreement was executed and the action that was then filed was dismissed is admitted."

To this remark counsel for Miss Ward responded, "All right," and proceeded with the examination of the witness. The colloquy between counsel was in effect a stipulation, and the language of the finding is a correct presentation of the actual occurrence.

The appellant objects to certain rulings of the trial court in admitting and excluding evidence, but it appears to us that none of them was erroneous.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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33 Cal. App. 589

SMALLEY v. HOLT et al. (Civ. 1645.)

(District Court of Appeal, Second District, California. May 8, 1917.)

1. Exchange of Property ⟹5—Abrogation of Contract — Provision by Receipt Agreement.

A provision of a land exchange contract that $750 was to be paid as part of the cash consideration was abrogated by the later contract, embodied in the receipt therefor, that it was to be returned if the parties receiving were unable to comply with the main contract in 30 days.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 5, 6, 8–10.]

2. Exchange of Property ⟹8(3)—Pleading and Proof.

In action to recover part payment under land exchange contract for failure of the other party to comply with the contract, the defense of invalidity of the contract for want of consideration, not being pleaded, was not available.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 16½.]

3. Appeal and Error ⟹1010(1)—Conflicting Evidence.

The question on appeal is, not where the preponderance of evidence on a given issue lies, but whether there is any evidence whatever in support of the finding upon it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3981, 4024.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by M. E. Smalley against H. R. Holt and another. From judgment for plaintiff, defendants appeal. Affirmed.

R. W. Richardson and Eugene A. Tucker, both of Los Angeles, for appellants. J. W. Ballard, of Los Angeles, and Clyde Bishop, of Santa Ana, for respondent.

WORKS, J. pro tem. This is an appeal from the judgment.

On June 29, 1911, respondent and appellant Holt entered into an agreement for an exchange of real property, together with the passing of certain mortgages and cash considerations as a part of the trade. The sum of $3,000 was agreed by respondent to be paid to Holt when certain abstracts and certificates of title were brought down to date, and it was further provided:

> "$750.00 in cash is to be paid to H. R. Holt on this agreement on or before July 3, 1911, which amount is to be credited and taken out of the $3,000.00 hereinbefore mentioned in this agreement."

On July 1st Smalley paid to appellants the sum of $750, and they executed to him a document in the following form:

> "Received from M. E. Smalley the sum of seven hundred and fifty dollars, which is the first cash payment mentioned in contract made and dated June 29, 1911, by and between H. R. Holt and M. E. Smalley.
>
> "It is hereby distinctly understood and agreed by H. R. Holt and Florence M. Wendell that in case said Holt is unable to comply with the terms of said contract within a reasonable time and within thirty days from this date, the said $750.00, without interest is to be returned to M. E. Smalley."

Florence M. Wendell was a party to the receipt and is a party to the action only because the property agreed in the first contract to be conveyed to Holt was actually to be conveyed to her to hold for him.

The action was commenced to recover the $750 paid to appellants, upon the ground that Holt was unable, up to the time of filing the complaint, which was on September 11, 1911, to comply with the terms of the original agreement by him to be performed. The complaint alleges that Smalley kept and that Holt did not keep all the covenants of the contract of June 29th by them respectively to be performed, thus apparently holding to the idea that the action was based upon that contract. The trial court found for respondent on these issues, and appellants insist that the finding is not supported by the evidence. Respondent rejoins that the allegation of his performance and of Holt's nonperformance under the contract of June 29th was surplusage, and therefore immaterial; that the action is really based on the paper executed July 1st; and that the complaint states and the evidence proved a cause of action under it. Upon which of these agreements was the cause of action founded?

[1] It seems plain that the paper, receipt, or agreement of July 1st displaced the provisions of the contract of June 29th as to the payment of the $750. Under the earlier arrangement, it was to have been paid as a part of a total sum of $3,000, which was a part of the consideration for the trade; under the later, it was made as a payment which might or might not be retained by Holt, depending upon whether he could comply with the main contract within thirty days. The two arrangements concerning the $750 were inconsistent, and the first was abrogated by the second. The cause of action was therefore on the latter, and the allegations concerning performance under the former were immaterial.

[2] The appellant claims that the agreement of July 1st, in the respect that it provided for a possible return of the $750, was void for want of consideration; but the defense is not pleaded, and it is not open to appellant without a pleading to support it.

[3] The trial court found that appellants, "for thirty days next after" July 1, 1911, "failed to comply with the terms" of the two agreements "and were at all times wholly unable to do so." It was further found that this inability to perform was not owing to any conduct of the respondent. In objecting to these findings, and to the others above mentioned, appellants continually insist that Smalley did not prove his case by a preponderance of the evidence; but that point is utterly devoid of interest here. The question on appeal is, not where the preponderance of the evidence on a given issue lies, but whether there is any evidence whatever in support of the finding upon it. This point has been so often decided that it is as well settled as any question in the jurisprudence of California. It is mentioned now only because of the insistent and lengthy argument of appellant upon it. We will assume that appellant has presented the only question which could be presented on appeal in this regard; that is, does the evidence support the findings from which quotation has just been made? We have examined the record, and answer the question in the affirmative. In fact, they find partial support in the admissions in the answer.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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33 Cal. App. 592

Ex parte WENMAN. (Cr. 683.)

(District Court of Appeal, First District, California. May 9, 1917.)

1. Divorce ⚿332—Foreign Divorce—Custody of Children.

The doctrine of comity between the states of the Union requires that a judgment granting a divorce and awarding the custody of a minor child rendered by a court of one state shall be conclusive in the jurisdiction of the other states, in the absence of a showing of changed conditions affecting the welfare of the child.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 843.]

2. Habeas Corpus ⚿99(4) — Custody of Child.

In view of kidnapping statutes (Pen. Code, §§ 207, 208), where a minor child whose custody was given to his father by a divorce decree in Connecticut was abducted by his divorced mother and taken to California, the California court would, on habeas corpus, award the child's custody to the father in the absence of showing that the father had become an unfit or unsafe person to have such custody.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84.]

Habeas corpus by Byrd Wilson Wenman, St., against Louise Ladew Nave to recover the custody of Byrd Wilson Wenman, Jr., a minor child. Custody granted to petitioner.

Garret W. McEnerney, Gavin McNab, R. P. Henshall and Andrew F. Burke, all of San Francisco, for petitioner. Sullivan & Sullivan and Theo J. Roche, Hiram W. Johnson, Jr., and Archibald M. Johnson, all of San Francisco, for respondent.

PER CURIAM. This is a proceeding in habeas corpus brought to recover the custody of a minor child alleged to have been abducted and at present unlawfully detained. The writ having issued a return was made thereto by the person detaining the child, and the matter is before us for decision upon demurrer to the return.

In May, 1914, in the state of Connecticut, the parents of the child, a boy now seven years of age, were divorced, and his custody was by the decree awarded to the petitioner, the father, with the right to the mother to visit her son twice a week at his father's home in the state of Connecticut and to be given his custody during certain vacation periods each year. That decree was subsequently, in the month of June, 1915, modified, by consent of the parties, and as modified provided that the mother should be permitted to visit the boy at his father's said home twice a month, remaining all day, and that he should be permitted to be with his mother at the home of her parents on Easter Sunday and Christmas day of each year, to remain overnight, and to be returned to his father on the following day as soon as reasonably convenient.

In the closing days of December, 1916, the boy's mother (who is the respondent in this proceeding) "abducted and kidnapped" him, says the petition, and caused him to be taken out of the state of New York, where he was at the time visiting her, and brought to the state of California. The child's parents at the time of the entry of the decree were residents of Connecticut. The mother has since remarried and become a resident of the state of New York, and at the time of the alleged abduction the petitioner with the child was temporarily residing in that state.

Kidnapping is denounced as an offense against the law both in Connecticut and New York, and when committed in another state, and the person kidnapped is brought into the state of California, is a continuing offense and punishable in this state. Pen. Code, §§ 207, 208.

[1] The doctrine of comity between the states of the Union requires that a judgment granting a divorce and awarding the custody of a minor child rendered by a court of one state shall be conclusive in the jurisdiction of the other states, in the absence of a showing of changed conditions affecting the welfare of the child. State ex rel. Nipp v. Dist. Court, etc., 46 Mont. 425, 128 Pac. 590, Ann. Cas. 1916B, 256.

In the case of Hartley v. Blease et al., 99 S. C. 92, 82 S. E. 991, it was held in a proceeding similar to this that, where in a suit for divorce the husband was granted the custody of a minor child of the marriage, who was subsequently kidnapped by the wife, the decree itself was evidence of the husband's moral fitness to care for the child, and that, unless his conduct since the rendition of the decree had been such as to render him an unfit guardian, he should, in a proceeding for the recovery of the child, be awarded his custody.

Some of the more important matters with which the respondent charges the petitioner in her return are alleged to have existed prior to and at the time of the entry of the decree of divorce. As to them, we think it evident that the decree is conclusive, and that this court cannot now re-examine them for the purpose of depriving the petitioner of a custody therein awarded to him. Other matters set forth in the return consist of alleged discourtesies to the respondent on the part of the petitioner when visiting the child; of failure to permit the child to remain overnight with her twice a year as in the modified decree provided; of failure to notify her on one occasion when the child was ill, as was required by the terms of the decree. By these and other allegations respondent in effect complains that she has been denied in a large measure the enjoyment of the society of her child contemplated by the decree.

[2] Without stopping to consider that these matters are alleged to have occurred, not in California, but at the domicile of the petitioner and minor in the state of Connecticut, or near there in the state of New York, where evidence concerning them is accessible, and where a proper enforcement of the decree may be readily had, they have little or no bearing on the question of the fitness of the petitioner to have the care and custody of his minor child, even if we concede for the sake of argument that under the circumstances existing in this case the courts of California would be warranted in assuming jurisdiction, and determining under the facts as they exist to-day who is entitled to such custody. It is shown by the record before us that the minor was brought to this state by the respondent in direct violation of a decree of a court of competent jurisdiction of a sister state awarding its custody to the petitioner. The child's presence here is founded on a tort or offense against the law, and it is not made to appear that since the entry of the decree under which the petitioner is now claiming he has become an unfit or unsafe person to have the care and control of his minor child, and it is admitted, at least tacitly, by the respondent in her return that she could not establish her right in the courts of Connecticut or New York, to the relief which, 3,000 miles away from the place where the

difficulties between the parties arose, she hopes to get in the courts of this state. Under these circumstances we think there is no question but that a due respect for the orderly administration of the law and according to the doctrine of comity among sister states requires this court to recognize the right of the petitioner under the decree of the court of the state of Connecticut hereinbefore referred to to the custody of Byrd Wilson Wenman, Jr., the said minor.

It is therefore ordered, that said respondent, Louise Ladew Nave, forthwith deliver to the petitioner, Byrd Wilson Wenman, Sr., the said minor child of petitioner and respondent.

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33 Cal. App. 630

INGRAM v. SLAYTON. (Civ. 1861.)

(District Court of Appeal, Second District, California. May 10, 1917.)

1. Forcible Entry and Detainer 🔑29(4)—Evidence.
In action for forcible entry, evidence *held* not to show such forcible entry as defined in Code Civ. Proc. § 1159.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 140.]

2. Appeal and Error 🔑903—Record.
Where the statement of testimony heard is settled as correct by the trial judge, the appellate court must assume that it shows all the material evidence received in support of the issue made by the complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3671.]

3. Forcible Entry and Detainer 🔑29(3)—Evidence.
In action for forcible entry, evidence by defendant of his title and right is not material, for one who enters where actual possession has been acquired by another may do so only in a peaceable way or under authority of a judgment of court or permission given him by the occupant.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Stuart H. Ingram against John T. Slayton. From judgment for plaintiff, defendant appeals. Reversed.

Childers & Bruce, of El Centro, for appellant. James E. Shelton and Parker & Collier, all of Los Angeles, and Herbert L. Iasigi, of El Centro, for respondent.

JAMES, J. Plaintiff brought this action to recover possession of a certain tract of real property in the county of Imperial, alleging that defendant had forcibly intruded upon his peaceable possession and "by force and by menacing the employés of plaintiff with a show of superior force entered thereon and in a forcible manner ejected plaintiff from the said land. * * *" The court entered judgment in favor of the plaintiff, from which this appeal is taken.

[1, 2] The main contention put forth by the appellant is that there is no evidence to sustain the finding of the court as to a forcible entry having been made, as such entry is defined in section 1159 of the Code of Civil Procedure. With this contention we must agree. The statement of the testimony heard is exceedingly meager; but in view of the fact that it was settled as correct by the trial judge, we must assume that it shows all the material evidence received in support of the issue made by the complaint. Richardson v. City of Eureka, 96 Cal. 443, 31 Pac. 458. Counsel for respondent, outside of the record, suggest that the statement was prepared wholly by the appellant, and that it was served and offered for settlement just prior to an earthquake having occurred in Imperial county, and that presumably for that cause the counsel resident in that county, being other than the counsel who appear here, neglected to have the record show a complete statement of the testimony. Respondent is not entitled to have any consideration given to that suggestion. The bill of exceptions presents in abstract form the testimony of the plaintiff and the defendant. The plaintiff testified that he had been in possession of the tract of land, which was raw and brush-covered before he started to work upon it, since the 30th of September, 1912; that he had had several teams at work on the land, off and on, up to the 22d of December, 1913, and that some of the land had been leveled and cleared; that he had an employé on the land on the 22d of December, 1913, but that he (the plaintiff) was at that time in the state of Nevada; that when he returned—the time is not stated—he found the defendant on the land with between seven and eleven teams which were at work. He testified that he had not fenced the land, nor watered it, nor cropped it; that when he first went upon the ground he put a stake at each corner, with a notice stating that he was making a claim to the property, and that when he put up these notices he found other notices, partially obliterated, already posted. Defendant testified that he had known the land since October, 1906, and on the 24th of December, 1909, he did some scraper work upon it and put up notices at each corner stating that he was the successful contestant, and had acquired a 30 days' prior right of entry to the land; that he plowed a furrow around the entire tract at that time in order to establish possession and show the public what his claim was; that he had never abandoned the land; that the first time he knew that plaintiff was on the land was in the latter part of October, 1912, and that in November, 1912, he had informed the plaintiff that he (the defendant) had a prior right of entry, won by a successful contest, and that he would assert his right when the land was restored to entry, to which the plaintiff had replied that he would follow the advice of his attorneys, and that he knew that the land was claimed by the defendant, but thought that he had abandoned it. Defendant further testified that in

December he went upon the land and found a man by the name of Jones there. He then testified as follows:

> "He (Jones) was not doing anything when I went there, but he came out where I was working and asked if I had the consent of Ingram to work there. He then asked me to tell him to get off the land and not to work there. He said Mr. Ingram owed him and he wanted to get his pay and get away. He said that he would tell Mr. Ingram that I just gave him hell. I told him not to tell Mr. Ingram anything of the kind, as I did not want him to carry any such news as that from me. I did not make any threats or exercise any force at all against Mr. Jones whatever. I asked Mr. Jones to eat dinner with us, and he did not show any evidence of being afraid of me.

Defendant offered to prove by an exemplified copy of a record of the United States Land Office that the Secretary of the Interior, upon a contest between the defendant and a third party, had rendered a decision stating that the land would be restored to entry, and that the defendant would be given 30 days after notice of such restoration, during which time he would have a preference right to make entry on the land. Objection was made to this testimony and the offer was refused. It was not shown that the land had ever been restored to entry. It thus appears that there was no proof of any violence, offer of violence, or show of superior force attendant upon the entry of the defendant upon the land. The testimony shows that the plaintiff's possession was more than a scrambling possession; in fact, that he at the time of the defendant's entry had actual peaceable possession of the ground. However, the plaintiff could not succeed in the action unless he established the facts alleged. The proof was wanting to show any circumstances such as those set forth in the complaint and relied upon by the plaintiff. As to the proof required in such a case, we cite, in addition to the section of the Code noted, section 1172, Code of Civil Procedure; Castro v. Tewksbury, 69 Cal. 562, 11 Pac. 339.

[3] The additional point is made that the defendant was entitled to have received the documentary evidence offered showing the action of the land department taken with respect to the contest formerly decided. He says that he was entitled to make this proof to show the nature of his possession and to show a color of right. From the evidence as stated, it is clear that at the time of the entry by the defendant the plaintiff was in actual possession of the land, and no showing of constructive possession could avail the defendant as against the plaintiff on that issue. It is generally held under such facts that the question of the entryman's title is not material to a recovery by his adversary, for one who enters where actual possession has been acquired by another may do so only in a peaceable way or under authority of a judgment of court, excepting, of course, where he enters under some form of permission given him by the occupant. Carteri v. Roberts, 140 Cal. 164, 73 Pac. 818. We think the last contention of appellant is without merit.

The judgment is reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(33 Cal. App. 637)

PEOPLE v. GRANDI. (Cr. 376.)

(District Court of Appeal, Third District, California. May 10, 1917.)

1. Criminal Law 🔑1169(3)—Harmless Error—Evidence.

In a trial for assault with a deadly weapon, where the defendant admits that he discharged a pistol at the time of the assault, the admission of a pistol not sufficiently identified as that with which defendant did the shooting is harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3139.]

2. Assault and Battery 🔑92 — Deadly Weapon—Sufficiency of Evidence.

In a trial for assault with a deadly weapon, the fact that the pistol with which the assault was committed was loaded is sufficiently proved where it is admitted that the weapon was discharged, and the prosecuting witness testified that he heard the hissing of the bullets.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 137-139.]

3. Criminal Law 🔑396(2)—Competency of Evidence—Matter Gone into by Opposite Party.

Where the state's attorney on cross-examination calls for a written statement which is pure hearsay, but does not introduce it, it is not admissible on behalf of defendant under Code Civ. Proc. § 1854, providing that, when part of an act or writing is given in evidence by one party, the whole truth on the subject may be inquired into by the other.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 862.]

4. Criminal Law 🔑829(3)—Instructions—Refusal of Requests Covered.

The refusal of an instruction that to convict jury must find that defendant was armed with a pistol loaded in such a manner that its discharge would produce death or a great bodily injury on person assaulted is not error where it is clearly covered by court's charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011.]

5. Criminal Law 🔑829(8), 1173(1)—Harmless Error—Instructions.

The refusal of an instruction that accused was presumed to have a good character for the traits involved in the charge on which he is tried is harmless, where no evidence is introduced as to his character; as it is covered by instruction as to presumption of innocence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2011, 3164, 3168.]

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Flori Grandi was convicted of an assault with a deadly weapon, and appeals. Affirmed.

H. B. Wolfe, of Quincy, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was charged by information filed in the superior court of Plumas county with the crime of assault with a deadly weapon with intent to commit murder, and was convicted of assault with a deadly weapon. He appeals from the judgment.

The assault occurred on the 20th day of July, 1916, between the hours of 4 and 5 o'clock, p. m., in Clover valley, a short distance from the town of Beckwith, in Plumas county. The party assaulted was one William Tognola. Both men are Italians, and were employed at a dairy owned by one Samuel Bonta. The prosecuting witness, Tognola, on the day before that upon which the assault was committed, mounted a horse for the purpose, as he stated, of going out into a field belonging to Bonta and driving therefrom some calves. Upon his return to the cabin in which he and the defendant had been living, and which was situated near the dairy, the accused, with a large stick or club in his hand, approached Tognola, and, addressing him, said, "You must be killed," or "You will be killed." Becoming frightened at this demonstration upon the part of the defendant, Tognola dismounted from the horse and ran some distance away from the premises. On the following day, at the hour above named, while Tognola was engaged in milking, the defendant again approached him, this time with a pistol, and as Tognola, who saw him approaching with the weapon, started to run from him, fired two shots at the latter, neither of which struck Tognola. This statement of the circumstances under which the assault was committed is taken from Tognola's testimony, which was corroborated by the testimony of one Paul Patonti, another employé of Bonta, and the only other person present at the time of the assault.

The motive for the assault is not clearly shown by the testimony, although Tognola testified that the defendant appeared to have become very angry with him on the day before because he (Tognola) had used the horse, which was the property of Bonta for the above-stated purpose.

Tognola testified that he owned the weapon used by the defendant in making the assault, that he (Tognola) had left the pistol on a table in the cabin, and that the defendant had evidently gone into the cabin and taken it with him, perhaps for the special purpose of assaulting Tognola. The latter further testified that he heard the hissing noise of the bullets as they passed near him, and also said that, after the shooting, he slipped into the cabin through a window, procured some blankets, and went out into the field, where he slept that night. The defendant, during the night left the premises, and was later placed under arrest.

The defendant admitted on the witness stand that he fired two shots from a "gun" at the time of the alleged assault, but positively declared that he did not shoot at Tognola.

The complaint on this appeal is of alleged errors in the action of the court disallowing certain testimony and declining to allow and read to the jury certain instructions requested by the defendant.

[1] Of these asserted errors the first to which attention is directed is in the ruling whereby the pistol with which the prosecution claimed the defendant committed the assault was admitted in evidence. The ground of the objection was that the weapon was not sufficiently identified as the weapon used by the accused on the occasion of the shooting. But, assuming that the weapon was not sufficiently identified as the one with which the defendant did the shooting, the action of the court in admitting it in evidence was clearly without prejudice, since the defendant himself admitted that he had a pistol at the time of the assault and that he discharged it. In view of that admission and of the fact that Tognola testified that the defendant fired the weapon at him, it obviously became a matter of little or no consequence whether the weapon actually used on the occasion of the shooting was identified at the trial and introduced in evidence or not. The only purpose which could be subserved by proof and the identification of the weapon would be to corroborate the testimony of the witnesses that one was in the possession of the defendant at the time of the alleged assault and that he used it as described by the witnesses for the people; and the admission by the accused that he did have such a weapon at the time referred to and discharged it supplied every evidentiary purpose which the production of the weapon itself could possibly have accomplished. It follows that even the introduction in evidence of a pistol which was not used by the defendant on the occasion of the assault could not in any degree have affected the verdict.

[2] It is next contended that there was entirely a failure to prove that the pistol by means of which the alleged assault was made was a deadly weapon. Confessedly it is essential for the people, in a case where, as here, the claim is that the assault charged was committed by shooting a pistol or gun at the prosecuting witness, to show that the pistol or gun used as the means for committing the assault was loaded with powder and ball, or, in other words, that it was, when so used, a weapon which, when employed as a means of assaulting another, is "likely to produce great bodily injury," and we think that there is evidence produced by the prosecution which tended sufficiently to prove that fact. The prosecuting witness and the witness Patonti, as well as the defendant himself, testified that the weapon was fired or discharged and Tognola declared that he heard the hissing sound which always accompanies a bullet as it whizzes through and against the air currents. These constituted circumstances from

which the inference would naturally follow that the pistol was loaded.

[3] There was no error in the action of the court in refusing to allow in evidence, on the motion of the defendant, a certain written statement to which a number of the residents of the vicinity of Beckwith had subscribed, and in which it was declared that the reputation of Paul Patonti, a witness for the people, for truth, honesty, and integrity in the community in which he lived was bad. The offer of the statement was made during the examination of the witness Rudolph Righetti, who testified for the defense. It appears that, after the defendant was charged with assaulting Tognola and after it was known that Patonti would give testimony at the trial against the defendant Righetti, an intimate friend of the latter, prepared the statement referred to and went about for the purpose of securing signatures thereto and succeeded in inducing a number of persons to sign it. These facts were brought to light through the cross-examination by the district attorney of Righetti, and the statement was called for by that officer and produced by the witness, but it was not read to the jury by the district attorney. The object of the cross-examination, so far as it was based upon said written statement, was merely to show the interest of Righetti in the case and in behalf of his friend, the defendant. The statement, if received in evidence, would have shown, as before stated, that certain persons regarded the reputation of Patonti for truth, honesty, and integrity as bad, and, under the circumstances under which it was offered as proof, it would, if admitted, have been hearsay, pure and simple. The statement was undoubtedly offered upon the theory that it was allowable under the terms of section 1854 of the Code of Civil Procedure, but, as stated, while the district attorney called for and was given and examined the statement, he read no part of it to the jury, but only referred to it to show that Righetti had taken unusual interest in the case in favor of the accused.

[4] The next assignment involves the action of the court in disallowing the following instruction requested by the defendant:

> "You are instructed that you must find that defendant was armed with a loaded pistol, and by that is meant a pistol loaded in such manner that the discharge of it would produce death or great bodily injury upon William Tognola, and, unless you find the pistol was so loaded, you must find defendant not guilty."

The court defined a deadly weapon within the meaning of section 245 of the Penal Code, and then covered and clearly explained to the jury the proposition contained in the above-quoted instruction as follows:

> "You are instructed that in this case defendant, Flori Grandi, is charged with the crime of assault with a deadly weapon with intent to commit murder, and you are instructed that, before you can find defendant guilty of the crime as charged, you must be satisfied to a moral certainty and beyond all reasonable doubt that defendant, Grandi, was armed with a pistol so loaded that it would inflict serious bodily injury or death upon William Tognola under the circumstances as shown by the evidence in this case."

Thus it will be observed the proposition enunciated in the rejected instruction was clearly covered by the court's charge.

[5] It is further objected that error was committed in the rejection of the following instruction, proposed by the defendant:

> "You are instructed that a person accused of a criminal offense is presumed to have a good character for the traits involved in this action for peace and quiet until the contrary is established by competent evidence, and you are further instructed that it is the duty of each and every of you as jurors to give the defendant the benefit of this presumption."

Generally, so far as the writer has observed, such an instruction is never proposed or given where the character of the accused for the traits involved in the charge upon which he is tried is not directly made an issue by the introduction of proof addressed thereto. It cannot be doubted, however, that the instruction correctly states the rule, and it would have been just as well to have given it, since the defendant requested that it be submitted to the jury; but it cannot be assumed, from the fact that the instruction or one bearing upon the subject to which it related was not given, that the jury considered the case upon the hypothesis that the defendant was not a man of good character for peace and quiet. It is, on the contrary, to be assumed, in view of the fact that the defendant's character was not directly assailed by the people, and that it was not made a direct issue by himself—that is, that there was no evidence whatever presented as to his character—that the jury considered the case as it was directly and actually made by the proofs and upon the case as so made arrived at their verdict. But, at all events, under the circumstances, it seems to us that what is said in the rejected instruction was substantially and sufficiently declared in the instruction which was given that the defendant was to be presumed to be innocent until his guilt was confirmed by the evidence beyond all reasonable doubt.

We have now considered all the points urged for a reversal, and, having fully examined and considered the whole record, have found no legal reason for setting at naught the result arrived at below.

The judgment is accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(33 Cal. App. 572)

HAY v. McDONALD. (Civ. 1851.)

(District Court of Appeal, Second District, California. May 3, 1917. Rehearing Denied by Supreme Court, July 3, 1917.)

1. Evidence 🔑459(2)—Contracts of Cashier—Parties—Parol Evidence.

Although where a written contract in the form of an I. O. U. was signed by the defendant, followed by the descriptive word "cashier," parol evidence was admissible to identify the party against whom the obligation is legally chargeable, it is not competent for the purpose of exonerating the signer from personal liability.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1722, 1908, 2110.]

2. Brokers 🔑7—Past Consideration.

Where plaintiff was attempting to sell real property, but failed to make satisfactory terms with the owner as to commission to be paid him, and made a contract with a bank which had authority to sell the land that the sale be made through the bank, and that plaintiff be protected as to commission in an amount stated, a subsequent agreement by the plaintiff to accept the sum of $400 as his commission was not based on sufficient consideration to make it binding.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 5–8.]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by George Hay against R. McDonald. From a judgment for defendant and from an order denying motion for new trial, plaintiff appeals. Reversed.

C. L. Claflin, E. W. Owen, and J. W. Wiley, all of Bakersfield, for appellant. Geo. E. Whitaker and E. L. Foster, both of Bakersfield, for respondent.

JAMES, J. Appeal from a judgment in favor of defendant and from an order of the trial court denying a motion for new trial. The action was brought to enforce payment of $1,000 on an alleged written promise of the defendant. The writing evidencing the alleged agreement was in the following form:

> "Bakersfield, Mar. 29–07.
>
> "I. O. U.
>
> "One thousand dollars on completion of sale of lots 3 & 4 in block 273 in city of Bakersfield.
>
> "R. McDonald, Cashier."

It appears that plaintiff as an agent was attempting to effect a sale of certain real property which was owned by one Weill. Plaintiff had failed to make satisfactory terms with Weill as to the commission to be paid to him for his services, and, learning that the Kern Valley Bank had authority in some contingency to sell the lots of land for the price of $15,000, proposed to the bank through McDonald, the cashier, that the sale be made through the bank for $16,000, and that plaintiff be protected as to a commission in the amount of $1,000. As evidence of this agreement for the payment of commission, the "I. O. U." above set out was made by McDonald. It will be noted that the Kern Valley Bank was not a party to this action. The court made findings, which are supported by the evidence, to the effect that plaintiff at all times knew that in the making of the contract by McDonald the latter was acting for the Kern Valley Bank of which he was managing agent and cashier. Further findings were made, however, to the effect that when Weill, the owner of the property, learned that the sale was to be made to a buyer represented by Hay, he threatened to refuse to complete the transaction, but offered to allow the bank to pay to the plaintiff the sum of $400, which it is found the plaintiff agreed to accept, and that thereupon the property was sold and the purchase price paid; that thereafter the Kern Valley Bank tendered to plaintiff the sum of $400, which the plaintiff refused to accept. The conclusions of law are brief and are as follows:

> "That the I. O. U. described was the contract of the Kern Valley Bank, and not that of the defendant; that the plaintiff knew and accepted said I. O. U. as the act and deed of the Kern Valley Bank; that the defendant is entitled to judgment."

The chief point raised here by the appellant is that the court erred in allowing oral evidence to be introduced to show that the contract was the contract of the Kern Valley Bank, and not of the defendant. This finding of the court, which followed the proof so made, is claimed to be erroneous:

> "That the plaintiff did not, at any of the times mentioned, treat or negotiate with the defendant in his individual capacity; that the said plaintiff had all of said negotiations and transactions with the said Kern Valley Bank, and it was so understood and agreed by him."

As we gather from the conclusions expressed by the trial judge, the judgment as entered depended for support upon that particular finding of fact which appellant attacks, and which is quoted above. This case was here on a former appeal. See Hay v. McDonald, 21 Cal. App. 204, 131 Pac. 74. The trial judge there had granted a motion for nonsuit, after the plaintiff had introduced his evidence. The motion was granted upon the same ground as that which is made the basis for the judgment here, to wit, that the contract was not the contract of McDonald, but of the Kern Valley Bank. This court there said:

> "The written contract or memorandum in the form of an 'I. O. U.' cannot be said to evidence a contract of the Kern Valley Bank when it is examined alone and for what it shows upon its face. Where, in the body of an instrument, no words appear which serve to define the agreement as being made on behalf of a party other than he whose signature is attached thereto, it will not be deemed to be the contract of another party, even though there may appear after the appended signature of the individual, qualifying or descriptive words, such as 'President,' 'Secretary,' or, as here, 'Cashier.' In such cases parol proof is admissible to identify the party against whom the obligation is legally chargeable. Hobson v. Hassett, 76 Cal. 203 [18 Pac. 320, 9 Am. St. Rep. 193]; Southern Pac. Co. v. Von Schmidt Dredge Co., 118 Cal. 368 [50 Pac. 650]; McCormick v. Stockton, etc., R. R. Co., 130 Cal. 100 [62 Pac. 267]."

[1] It is a rule which has been many times illustrated by the decisions that where an agent contracts in terms not fully expressing his representative capacity, parol evidence is admissible to show that it was understood by the parties that another person was intended to be bound, or that there was a principal wholly undisclosed or unknown to the opposite contracting party. In such cases such principal may be held. This rule, however, does not operate to allow an agent who contracts apparently in his own name to relieve himself of liability, but is a rule which extends to the other party the option of proving a charge under the contract against the real principal also. We find no difference in the decisions or statements of the text-writers on this subject. "Where an agent has entered into a contract which in terms charges himself, parol evidence is not admissible to discharge him by showing that he intended to charge the principal, but where the contract bears upon its face evidence that the person signing was in fact an agent, and where the contract is so framed as to render it uncertain whether the agent or the principal was intended to be bound, parol evidence may be received to show that it was the intention to bind the principal and not the agent. But although parol evidence may not in other cases be admissible to release the agent, it may be made use of to charge the principal. * * * And this doctrine applies as well to those contracts which are required to be in writing as to those to whose validity a writing is not essential." 1 Mechem on Agency (2d Ed.) § 1176. In Hobson v. Hassett, supra, the contracting party signed, "A. Hassett, President." The court there, in discussing the subject pertinent to this case, said:

> "Prof. Parsons says: 'If an agent make a note in his own name, and add to his signature the word "Agent," but there is nothing on the note to indicate who is principal, the agent will be personally liable, just as if the word "Agent" were not added.'"

In S. P. Co. v. Von Schmidt Dredge Co., supra, the court declared:

> "Thus the rule is well settled that where a reading of a simple contract, however inartificially it may be drawn, discloses that it is executed for or on behalf of a principal, or discloses an intent to bind such principal, or even leaves the matter one of doubt, parol evidence may be employed to determine whose contract it is, and this even in cases where the instrument is sufficiently clear in its terms to bind the agent. This is not contradicting by parol the terms of a written instrument, for, as has been said: 'It is no contradiction of a contract, which is silent as to the fact, to prove that a party is acting therein, not on his own behalf, but for another. "This does not deny," said Parke, B., "that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is in law the act of the principal."' Bishop on Contracts, § 1084."

[2] As will be noted from the authorities to which we have called attention, while parol evidence in such a case as this is competent, it is not competent for the purpose of exonerating the signer from personal liability, but is competent for the purpose of extending the liability to other parties for whom the signer may have intended to contract and for whom he had authority to contract. Such is the rule which we deduce from a reading of the cases. We have noted that the court made a finding of an alleged compromise agreement by which it was asserted that the plaintiff agreed to accept the sum of $400 in lieu of the amount set out in the written instrument sued upon. The sufficiency of these facts found to establish a modification of the original agreement or a substituted or new agreement is not argued in the briefs, and a consideration of those questions is not necessary to the decision in the case. However, it may be proper to suggest that under the facts found and alleged by the defendant, is would seem that such subsequent agreement was lacking in the essential of a sufficient consideration to make it of binding effect. The judgment of the court was plainly based upon the finding that defendant assumed no liability by the contract, but that the liability was rather that of the Kern Valley Bank. In this conclusion we think the court erred for the reasons stated.

The judgment and order are reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

33 Cal. App. 581

MYERS v. HERSKOWITZ. (Civ. 1855.)

(District Court of Appeal, Second District, California. May 7, 1917.)

1. Landlord and Tenant 🔑112(2) — Receipt of Rent as Waiver of Forfeiture.

Where a particular act or omission entitles the landlord to declare a forfeiture of the lease, generally receipt of rent accruing subsequent to the act which works the forfeiture waives the forfeiture.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 345.]

2. Landlord and Tenant 🔑94(5)—Receipt of Rent as Waiver of Forfeiture — "Waiver."

While unconditional acceptance by landlord of rent accruing after a tenant should have surrendered possession because of breach of lease condition will constitute strong evidence of the landlord's waiver of his notice to quit under Code Civ. Proc. § 1161, subd. 3, nevertheless the question of waiver is one of intent, waiver being the intentional relinquishment of a known right after knowledge of the facts, and to establish such waiver the evidence must indicate a meeting of the minds and the intentional forbearance to enforce a right.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 320.

For other definitions, see Words and Phrases, First and Second Series, Waiver.]

3. LANDLORD AND TENANT 🔑112(2) — RECEIPT OF RENT AS "WAIVER" OF FORFEITURE —CONTINUING BREACH.

Tenant of a section in a storehouse had been notified of his violation of a lease requirement that aisle space in the storehouse reserved for common use of tenants should be kept free of goods, and on June 1st his check for rent was returned by the landlord. He then deposited it to the landlord's credit in a bank. On June 4th the landlord served on him notice requiring compliance with such provision or surrender of possession, as provided by Code Civ. Proc. § 1161, subd. 3, and on June 15th, on tenant's noncompliance, began action in unlawful detainer. In July the landlord drew from the bank the money deposited by the tenant, and the same procedure as to monthly rent was followed to the time of trial, which was the following March. *Held*, the conduct of plaintiff in accepting the money, not in advance, but after the completion of the several months, was not a waiver of his right to prosecute the action, for the covenant was of a continuing nature, defendant was continuing to violate it, and plaintiff was continuing to object to such violation, and, the tenant having succeeded in retaining possession during the pendency of the action, plaintiff might accept compensation therefor after the benefit had been received, without waiver of his right of action.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 345.]

4. EVIDENCE 🔑474(18)—OPINION AS TO VALUE—QUALIFICATION OF WITNESS.

A witness stating he had been familiar with rental value of the premises in question for eight or nine years, and especially for the last three or four years, sufficiently qualified himself to testify thereon.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2217.]

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by W. L. Myers against David Herskowitz. From judgment for plaintiff and order denying new trial, defendant appeals. Affirmed.

John C. Stick, of Los Angeles, for appellant. Edward M. Selby, of Los Angeles, for respondent.

CONREY, P. J. Appeal by the defendant from the judgment and from an order denying his motion for a new trial.

The plaintiff was the owner of a lease covering a storeroom building in the city of Los Angeles. One of the storerooms of that building was known as No. 554 South Main street. The storeroom was sublet in separate sections to several tenants. The defendant was the owner of one of these subleases for a described portion of said storeroom for a period ending December 31, 1914. There was extending through the storeroom an aisle space reserved for common use of the tenants. Defendant's lease provided that:

> "That certain space so reserved shall be used for the common purpose of ingress and egress of any and all persons doing business in said room and their patrons, and to be used exclusively for said purpose; it being especially and expressly agreed that no goods, wares, or merchandise shall be placed, kept, or permitted in said space so set aside for the common use aforesaid, but that the same shall at all times be kept free and clear for the uses hereinbefore specified."

In September, 1913, the plaintiff and defendant entered into an agreement whereby defendant's lease (subject to the conditions set out therein, with exceptions not important here) was extended for a further period of two years. It was agreed that, if any default be made in any of the covenants or conditions of the lease, the defendant would by such default forfeit all right, title, or interest thereunder.

This is an action in unlawful detainer. It is alleged in the complaint, which was filed on June 15, 1914, that at all times since the 4th day of September, 1913, the defendant failed, neglected, and refused to permit said space so reserved to be used exclusively for the purposes limited by the lease, and has repeatedly placed and kept goods, wares and merchandise in said space so set aside for common use, and has refused to keep said space free and clear for the uses specified in the lease. It was alleged that by reason of defendant's breach of said conditions and covenants the plaintiff was unable to rent or sublet other portions of said storeroom, whereby plaintiff was damaged in the sum of $750. On June 4, 1914, the plaintiff served upon defendant a notice in writing which referred definitely to the covenants above stated and the claimed breach thereof by the above-mentioned acts of the defendant, and required the defendant to perform said conditions and covenants or deliver possession of said premises to the plaintiff within three days after the service of said notice. It is alleged that defendant neglected to comply with this notice. The notice given was the notice required by section 1161, subd. 3, Code of Civil Procedure. The defendant by his answer herein admitted the contract as pleaded, but denied that he had refused, neglected, or failed to perform the said conditions of the lease, and denied that because of such neglect or failure the plaintiff was unable to rent or sublet the premises, and denied that the plaintiff had suffered damages by reason of any act or neglect on the part of defendant. The defendant further alleged, as a separate defense, that the plaintiff and the plaintiff's assignor had waived all right which they may have had under the lease to the space alleged in the complaint to have been occupied by the defendant.

[1, 2] The principal contention requiring attention here arises from appellant's claim that respondent waived the alleged infraction of the lease by accepting payments of rent at times when respondent knew the facts constituting such infraction. The rent was regularly paid and accepted monthly in advance until and including May, 1914. On June 1, 1914, appellant tendered the amount of rent for that month by sending to respondent a check therefor, and the check was re-

turned to appellant. Appellant then deposited the same to the credit of respondent in a bank at Los Angeles, and respondent was notified thereof. In July respondent drew that money from the bank. The same procedure was followed by the respective parties each month thereafter down to the time of the trial, which occurred in March, 1915. Where a particular act or omission entitles the landlord to declare a forfeiture of the lease, the general rule is that the receipt of rent accruing subsequent to the act which works the forfeiture, waives the forfeiture, if the lessor at the time of receiving such rent has knowledge of the facts entitling him to such forfeiture. The rent which he accepted must be rent which became due after the breach committed by the tenant. McGlynn v. Moore, 25 Cal. 384, 394; Silva v. Campbell, 84 Cal. 420, 24 Pac. 316. But in the application of this rule there is a distinct difference between a covenant or condition which is of a continuing nature and one not of that nature. While the unconditional acceptance by the landlord of moneys as rent, which rent has accrued after the time a tenant should have surrendered possession, will constitute strong evidence of the landlord's waiver of his notice to quit, nevertheless the question of waiver is one of intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. To establish such waiver the evidence must indicate a meeting of minds and the intentional forbearance to enforce a right. Alden v. Mayfield, 164 Cal. 6, at page 11, 127 Pac. 45. Where the general course of dealing between parties has led one of them to believe that a strict compliance with the terms of a condition binding him will not be required, the other party may be estopped from claiming the forfeiture. What we have to determine, therefore, is whether the plaintiff manifested an intention to waive his objections to the conduct of the defendant, and whether in so doing he misled the defendant to his injury by causing defendant to believe these infractions of the covenant would be condoned.

[3] The court found that it was not true that the plaintiff or his assignor had waived their rights as to this matter. Appellant insists that the evidence is insufficient to support that finding; but we think that the evidence does support the finding. The defendant admitted that he received from the plaintiff two letters prior to the time of the notice served on June 4th. One of these stated that the defendant occupied too much space around a certain post at the side of the aisle. The second letter, dated March 17, 1914, called defendant's attention to the aisle space in question here. During the month of May, 1914, additional violations of the same covenant of the lease took place. Thereafter the plaintiff proceeded as above stated, and diligently prosecuted this action. Under these circumstances, we think that the conduct of the plaintiff in accepting the money, not in advance, but after the completion of the several months, was not a waiver of his right to prosecute the action. The covenant was of a continuing nature, the defendant was continuing to violate it, and the plaintiff was continuing to object to such violation and continuing his attempt to obtain possession of the premises. The tenant having succeeded in retaining possession of the premises during the pendency of the action, plaintiff was entitled to compensation therefor, and after the benefit had been received by the defendant the plaintiff might reasonably accept such compensation to which he was entitled without being held to have waived the right of action which he was then prosecuting. In Ramish v. Workman, 164 Pac. 26, decided by this court February 14, 1917, it was held:

> That the landlord was entitled to recover rent for a period which included the time between the entry of a judgment for possession and the date of actual ejectment of the tenant. "So long as defendants continued to occupy the premises pending the final determination of the action for unlawful detainer, the lease constituted the measure of their liability for such time as they remained in possession."

Under these circumstances we perceive no reason why plaintiff's acceptance of compensation to which he was clearly entitled should force upon him an implied waiver which he did not intend, and which evidently the defendant knew that he did not intend.

> "Neither will the receipt of rent after a landlord has actually commenced his action of ejectment for the forfeiture, or as compensation for the occupation, the landlord reserving the right to re-enter, amount to a waiver." Taylor on Landlord and Tenant (9th Ed.) § 497.

Appellant contends that the clauses of the lease involved in this controversy constitute a covenant, and not a condition, and that under the rules applicable thereto a forfeiture for a breach thereof should not be permitted. Since the agreement between these parties affirmed the right of forfeiture through breach of the "covenants or conditions of the lease," it would seem that the stipulations here in question created qualifications whereby the estate granted might be defeated and did amount to a condition. Knight v. Black, 19 Cal. App. 518, 522, 126 Pac. 512. But the distinction is not material, since the provisions of section 1161, Code of Civil Procedure, under which this action is maintained, apply equally to "conditions or covenants."

Appellant urges also that the evidence is insufficient to support the findings which determine that the defendant violated the conditions or covenants of the lease, and that by reason thereof the plaintiff was unable to rent other portions of said storeroom, whereby plaintiff was damaged in the sum specified. Without incumbering this opinion with a statement of the evidence, it is sufficient to say that we have examined the evidence referred to in the briefs of counsel and are satisfied that it supports the findings.

[4] Appellant claims error by the court in receiving the testimony of the witness Elderton, who testified to the rental value of the premises, as a basis for the award of damages. The claim is that a sufficient foundation was not laid, and that the witness did not sufficiently qualify himself, although he stated that he had been familiar with such rental value for eight or nine years, and especially the last three or four years, and that the court erred in overruling appellant's objection to the foundation question asked of the witness, which was:

> "Are you familiar with the rental value in the neighborhood of these premises at 554 South Main street?"

The ruling was correct and the defendant did not attempt to show that the witness was not qualified and did not introduce any evidence contradicting his testimony.

The judgment and order are affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

(33 Cal. App. 605)

PEOPLE v. FEALY. (Gr. 366.)

(District Court of Appeal, Third District, California. May 9, 1917. Rehearing Denied by Supreme Court July 5, 1917.)

1. CRIMINAL LAW 🔑1158(1)—APPEAL—INDICTMENT—SUFFICIENCY OF EVIDENCE.

The action of the grand jury in finding an indictment cannot be reviewed on the ground that there was not sufficient competent evidence adduced before it to warrant the finding of the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3070, 3071, 3074.]

2. CRIMINAL LAW 🔑422(6)—EVIDENCE—ACTS OF COCONSPIRATORS.

Under Code Civ. Proc. § 1870, subd. 6, testimony may be given, after proof of the conspiracy, as to statements and transactions of the alleged conspirators relative to the conspiracy after its formation and before the consummation of its object, whether or not the accused was present when they occurred.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 984.]

3. WITNESSES 🔑337(3) — IMPEACHMENT — CHARACTER OF ACCUSED.

Where defendant in a criminal case testifies for himself, he, like any other witness, may be impeached by evidence that his general reputation for truth, honesty, and integrity is bad, under Code Civ. Proc. § 2051.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1130.]

4. CRIMINAL LAW 🔑1172(2) — REVIEW — HARMLESS ERROR — INSTRUCTIONS — CREDIBILITY OF ACCUSED.

Giving of an instruction that jury should fairly and impartially consider testimony of accused, and "if it produces conviction in your minds, you should act upon it; otherwise you may reject it,"—is harmless error, where the evidence of his guilt is clear and convincing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3155.]

5. CRIMINAL LAW 🔑741(6)—INSTRUCTIONS—MATTERS OF FACT.

An instruction that "circumstantial evidence may consist of incriminating admissions made by one accused of crime, plans laid for the commission of the crime by the accused, such as putting himself in a position to commit it, in short, any act, declaration, or circumstance admitted in evidence tending to connect accused with the commission of the crime," is not an instruction on matters of fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1727, 1728.]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Richard W. Fealy was convicted of the crime of willfully burning and destroying property with the felonious intent to injure and defraud the insurer, and appeals. Affirmed.

E. S. Bell, of Napa, and Knight & Heggerty, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was indicted by the grand jury of Napa county for the crime of "willfully and feloniously burning, injuring, and destroying property with the felonious intent to injure, prejudice, damage, and defraud the insurer" of said property. Thereafter he was put upon his trial thereunder, and was convicted by the jury of the crime as so charged, and he appeals from the judgment of conviction and the order denying him a new trial.

The law upon which the indictment was founded is to be found in section 548 of the Penal Code, whose language is as follows:

> "Every person who willfully burns, or in any other manner injures or destroys any property which is at the time insured against loss or damage by fire or by any other casualty, with intent to defraud or prejudice the insurer, whether the same be the property of or in possession of such person or of any other, is punishable by imprisonment in the state prison not less than one nor more than ten years."

Following what is conceived to be the more orderly course in this case, the story of the alleged crime, as it was developed by the evidence, should first briefly be narrated.

It should first be explained that the theory of the people at the trial and in the prosecution of the defendant was that the burning of the building was the climax of a conspiracy concocted by Fealy, his wife, other members of his family and one Will Dodson, and that the motive for the act was to secure the insurance which had been placed upon the building and its contents.

The crime charged was committed on the 23d day of September, 1913, at about 8 o'clock in the evening. The property alleged to have been set on fire and burned by the accused was a dwelling house, situated at the corner of Hudson avenue and Main street, in the city of St. Helena, Napa county. This property was originally owned by Mrs. Mary Center, the mother of Mrs. Laura Ida Fealy, wife of the defendant. Mrs. Laura Ida Fealy at the time of her intermarriage with the defendant, on the 12th day of June, 1910, was a widow, having previously been the wife of one Gisin, by whom she had two male children, Ernest and George, aged, respectively, at the time of the trial, about 22 and 24 years.

Mrs. Center conveyed the property in question to her daughter, Mrs. Fealy, on the 1st day of November, 1910. This conveyance was a deed of gift, the expressed consideration being love and affection. On the 18th day of July, 1913, Mrs. Fealy conveyed said property, by a deed of grant, bargain, and sale, for the nominal consideration of $10, as expressed in said deed, to said Will Dodson, a resident of the city and county of San Francisco. On the 11th day of November, 1915, said Dodson reconveyed the property to Mrs. Fealy.

The facts above recited concerning the several transfers of the property prior to the burning of the building and the retransfer of said property by Dodson to Mrs. Fealy after the burning are, as may readily be apprehended, established by record evidence, as to the verity of which no question is raised. Further facts of the case, a brief statement of which, following an orderly course, is to follow, are reasonably deducible from the evidence as presented, and show quite conclusively that the verdict is well supported, although, it is to be remarked, there is evidence in the record which, if believable, would support a conclusion the reverse of that evidenced by the verdict.

For several years prior to and at the time of the fire, on the 23d day of September, 1913, the defendant and his wife, together with the latter's mother, Mrs. Center, and two sons, Ernest and George Gisin, resided in the house in question. Upon the said property there then subsisted an incumbrance amounting to a trifle over $4.000. On various occasions the members of the family above referred to discussed their financial affairs, and it was finally suggested by the defendant that the better way to relieve themselves of their financial obligations and burdens would be to burn the property, secure the insurance, and with the money so obtained pay off their indebtedness and, with the balance of the money, set themselves up in the ranching business. This proposition was frequently discussed among the members of the family, and on several occasions when Thomas Fealy, a brother of the defendant, was present. As a part of the scheme thus proposed, the property was, as above shown, transferred by Mrs. Fealy to Dodson. The insurance on the house at the date of this transfer stood in the name of Mrs. Center, the mother of Mrs. Fealy. Upon the conveyance of the property to Dodson, the latter, accompanied by Mrs. Fealy, went to the local agent in St. Helena of the companies issuing the policies of insurance on the property, and had the insurance transferred to Dodson, Mrs. Fealy at the same time explaining that she had transferred the property to Dodson. On this same occasion, Dodson applied for and received additional insurance of $1,500 on the contents of the house, that is, the furniture and other household equipments. As the property then stood, the aggregate insurance on the house and its contents amounted to the sum of $9,000, of which the sum of $6,000 was on the house and the balance, $3,000, on the furniture and other contents. There is evidence tending to show, and which, in fact, if believable, does show, that the house, which was a frame two-story building and, with the exception of a small addition built to it in recent years, an old structure, was of no greater value than of the sum of $3,500. It is not seriously claimed that the furniture and other contents of the building were not of the value of the sum for which they were insured, viz. $3,000.

After the last-mentioned transaction was consummated, the defendant and his brother proceeded to remove the furniture and other household paraphernalia from the building to the home of the defendant's father, Thomas F. Fealy, Sr., near Rutherford, Napa county, and distant about six miles, northeasterly, from the Hudson street property, or the property that was burned. The bulk and the most valuable of the furniture, carpets, silverware, kitchen utensils, and dining room equipments were by degrees or at near intervals so taken to the senior Fealy's home and there stored. The defendant then placed in the burned house a quantity of old furniture, which was of very little value, and scattered it about the house in the several rooms in irregular order.

The building was only partly damaged, the fire having been observed and an alarm thereof given in time to enable the fire department and citizens of the town to get to the building before the fire had made much progress or gained any considerable headway. After the flames were extinguished, an examination of the interior of the house very plainly disclosed that some four or five fires, originating in different rooms and parts of the building and independently of each other, had started. One of these fires was started in the attic of the building. It was further discovered that large-sized holes had been punched into the walls of some of the rooms, the plastering and lathing having thus been broken in at a number of different places. Into these holes there had been placed or stuffed a large quantity of old newspapers, excelsior, evidently taken from an old, dilapidated lounge found in one of the rooms, and other like inflammable materials.

The house was lighted by electricity furnished by a local power company. There were two or three kerosene oil lamps in the house, but these were used only when the lighting system was temporarily out of repair or in defective condition for brief periods, as from heavy rain or wind storms. It was shown by an expert electrician who was thoroughly familiar with the electric wiring of the house, and who minutely examined the wires and their connections immediately after the fires in the house had been extinguished, that it was absolutely certain that the fires were not caused, either directly or indirectly, by the electrical currents transmitted to and through the wires or from electricity at all.

That a large quantity of the most valuable contents of the house upon which insurance had been placed was removed therefrom at different times by the defendant prior to the fire seems to have been very clearly shown. The Gisin brothers, or at least one of them, testified to seeing the defendant take the furniture from the house, load it into a wagon and haul it away, and that they subsequently saw it at the home of the elder Fealy. The boys were corroborated by other witnesses, who saw the wagon loaded with furniture leaving the Hudson street house, and by the statement of the defendant himself to one of said witnesses that, Dodson having bought the house and realty, he (defendant) was moving the furniture away to be stored until such time as he could settle upon a farm which he intended quite soon to take over. In fact, the circumstance of the removal of the furniture from the Hudson street house to the home of the defendant's father seems to have been quite conclusively shown by the production in court at the trial of the furniture, etc., itself, it having been further shown in this connection that the officers of the law had, under the authority of a search warrant, found the furniture and taken possession thereof at the home of the elder Fealy.

The Gisin brothers, who claimed to have known, from its very inception, of the scheme to destroy the Hudson street property by fire, after the removal of the contents of the building therefrom, but who declared that they were forced to secrecy concerning said scheme by threats of the defendant that, if he went to jail for the crime, they (the Gisin boys) would go with him, gave exceedingly damaging testimony against the accused. From the testimony of the one or the other or both, these facts were elicited: That, at some time prior to the fire, one of the streets upon which the building abutted was plowed and torn up, preparatory to the bituminizing thereof, and that, while the street was in that condition, the defendant remarked to one of the boys that "this would be a good time for the fire, as the fire engine could not get down near the house and put the fire out"; that, just preceding the date of the fire, the water connection of the premises with the city water mains was disconnected by the defendant, and this for the avowed purpose of circumventing any efforts which might be found requisite properly to combat and extinguish the fire; that, on the night of the fire, the large water tank maintained on the premises was dry or without even a trace of water therein; that, several days before the fire, the defendant was in one of the rooms of the house, engaged in experimenting with burning candles to determine, as he declared to one of the Gisins, how long it would require a lighted candle five inches in length to consume itself or burn to the end; that he said that he intended to use the candles for the purpose of setting fire to the house, by placing them in the holes in the wall into which paper and other readily combustible material had been placed, and in such a position with reference to said material that the candles, being lighted, would in a brief time burn down to the material and thus set it afire; that, on the evening of the fire, having, according to other witnesses, left the Hudson street house in a buggy, accompanied by his wife, at about 6 o'clock, the defendant two hours later arrived at the "Farrier place," in Conn valley, Napa county, where the Gisin boys, Mrs. Center and a brother of the latter were then temporarily domiciled in an "old shack," as one of the Gisins described the structure; that he told the boys that it was then about time that the house should "go up" and that if they would go up "on the hill" they could probably see the blaze from that point; that the defendant's wife commenced to cry and said, "Yes, he set the house on fire"; that the defendant remained at the Farrier place for a brief time and then went away.

It was shown that, near the hour of 10 o'clock that night, the defendant appeared at the Hudson street house while many of the people that had been attracted to the place by the fire were still there. He had left his wife in the buggy, and himself went into the house, where he met a man named Beck. He asked the latter: "What is the matter; is there a fire?" Beck replied: "Well, you, s——n of a b——h, can't you see that the house is on fire?" to which the defendant made no reply, but afterwards inquired whether the piano had been saved. Having been told that it was not, he immediately left the house without going into any other room than the living room, where the above conversation took place.

Some weeks after the fire, Dodson filed with the insurance companies a sworn statement of the loss, and included in said statement was a detailed list of the furniture, pictures, silverware and other contents of the house, upon which an insurance of $3,000 had been placed and which, previously to the fire, had been removed from the house as above indicated and described. The companies carrying the insurance on the house and the contents refused to pay the policies, and thereupon suits were instituted in the superior court for the recovery of the insurance money.

There is a vast amount of other testimony in the record than that from which the foregoing facts are extracted. In fact, the testimony covered a wide range of topics, all bearing in a greater or less degree upon the charge set forth in the indictment, and disclosing and establishing against the accused circumstances of the most incriminatory character, including statements by the defendant which involved, in effect, admissions of the incendiary origin of the fire and his responsibility therefor. We have, however, briefly stated herein enough of the testimony presented before the jury in support of the charge preferred against the defendant clearly to show that the verdict stands before this court amply supported.

It is not seriously urged here, though, that the conclusion arrived at by the jury as indicated by the verdict is not sustained by the proofs. It is claimed, however, that the defendant was denied a legal trial for these reasons, generally stating them: (1) That a large amount of the evidence presented before the grand jury, and upon which the indictment was founded, was irrelevant and incompetent, and that there was not sufficient competent proof adduced before that body to warrant the finding of the indictment; that therefore the trial court erred in denying the motion of the accused to set aside the indictment; (2) that the court erred in admitting certain testimony to which objection was made by the accused; (3) that the charge of the court involved an erroneous and prejudicial statement of the law in certain indicated particulars. These propositions will now be considered in the order in which they are thus stated.

1. We are not prepared to say that the testimony taken before the grand jury was not of a character to warrant the indictment of the accused. It is true that the investigation before that body was not as full and complete as was the trial, and that many facts and circumstances brought out at the trial were not developed before the grand jury; still, the fact of the removal by the defendant of the furniture, etc., from the house shortly before the fire, the fact that certain oil paintings which had been hung from the walls of the house before the fire and some furniture were found stored in the "tank house" after the fire, the fact that holes had been bored in the walls and paper and other inflammable materials stuffed in said holes, the fact that several fires, evidently starting independently of each other, broke out in the house and in different rooms, and the fact of the securing of additional insurance on the furniture, etc., which was removed from the house, were all brought to the attention of the inquisitorial body. In addition to these facts, the actions of the defendant and his wife prior to and on the day and evening of the fire were shown, thus disclosing conduct on their part which, when considered in connection with the circumstance of the burning of the house, was, to say the least of it, of a very suspicious character.

[1] But conceding, for the purpose only of the decision of the point now before us, that the testimony so heard was entirely incompetent and in any event entirely insufficient to justify the indictment, yet, under the law, an appellate court cannot review that question to any purpose. It is true that section 919 of the Penal Code provides that the grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence. It is also true that section 921 of said Code declares that "the grand jury ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction," which, no doubt, also means that, unless the evidence is such as is thus described, an indictment ought not to be returned, although it has been held that as far as said section was intended to go was to operate "only as a matter of advice to the jury." State v. Boyd, 2 Hill (S. C.) 288, 27 Am. Dec. 376; In re Kennedy, 144 Cal. 634, 78 Pac. 34, 67 L. R. A. 406, 103 Am. St. Rep. 117, 1 Ann. Cas. 840. It has, however, repeatedly been held in this state that there is no method provided for revising the action of a grand jury on the ground that there was not sufficient evidence to support it. In re Kennedy, 144 Cal. 636, 78 Pac. 34, 67 L. R. A. 406, 103 Am. St. Rep. 117, 1 Ann. Cas. 840, and cases therein cited; Brobeck v. Superior Court, 152 Cal. 289, 92 Pac. 646. See, also, Bishop on Criminal Procedure, § 872, and United States v. Reed, 2 Blatchf. 437, Fed. Cas. No. 16,134. In the Kennedy Case it is said:

> "An indictment is the record of the action of a judicial body, and such action is final when there is no appeal therefrom and no other method provided for revising it; and there is no method for revising it on the ground that there was not sufficient evidence to support it" (citing Bishop on Crim. Proc. § 872; State v. Boyd, 2 Hill [S. C.] 288, 27 Am. Dec. 376; Smith v. State, 61 Miss. 759; Hight v. United States, Morris [Iowa] 407, 43 Am. Dec. 111; U. S. v. Reed, 2 Blatchf. 437, Fed. Cas. No. 16,134; Hammond v. State, 74 Miss. 214, 21 South. 149).

In all the cases just named, the question was reviewed on appeal, and in the Kennedy Case, supra, our Supreme Court said that:

> "The statutes of the states where the decisions above referred to were made do not differ materially on the subject of grand juries * * * from those of this state."

2. Counsel for the defendant, in their briefs, make a general objection that a mass of evidence was admitted which involved irrelevant and hearsay testimony, all prejudicial to the substantial rights of the accused. The fact is, indeed, that the alleged errors of which the defendant thus seeks to avail himself here are not pointed out with that definiteness essential to make it entirely clear what particular rulings it is claimed the court erroneously made to the detriment of the accused. But we are able to gather from the briefs that it is the claim that all the testimony relating to the several transfers of the property, when those transactions were not carried on or discussed in the presence of the defendant, was hearsay and incom-

petent; that the testimony relative to the insurance, involving the statements and acts of Dodson, Mrs. Fealy, and the insurance agents and adjusters, made and done both before and after the fire, in the absence of the defendant, was likewise incompetent and prejudicial; that the testimony of the notary public, before whom the deed from Mrs. Fealy to Dodson was acknowledged, disclosing what was done and said by and between Dodson and Mrs. Fealy constituted hearsay statements, the defendant not having been present when that transaction took place; that certain witnesses were erroneously permitted to testify that certain furniture which was found to have been removed from the house before the fire they had seen in the house prior to the fire; that the testimony offered and received in impeachment of the defendant's general reputation in Napa county for truth, honesty, and integrity was improperly allowed and seriously damaging to the defendant. As before stated, the theory upon which the case was tried was that the defendant, his wife, his brother Tom, and Dodson had entered into a confederation or conspiracy to destroy the building by fire for the purpose of securing the insurance money. Necessarily, from the very nature of the case —that is, from the fact that, to support the charge and prove the defendant's connection with the alleged conspiracy, reliance upon circumstantial evidence was necessary—the proofs covered an extensive and varied field of inquiry. The evidence in the case of a conspiracy, where the defendant's connection therewith it is necessary to prove, is wider than perhaps in any other case. Taken by themselves, the acts constituting a conspiracy, while perhaps more or less incriminatory, are seldom of an unequivocally guilty character, and can only be properly and justly estimated when connected with all the surrounding circumstances. And there is no rule of evidence better settled than that:

> "Where the guilt of a party depends upon the intent, purpose, or design with which an act is done, or upon his guilty knowledge thereof, collateral facts in which he bore a principal part may be examined into for the purpose of establishing such guilty intent, design, purpose, or knowledge. It is sufficient that such collateral facts have some connection with each other as a part of the same plan or induced by the same motive, and it is immaterial that they show the commission of other crimes." 8 Cyc. 684.

In this case, the theory that there had been formed by and between the defendant, his wife and brother and Dodson a conspiracy to destroy the building by fire is an exceedingly plausible one. It, indeed, was supported by what appear to be very powerful circumstances; and, while it is no doubt true, as might reasonably be expected and, indeed, quite unavoidable in a case where, as in this, multitudinous as well as multifarious circumstances are required to be shown to prove the ultimate fact, some erroneous statements or testimony found their way here and there in the record, still careful examination and consideration of all the testimony has convinced us that, in the main, the testimony complained of was not only pertinent to the case but legally competent, and that the few errors which were committed were of little consequence, or bore upon matters which, in view of the strong circumstantial case legitimately made against the defendant, could have exerted no baleful influence in bringing about the result arrived at by the jury.

[2] Replying, however, somewhat specifically, though briefly, to the objections urged here against some of the testimony, it may be observed that it was obviously not only proper, but, considering the hypothesis upon which the case was presented by the people (that the burning was the consequence of a conspiracy formed for that purpose) it was necessary to show that the property in reality belonged to Mrs. Fealy, and that she had never in fact parted with title thereto before the fire, and the conveyance to Dodson, as he himself admitted, was not intended nor understood to be a bona fide transfer of the fee; that it was likewise proper and necessary to show that the insurance had been transferred to Dodson; that he obtained additional insurance on the furniture or building; that he, aided by the defendant and his wife, made out the inventory of losses to present to the insurance companies, and included therein furniture, silverware, pictures, and other household equipments which had, prior to the fire, been removed by the defendant and his wife from the house and stored and safely preserved elsewhere. It was proper to show that the insurance companies refused to pay the losses, when such payment had been applied for by Dodson and Mrs. Fealy, even though some of the conversations relating thereto were had when the defendant was not present. All these conversations and transactions were had before the consummation of the transaction for the execution of which the conspiracy or corrupt agreement was formed, viz. fraudulently to obtain money from the insurance companies holding policies on the property. They, therefore, involved statements only of certain of the alleged conspirators relative to the conspiracy after its formation and before the consummation or abandonment of its object, thus rendering testimony thereof, whether the accused was or was not present when they occurred, admissible under the rule. Code Civ. Proc. § 1870, subd. 6; 8 Cyc. p. 680, and cases cited in the footnotes; People v. Irwin, 77 Cal. 494, 20 Pac. 56.

[3] The proposition that the testimony of the general reputation of the defendant in the community in which he had resided for many years, for truth, honesty, and integrity was erroneously allowed is to be met by reference to the provisions of section 2051 of the Code of Civil Procedure. That section declares that a witness may be impeached, among other ways, "by evidence that his general reputation for truth, honesty, and in-

tegrity is bad." The defendant took the witness stand in his own behalf, and gave testimony the purpose and the tendency of which were to exculpate him from the charge or absolve him entirely from any connection with the commission of the alleged crime. It has from a very early date and time and again been held that, when a defendant in a criminal case testifies for himself and gives testimony tending to exonerate him from the crime for which he is on trial, he for the time being removes from himself the character of a defendant and takes on that of a witness, and that the moment he so submits himself as a witness, "his character *as such witness*, for truth, honesty, and integrity is involved," and he becomes subject to the same rules for testing his credibility before the jury, by impeachment, as is any other witness. People v. Beck, 58 Cal. 212; People v. Bentley, 77 Cal. 7, 18 Pac. 799, 11 Am. St. Rep. 225; People v. Gallagher, 100 Cal. 466, 35 Pac. 80; People v. Hickman, 113 Cal. 80, 86, 87, 45 Pac. 175; People v. Mayes, 113 Cal. 618, 624, 45 Pac. 860. It follows that it was proper in this case for the people, by way of rebuttal, to show that the defendant's general reputation for the traits mentioned was bad.

[4] The defendant complains of the following instruction which was given by the court:

> "The defendant has offered himself as a witness in this case, and given testimony in his own behalf, which is his constitutional right, and you should not reject his testimony solely because he stands accused of a crime. It is your duty to fairly and impartially consider his testimony under the rules of evidence given you, and, *if it produces conviction in your minds, you should act upon it, otherwise you may reject it.*"

The criticism is aimed at the portion of the instruction in italics, and it is said that by that language the court in effect instructed the jury that it was incumbent upon the defendant to establish his innocence beyond a reasonable doubt.

It may perhaps be well enough in criminal cases to remind the jury of their duty of considering and weighing the testimony of a defendant as they are required to consider the testimony of any other witness in the case, and regardless of the fact that the defendant stands accused of the crime which is under investigation; but the other parts of the instruction it is unnecessary under any view to submit to a jury and should never be given, lest they may produce the impression that the judge himself questions the veracity of the accused. The portions of the instruction referred to embrace, as a matter of fact, mere commonplaces, or propositions with which the most ordinary understanding should be familiar. The truth is that the criticized language of the instruction does not accurately state the proposition which it purports to express, for it is the duty of the jury to *act* upon the defendant's testimony in any event, either by accepting it as truthful or rejecting it as unworthy of belief, or by giving it some weight or no weight. What was really intended to be expressed by the language referred to, however, was probably this: That, if the jury believed the defendant's story, he would be entitled to an acquittal, and if they did not believe it, they should, in reaching a conclusion upon the question of his guilt or innocence, reject it. If a jury of citizens could be found in this enlightened day and generation who would not know, without being told, that it would be their duty to reject testimony which they did not believe, or, if they did believe it, to give it due weight and so let it perform its proper function in the determination of the final result, it would indeed be necessary to declare that there had been a noticeable as well as lamentable decline in the efficacy of the jury system as an instrumentality for the administration of public justice. If, however, it could justly be said that the language of the instruction is misleading, or, as we believe to be true, does not accurately expound the rule so sought to be explained, and even if to some extent it may be obnoxious to the other objections made against it, yet we cannot say that the defendant suffered any prejudice by the submission of it to the jury; or, considering all the evidence, that a miscarriage of justice followed from it. Article 6, § 4½, Const. The record upon the whole shows that the accused was given a fair trial, and the evidence of his guilt appears to be clear and convincing, and we cannot persuade ourselves that the instruction, even though, as is further said of it, it singles out the defendant from among the many witnesses testifying, and so refers solely to his testimony, could have affected the verdict. People v. Loomis, 170 Cal. 351, 149 Pac. 581; People v. Weston, 169 Cal. 396, 146 Pac. 871; People v. Stephens, 29 Cal. App. 621, 157 Pac. 570, 572; People v. Burns, 27 Cal. App. 237, 149 Pac. 605.

[5] 5. The defendant requested an instruction stating that the law recognizes two classes of evidence, upon either of which, if legally sufficient in the degree of its persuasiveness in probative force, a jury may lawfully find an accused guilty of crime, to wit, direct and circumstantial evidence. In allowing and giving the instruction the court added thereto the following language:

> "Such circumstantial evidence may consist of incriminating admissions made by one accused of crime, plans laid for the commission of the crime by the accused, such as putting himself in a position to commit it; in short, any act, declaration, or circumstance admitted in evidence tending to connect the accused with the commission of the crime."

It is claimed by the defendant that, in thus modifying the instruction and as so modified reading it to the jury, the court instructed upon matters of fact. We do not so view the instruction as given. It is general in form, and makes no special reference to the case in hand, is abstractly correct in stating the nature and elements constituting circumstantial evidence, and, indeed, like the instruction first above considered, involves only the statement of propositions coming within the range of common knowledge, and which should be obvious to every person possessing common intelligence.

We have found no prejudicial error in the record, and the judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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33 Cal. App. 619

JOHNSON v. CORDES. (Civ. 2029.)

(District Court of Appeal, First District, California. May 10, 1917.)

1. Vendor and Purchaser 🔑44—Evidence—Sufficiency.

In a vendor's action for damages and costs for breach of the contract to purchase real estate, evidence *held* insufficient to show that the defendant entered into the written agreement set forth in plaintiff's complaint.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 69–76.]

2. Alteration of Instruments 🔑4—Materiality—Contract for the Sale of Real Estate—Purchase Price.

A change in the purchase price to be paid for real property as stated in a contract for the sale of the property is a material alteration of its terms.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 16, 17.]

3. Alteration of Instruments 🔑5(1) — Materiality—Contract for Sale of Real Estate—Taxes.

The addition to a contract for the sale of real estate of a clause to the effect that the taxes upon the property should be prorated constituted a material alteration of its terms.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 18–20, 28, 29.]

4. Appeal and Error 🔑959(4) — Pleading 🔑261—Amendment—Discretion of Court—Review.

The matter of permitting the defendant a year and a half after he was served with a copy of the alleged contract to amend his pleading so as to set up in defense that such contract had been materially altered since he signed it rested in the sound discretion of the trial judge, which, being exercised in favor of permitting the proposed amendment, is not the subject of review upon appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3831; Pleading, Cent. Dig. §§ 794–800.]

5. Pleading 🔑264—Answer—Amendment.

When such amendment was made, it related back to the time of filing the original answer, and entitled the defendant to all the advantages of its defense which he would have had if the amended matter had been a part of his original pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 803–805.]

6. Trial 🔑83(1)—Objections to Evidence—Sufficiency.

The defendant's objection to the admissibility of such contract made immediately after the amendment to his answer and with direct reference to it was sufficiently specific.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 193–198, 200–209.]

7. Appeal and Error 🔑970(3)—Trial 🔑59(2)—Review—Order of Proof—Discretion of Court.

The time when the proofs shall be presented upon an issue as to the validity or admissibility of a writing claimed to have been altered after its execution is a matter of procedure during the trial within the regulation of the trial court, and the order in which the evidence is presented is not ordinarily reviewable where the evidence itself is responsive to an issue, and is admitted without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3851; Trial, Cent. Dig. §§ 139, 140.]

8. Appeal and Error 🔑843(2)—Review—Questions Considered.

Misrepresentations made by the vendor are immaterial, and need not be discussed, where it appears that the agreement itself was not binding because of material alterations.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3331.]

Appeal from Superior Court, City and County of San Francisco; Adolphus E. Graupner, Judge.

Action by Frank H. Johnson against W. F. Cordes. Judgment for plaintiff, and defendant appeals. Reversed.

C. W. Durbrow and Frank B. Austin, both of San Francisco, for appellant. Grant H. Smith, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff for the sum of $2,000 damages, and costs, in an action arising out of a contract for the sale of real estate.

The facts of the case are these: The plaintiff, Frank H. Johnson, had listed a certain piece of real estate known as "Highlands," situated in Marin county, Cal., with A. J. Rich & Co., a firm of real estate brokers in San Francisco, for sale. On April 6, 1912, the defendant, W. F. Cordes, met one A. C. Blumenthal, an employé of A. J. Rich & Co., at the real estate office of another broker at San Rafael, and there discussed the subject of the sale and purchase of the property. After certain representations had been made by Blumenthal, two printed blank forms of A. J. Rich & Co.'s combined receipt and agreement for the purchase of real estate were produced by the latter, which, after being filled out to a certain—or rather uncertain—extent by him, were both signed by Blumenthal, acting for A. J. Rich & Co. One of these was then subscribed by the defendant, Cordes, and retained by Blumenthal. The other was not signed by Cordes, but was delivered to him apparently as his receipt for the sum of $250 then paid by him on account of said purchase, and also as his memorandum of the agreement thus made. Within the course of a month after the execution of these papers the defendant, Cordes, repudiated his promised purchase of the premises and refused to proceed further with the matter, asserting that he had signed the agreement upon the understanding that the property could be sold at an advance, and that he had no use for the property. After some efforts to induce the defendant to take the property at the agreed figure of $17,000, the plaintiff sold the premises in January, 1913, for the sum of $15,000, and then instituted this action to recover in the form of damages the sum of $2,000 for the defendant's alleged breach of his contract.

To his complaint in said action the plaintiff attached as an exhibit the alleged contract upon which his cause of action was founded. In his answer as at first filed the defendant did not dispute the form or due execution of said contract as set forth in said exhibit, but relied upon certain alleged false representations on the part of Blumenthal to defeat the plaintiff's claim. When the cause came on for trial and the original contract itself was produced, and for the first time after the date of its execution exhibited to the defendant, he at once asserted that it had been changed after its execution by the making of certain erasures, interlineations, and additions which went to the essence of the contract itself and vitally affected its validity; and in support of this assertion the defendant asked and was granted leave of court to so amend his answer as to set up these matters by way of defense. This being done, the plaintiff offered his alleged contract in evidence, and the court admitted it over the objection of the defendant, which, while quite general in its terms, was evidently made in the light of and with direct reference to the subject-matter of the amendment to his answer. After the admission of the paper in evidence the trial court heard the evidence offered by both parties touching the alleged alteration of the contract after its execution. The cause having been submitted, the court made its finding to the effect that on April 6, 1912, the defendant had entered into the agreement in writing as set forth in the plaintiff's complaint, but made no direct finding upon the issue as to the alleged alteration of the writing after its execution. The other findings of the court were in plaintiff's favor, and judgment was thereon entered against the defendant for the sum of $2,000, from which he now prosecutes this appeal.

[1] The first contention of the appellant is that the finding of the trial court that the defendant entered into the written agreement set forth in the plaintiff's complaint is unsupported by the evidence in the case. From a careful reading of the record before us, as well as from an inspection of the two original documents claimed by the plaintiff to have been made contemporaneously on April 16, 1916, we are constrained to uphold the appellant's contention in this regard. There were but two witnesses to the facts and circumstances attending the execution of the documents in question—the defendant and the witness Blumenthal. The defendant testified positively and unequivocally that the two papers were in substantially the same identical form at the time of their execution, and that the erasures made in the copy retained by Blumenthal, and the insertion therein of the purchase price of the property in both letters and figures, and also the addition of the clause relating to the prorating of the taxes and insurance upon the property, were made at some time after his signing said paper and without his knowledge or consent. On the other hand, the witness Blumenthal is, even in his direct examination upon the subject, most equivocal as to when the evident erasures and interlineations were made; while upon his cross-examination and in response to a direct and pointed inquiry he expressly stated that he could not say whether it was before or after the execution of the contract that these changes were made. The original paper produced before us upon the argument on this appeal supplies to our minds its own irresistible proof that the erasures and interlineations in this document were made at some time after the original writing was executed.

[2, 3] What these erasures and insertions were appears by comparison with the substantial copy of the agreement delivered to the defendant; but chief among these in the point of vital importance to the validity of the original writing itself as an agreement for the sale of real estate was the insertion, in both letters and figures, of the purchase price of the property to be transferred. It has been held by this court that one of the essentials to an enforceable contract to sell real estate is that the writing shall expressly set forth the purchase price to be paid for the property. Baume v. Morse, 13 Cal. App. 456, 110 Pac. 350. It is also needless to say that the addition to the original record of a clause to the effect that the taxes upon the property should be prorated would also constitute a material alteration of its terms.

The respondent, however, insists that the appellant is not entitled to take advantage of these alterations in his agreement, for two reasons: First, that in his original answer he did not attack the integrity or due execution of the writing a copy of which was attached to the complaint served upon him, and that his subsequent objection thereto made for the first time more than a year and a half after he had been served with a copy of such paper, in the form of his amended answer, comes too late; and, second, that the defendant's objection and proofs should have been specifically made and tendered at the time the instrument was offered in evidence, and not at a later time in the trial after the court had received the instrument in evidence.

[4, 5] Neither of these objections is in our

opinion well taken. The matter of permitting the defendant to amend his pleading so as to set up the defense referred to rested in the sound discretion of the trial judge, which, being exercised in favor of permitting the proposed amendment, is not the subject of review upon this appeal. When such amendment was made, it related back to the filing of the defendant's original answer, and entitled him to all the advantages of its defense which he would have had if the amended matter had been a part of his original pleading.

[6, 7] As to the respondent's other insistence, that the defendant should have specifically made and stood upon his objection to the admissibility of the changed document in evidence, and then and prior to its admission proffered his proofs as to its alteration, there are two answers: The first of which is that the defendant's objection to the admissibility of this document, made immediately after the amendment to his answer and with direct reference to it, was in our opinion sufficiently specific; and, second, that the time when the proofs shall be presented upon an issue as to the validity or admissibility of a writing claimed to have been altered after its execution is a mere matter of procedure during the trial within the regulation of the trial court. The order in which the evidence is presented is not ordinarily reviewable upon appeal where the evidence itself is responsive to an issue and is admitted without objection.

[8] The foregoing views with respect to the invalidity of the original contract for the sale of the real estate in question render unnecessary a discussion of the appellant's further contention as to the effect of the alleged misrepresentations of Blumenthal as a sufficient ground for the avoidance of the defendant's agreement for the purchase of said property; for these alleged misrepresentations are immaterial if the agreement itself was not of binding effect.

Judgment reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

33 Cal. App. 577

ELLIOTT v. ROBBINS. (Civ. 2234.)

(District Court of Appeal, Second District, California. May 4, 1917. Rehearing Denied by Supreme Court July 2, 1917.)

1. Adverse Possession 🔑7(3) — Public Lands—Right to Possession—Statute.

Under Code Civ. Proc. § 1925, providing that a certificate of purchase and of location of public lands is primary evidence that the holder or assignee of such certificate is the owner of the land described therein, but that this evidence may be overcome by proof that at the time of location or the time of filing a pre-emption claim on which the certificate may have been issued, the land was in adverse possession of the adverse party or those under whom he claimed, in action to recover possession of public land the statement in the answer that defendant was in adverse possession of the land at the date of the inception of the claim upon which plaintiff's certificate of entry was founded and at all times since under claim of right to make a homestead entry constituted a defense to plaintiff's alleged cause of action.

2. Public Lands 🔑106(1)—Proceedings in Land Office—Conclusiveness of Decisions—Statute.

The decisions of officers of the land department upon questions of fact upon evidence tending to prove the same are conclusive upon third persons, at least in the absence of fraud or imposition practiced upon them, and if fraud is practiced upon them their rulings may be reviewed and annulled by the courts when private parties are affected by their decisions.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 305.]

3. Public Lands 🔑106(3) — Decisions of Land Office—Attack.

Where a decision made by the officers of the land department in a contest of conflicting claims concerning land entries is attacked upon the ground of fraud in obtaining it, the right to make such attack is governed by the same principles which control in testing the validity of the ordinary judgments of courts.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301.]

4. Public Lands 🔑106(3)—Proceedings in Land Office — Conclusiveness of Decisions—Fraud.

In an action to recover possession of public land in which plaintiff relies upon a certificate of entry, and it appears that in a contest between the plaintiff and the defendant before a competent tribunal the claim of the plaintiff of right to enter upon the land was sustained, and that the certificate of entry upon which plaintiff relies was issued pursuant to that judgment, such decision could not be set aside on the ground of plaintiff's fraud and perjury in procuring it, and plaintiff was entitled to recover possession, since, where a trial of issues in any case is had, the parties must be prepared to meet and expose perjury then and there, and a judgment will not be nullified subsequently upon the ground of such fraud.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301.]

5. Pleading 🔑350(3) — Motion for Judgment on the Pleadings.

For the purposes of plaintiff's motion for judgment on the pleadings, plaintiff is deemed to have admitted the truth of all the allegations of the defendant's answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1075, 1077.]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Andrew J. Elliott against Earl E. Robbins. From a judgment for plaintiff, defendant appeals. Affirmed.

Noel & Sorensen, for appellant. Conkling & Brown, of El Centro, for respondent.

CONREY, P. J. This is an action to recover possession of public land the legal title to which is vested in the United States of America. The defendant appeals from the judgment, which was entered pursuant to an order granting the plaintiff's motion for judgment on the pleadings.

[1] The plaintiff relies upon a certificate of entry issued by the register and receiver

of the United States land office at Los Angeles, Cal., upon the application of plaintiff to make desert land entry for the land described in the complaint. The answer admitted the issuance of the certificate of entry, but alleged adverse possession by the defendant of the land at date of the inception of the claim upon which plaintiff's certificate of entry was founded, and at all times since under claim of right by the defendant to make homestead entry for said land, and alleged compliance by defendant with all of the requirements of the homestead laws of the United States. Counsel for respondent admit that if this had been the entire answer the defense might have been sufficient. While a certificate of purchase and of location of public lands is primary evidence that the holder or assignee of such certificate is the owner of the land described therein, this evidence may be overcome by proof that "at the time of the location, or time of filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims." Code Civ. Proc. § 1925; Haven v. Haws, 63 Cal. 452. It follows that when the defendant stated in his answer that he was in adverse possession of the land at the times stated, such answer constituted a defense to the plaintiff's alleged cause of action.

But the answer alleged further facts as follows: That at a time prior to the commencement of this action the defendant had offered and attempted to make a homestead application upon said land; that the plaintiff also filed an application to enter said land pursuant to an alleged claim of preferenced right of entry thereon as successful contestant in certain contests against the desert land entries of certain other persons, and that in making his application plaintiff alleged that the land described in his said application was formerly embraced within said successfully contested entries; that at a hearing had before the register and receiver of the United States district land office at Los Angeles to determine the respective rights of entry of the plaintiff herein and this defendant "the plaintiff herein testified falsely as to the location of the land described in the said contested entry, and that said false testimony was so given by said plaintiff herein with intent to deceive the register and receiver of said land office, and that as a result of the fraud and deceit so practiced upon them the said officials of said land office, relying upon said false testimony so given with intent to deceive them, held and decided that the land described in plaintiff's complaint herein was formerly embraced in said contested entry, and that the said plaintiff herein as successful contestant was entitled to exercise a preferenced right of entry for said land; that the land described in the complaint herein was not embraced in said contested desert land entry, nor in either of them, and but for the false testimony given by the plaintiff herein at the hearing above mentioned the officials of the United States land office would not have held that said land, or any part thereof, was embraced within either of said contested entries, and would not have held that the plaintiff herein was entitled to exercise any preferenced right of entry, or any right of entry, for said land."

[2, 3] It is a well-established proposition that the decisions of the officers of the land department on questions of fact upon evidence tending to prove the same are conclusive upon third persons, at least in the absence of fraud or imposition practiced upon them. And if fraud is practiced upon them, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties affected by their decisions. Sanders v. Dutcher, 168 Cal. 353, 357, 143 Pac. 599; Shepley v. Cowan, 91 U. S. 340, 23 L. Ed. 424; Marquez v. Frisbie, 101 U. S. 476, 25 L. Ed. 800. But where a decision made by the officers of the land department in a contest of conflicting claims concerning land entries is attacked upon the ground of alleged fraud in obtaining the same, the right to make such attack is govered by the same principles which control in testing the validity of the ordinary judgments of courts. Those principles are thoroughly settled. "Even granting that the decree in Marceau v. Fiske was based upon Mrs. Marceau's false testimony, it may not be set aside in this action for that reason. There was no extrinsic fraud by which the unsuccessful litigants in that case were prevented from having a fair submission of the controversy. True the plaintiff swore falsely, but where a trial of issues in any case is had, the parties must be prepared to meet and to expose perjury then and there. * * * Therefore we must hold that we may not upon the ground of such fraud nullify the effect of that judgment." Fresno Estate Co. v. Fiske, 172 Cal. 583, 593, 157 Pac. 1127, 1131, and decisions there cited; United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Nicholson v. Leatham, 28 Cal. App. 597, 603, 153 Pac. 965, 155 Pac. 98.

[4, 5] In the present case it appears by the allegations of the defendant's answer that in a contest between the plaintiff and the defendant before a competent tribunal, the claim of respondent Elliott of right to enter upon this land was sustained, and that the certificate of entry upon which the plaintiff relies was issued pursuant to that judgment. The defendant alleges that the decision was obtained by fraud and deceit, but the fraud and deceit described by his answer are exclusively of a kind which, under the decisions above mentioned, do not authorize the court to set aside or disregard the land office decision. For the purposes of the motion for judgment on the pleadings, the plaintiff is deemed to have admitted the truth of all of the allegations of the defendant's answer, and of course they are admitted and affirmed by the defendant. The case thus exhibited to the court was sufficient to establish the plaintiff's right to recover possession of said land.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

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33 Cal. App. 598

PEOPLE v. MABRIER. (Cr. 372.)

(District Court of Appeal, Third District, California. May 9, 1917. Rehearing Denied by Supreme Court July 5, 1917.)

1. CRIMINAL LAW 🔑121, 1150—TRIAL—DISCRETION OF COURT—MOTION FOR CHANGE OF PLACE OF TRIAL.

In a rape case an application for change of place of trial is addressed to the sound discretion of the trial court, and where error is assigned, a clear case must be shown by the record before the appellate court will interfere, since the trial court is in a better position to weigh the statements of the parties.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 241, 3044.]

2. CRIMINAL LAW 🔑122 — TRIAL — MOTION FOR CHANGE OF PLACE OF TRIAL.

Where facts are disclosed at the impanelment of the jury in a criminal case which would warrant a renewal of a motion for the change of the place of trial, such renewal seems to be a proper proceeding.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 254.]

3. CRIMINAL LAW 🔑1150 — REVIEW — DISCRETION OF COURT—ABUSE.

That the population of the county was 6,000, and at the trial 39 talesmen were examined before a jury of 12 men to try defendant was secured, and 10 of these talesmen whose residences were scattered throughout the county swore upon their voir dire that they could not give the defendant a fair and impartial trial on account of their bias and prejudice, would not justify the appellate court in holding that the trial court had abused its discretion in overruling defendant's motion for a change of place of trial on the ground that, owing to the bias and prejudice against him throughout the county, he could not have a fair and impartial trial in that county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3044.]

4. CRIMINAL LAW 🔑1152(2) — REVIEW — DISCRETION OF COURT.

The trial court is charged with the duty of resolving contradictions in the answers of jurymen on their voir dire examinations, and its decision is binding upon the appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3056.]

5. CRIMINAL LAW 🔑1170(2)—APPEAL AND ERROR—REVIEW—HARMLESS ERROR.

Refusal of the trial court to allow the defendant's attorney to testify to a conversation with the father of the complaining witness the day after the alleged assault "about having an examination of [complaining witness] to determine whether or not sexual intercourse had been had with her," and whether or not at the preliminary examination of defendant he applied to the court for an examination of this kind by a competent physician, was not prejudicial error, where the record shows that upon stipulation of counsel and by order of the court eight days after the alleged offense was committed such an examination was made by three physicians, and their testimony appears in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3146.]

6. WITNESSSES 🔑388(2) — IMPEACHMENT — FOUNDATION.

Where no foundation for impeachment was laid while a witness was on the stand, the reading of his testimony at a former trial was properly refused, since to warrant its being read to the jury the witness' attention should have been called to it, and he should have been asked if he made the answers theretofore given by him, and upon his denial it would have been permissible to show that he testified as claimed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1233.]

7. WITNESSES 🔑388(2) — IMPEACHMENT — FOUNDATION.

Where no question was asked the witness which would serve as a foundation for impeaching questions propounded to other witnesses, the court properly sustained objections thereto.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1233.]

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Jeff Mabrier was convicted of rape upon a female under the age of 18 years. From a judgment of conviction and an order denying a motion for a new trial, he appeals. Affirmed.

Jamison & Wylie, of Alturas, and G. P. Johnson, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Information was laid by the district attorney of Modoc county charging defendant with the crime of rape upon a female person under the age of 18 years. He was convicted by the jury, and was sentenced by the court to imprisonment in the state prison for the period of 47 years. The appeal is from the judgment of conviction and from the order denying motion for a new trial.

The sufficiency of the evidence to justify the verdict is not called in question. The point most strongly urged for a reversal is that the court erred in denying defendant's motion, made under section 1033 of the Penal Code, to change the place of trial to some county other than Modoc on the ground that, owing to the bias and prejudice against him throughout the county, defendant could not have a fair and impartial trial in that county.

[1] It appeared that defendant's conviction was upon the third trial for the same crime, and that at the two former trials there were disagreements, the jury standing eleven for conviction and one for acquittal. An application for the change of the place of trial was made and denied before the second trial, and again before the third trial began. The application was also made and denied after defendant had exhausted his peremptory

challenges, but before the jury was completed. The second and third applications were made upon affidavits, newspaper clippings, and the record in the case used at the hearing of the first application; the only additional matter being a newspaper article published after the second trial. It was shown that the comment upon the former trial by the three principal newspapers published in Modoc county were of such character as would have a tendency to prejudice the readers of these papers against defendant in so far as newspaper articles might influence their readers, and it appeared that these papers circulated very generally throughout the county and were read by many people, and in affidavits submitted at the hearing the opinion was expressed that these newspaper articles had created such a widespread feeling of bias and prejudice against defendant as to prevent his having a fair and impartial trial in Modoc county. Affidavits of citizens residing in different parts of the county were read in which affiants stated that they had talked with many residents of the county, and from what they had learned in these conversations they were convinced that defendant could not have a fair trial in that county. Counter affidavits were submitted by the people stating that affiants were widely acquainted with the residents of the county and had talked with many people in various parts of the county since the first trial, and that they (affiants) "had no knowledge of any bias or prejudice existing against defendant in said county or among the citizens of said county," and from their knowledge derived from meeting and talking with citizens of the county affiants expressed the opinion "that defendant could have as fair a trial in Modoc county as elsewhere."

The statements in the affidavits, both in support of and against the motion, were by persons having apparently equal opportunity to form an opinion as to whether or not a fair trial could be had in Modoc county. Specific instances of persons having been or being influenced adversely to defendant by the newspaper articles referred to are wanting. No affiant mentioned the name of any person with whom he had talked or that any named person exhibited hostility to defendant; nor did any affiant furnish the court with facts from which the court could intelligently determine the value to be given to the opinion of affiant. This is equally true of all the affidavits; for they are but the expression of opinions and conclusions of affiants, "after having talked with many citizens of the county." The newspaper clippings show that they went much beyond a report of the evidence, condemning by name in severe terms the juror who voted for acquittal. In one of these newspapers it was stated that the district attorney had "the case of this juror under advisement and an example may be made of him." But the affidavits did not make clear that these comments of the newspapers had so poisoned or influenced the minds of the citizenry of the county generally as to make it unlikely that a fair and impartial trial could be had in that county.

Applications such as this are addressed to the sound discretion of the trial court, and, as was said in People v. Goldenson, 76 Cal. 328, 339, 19 Pac. 161, 166:

> "Where error is assigned, a clear case should be shown by the record, or this court will not interfere. The court below was then in a better position to weigh the statements of the parties and to determine the truth than this court is now."

[2] Where facts are disclosed at the impanelment of the jury which would warrant a renewal of the motion for a change of the place of trial, such renewal seems to be a proper proceeding. People v. Staples, 149 Cal. 405, 412, 86 Pac. 886.

[3] Our attention is called to the fact that:

> "At this trial 39 talesmen were examined before a jury of 12 men to try the defendant were secured. Ten of these talesmen whose residences are scattered throughout Modoc county swore upon their voir dire that they could not give the defendant a fair and impartial trial, on account of their bias and prejudice."

It is stated that the population of Modoc county is about 6,000. It does not appear to us that the number of talesmen examined was unusually large or that the fact that 10 out of this number disqualified themselves on the ground of bias would justify the inference sought to be drawn from it. We cannot say that the court abused its discretion in overruling defendant's motion.

Error of the court is claimed in overruling defendant's challenge for cause against Talesman Osmund Ratcliffe and sustaining plaintiff's challenge against W. C. Clark. Ratcliffe was examined at great length on his voir dire, in the course of which he stated:

> That he had formed an opinion in the case unfavorable to defendant and that his "mind was set"; that his opinion was formed from rumors; that he had not talked with any witness in the case nor with any of the former jurors. "Q. And you have made up your mind that if you were accepted as a juryman you would be against him? A. Yes, sir. Q. If you were sworn to try the case you would be against him? A. My mind is made up."

At this point the challenge was interposed. In reply to questions by the district attorney Ratcliffe stated that he had not talked with any witness and had formed an opinion from "current talk." He was asked if he would try the case—

> "upon those rumors, or try it upon the evidence introduced here? A. Well, I don't think there would be any evidence to change my mind at all. * * * Q. Is it your understanding that you are to try the case upon the evidence and not upon rumors? A. Yes, sir. Q. If you were accepted as a juror, wouldn't you try the case upon the evidence? A. Well, I don't know."

He testified:

> That if he was himself upon trial he would accept a juror in his frame of mind, and that "if the evidence should not be like what he had heard he would go according to the evidence"; that he had no prejudice against defendant per-

sonally, and that he "could give the defendant a fair and impartial trial on the evidence. The Court: Do you understand, Mr. Ratcliffe, that when you are sworn as a juror, it is your duty to try the case upon the evidence presented here alone, and not upon public rumor; do you understand that to be the law? A. Yes, sir. Q. If you were accepted as a juror in this case, would you try it solely upon what you hear in court, upon the evidence only? A. Yes, sir; I would have to."

He also testified that notwithstanding any opinion he then had he would lay aside that opinion and try the case solely on the evidence.

"Mr. Jamison (defendant's attorney): Q. Mr. Ratcliffe, if that opinion is in your mind, it is a strong opinion, and it would go with you into the jury box, and after they began to introduce evidence, would it not? A. No; I think I could go according to the evidence. Q. But you would have that opinion until sufficient evidence has been introduced to overcome it? A. Yes, sir. Q. You have a strong fixed opinion in your mind that this defendant is guilty? A. No; I could not say that. Q. Do you think you could lay that opinion aside and try the case wholly on the evidence, or would that opinion influence you? A. No; I don't think so. I don't think it would influence me. The Court: The challenge is disallowed."

Ratcliffe was still further interrogated:

"Mr. Wylie (defendant's attorney): Q. Mr. Ratcliffe, do you understand that under the law a man is presumed to be innocent until his guilt is proven? A. Yes, sir. Q. Would you accord the defendant the benefit and protection of that law if you were accepted as a juryman? A. Yes, sir. Q. Would you insist that the people in this case prove his guilt to a moral certainty and beyond a reasonable doubt before you find him guilty? A. Yes, sir. Q. And you will do so? A. Yes, sir. Q. Will you try this case on the evidence and nothing else? A. Sure. Q. Will you take the law regulating and controlling this case from the court, as instructed by the court from his instructions? A. Yes, sir. * * * Q. Will you try this case irrespective of outside opinion or what the public might say? A. I would act according to the evidence."

Ratcliffe was one of the first 12 called to the jury box, and was peremptorily challenged by defendant. In the case of People v. Ryan, 152 Cal. 364, 371, 92 Pac. 853, 856, certain jurors impaneled to try the case gave contradictory answers upon the subject of their ability to disregard opinions as to defendant's guilt, which they had formed from newspaper reports and public rumors. Said the court:

"Many persons, competent as jurors, have not given much attention to such subjects, are inexperienced as witnesses, and are unable readily to comprehend the force and effect of the language in which such questions are couched, and they generally answer without reflection as to the effect of their own words. Such contradictions are by no means infrequent, if, indeed, they are not the rule, rather than the exception. The trial court must decide which of the answers most truly shows the juror's mind. It should, of course, be liberal in giving the defendant and the people the benefit of any doubts that may arise as to the fairness of the juror and his ability to lay aside preconceived impressions and should excuse the juror if such doubt is created. But where there are such contradictions its decision is binding upon this court"—citing cases.

[4] It is urged that the examination of Juror Clark showed a similar state of mind to that of Ratcliffe's, except that he had formed an opinion favorable to defendant, and that to be consistent the court should have refused the district attorney's challenge of Clark for cause. What was said as to the ruling in Ratcliffe's case applies to Clark's. The trial court was charged with the duty of resolving the contradictions in the answers of these jurymen and "its decision is binding upon this court." The foregoing will apply equally to Jurymen Dannhauser and McDaniels, the latter having been called as a juror after defendant had exhausted his peremptory challenges.

[5] Error is assigned because of the refusal of the court to allow defendant's attorney, Wylie, to testify that he had a conversation with the father of the complaining witness the day after the alleged assault "about having an examination of Mary to determine whether or not sexual intercourse had been had with her," and whether or not at the preliminary examination of defendant he applied to the court for an examination of this kind by a competent physician. The record shows that, upon stipulation of counsel and by order of the court, eight days after the alleged offense was committed, such an examination was made by three physicians, and their testimony appears in the record. We see no prejudicial error in the ruling.

[6] The witness Frank Hardin, a boy of 15 years of age, testified at a former trial that he followed the defendant and the prosecuting witness and saw them at the place where the crime was alleged to have been committed, and that nothing of the kind happened there. When called at the present trial, to the disappointment and surprise of defendant's attorney, he said he was not at this place and admitted that he did not tell the truth at the former trial. Hardin left the witness stand and was not again recalled. Attorney Wylie was sworn and asked to state whether or not, just before being called as a witness, Hardin had not stated that his testimony would be the same as at the former trial. Objection was made and sustained that no proper foundation for Hardin's impeachment had been laid. An offer was then made to introduce the testimony of Hardin given at the last trial. The ruling was not error. No foundation was laid while Hardin was on the stand as a witness for his impeachment. The reading of his former testimony was properly refused. To have warranted its being read to the jury Hardin's attention should have been called to it, and he should have been asked if he made the answers theretofore given by him. Upon his denial it would have been permissible to show that he testified as claimed by defendant at the former trial.

[7] Witness L. F. Gill was called by defendant, and the following questions were asked:

"Q. I will ask you to state whether or not at that time he stated to you that he had followed Jeff. Mabrier and Mary Ostrom across the field where they had gone to the place where it is alleged that the rape was committed upon the girl, and that no such act had been committed. Q. I will ask you what he told you or said to you in reference to the act charged in this case and whether such act had been committed or not."

Objection that no proper foundation had been laid and that the questions were incompetent, immaterial, and leading was sustained. Clearly, inasmuch as no question had been asked the witness Hardin which would serve as a foundation for the impeaching questions propounded, the court properly sustained the objection.

The judgment and order are affirmed

We concur: HART, J.; BURNETT, J.

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33 Cal. App. 634

BUNNELL v. THOMAS, Constable, et al.

(Civ. 1822.)

(District Court of Appeal, Second District, California. May 10, 1917.)

1. Appeal and Error 🔑108—Trial 🔑400 (1) — Findings of Fact — Changing after Judgment—Review.

The court has no authority to change its findings of fact after its entry of judgment; hence an appeal from the order denying a motion for substituted findings of fact after judgment cannot be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 588, 740; Trial, Cent. Dig. §§ 269, 269½.]

2. Attachment 🔑314—Claims—Judgment.

In an action to recover possession of an automobile attached as the property of a third person, where the facts found showed that the automobile was the property of the plaintiff at the time of the submission of the case, the action of the court in entering judgment denying possession of the automobile to plaintiff, based upon a purported assignment of plaintiff's rights in the action subsequently filed with the papers in the case, was error, and a motion for another and different judgment should have been granted, giving plaintiff possession of the property or its value in case delivery could not be had, and damages during the period of detention.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1120–1130, 1133, 1138, 1379½.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by C. A. Bunnell against Charles R. Thomas, Constable of Los Angeles Township, and others. From a judgment for defendants and from an order denying a motion to substitute other findings of fact for the findings of fact signed by the court, and from an order denying plaintiff's motion to vacate and set aside the judgment and enter another and different judgment, plaintiff appeals. Reversed and remanded for new trial.

Winslow P. Hyatt and Stephen L. Sullivan, both of Los Angeles, for appellant. M. A. Fleming, W. R. Law, C. W. Hall, and A. J. Mitchell, all of Los Angeles, for respondents.

CONREY, P. J. The plaintiff appeals from the judgment and this appeal is presented on the judgment roll. He also appeals from an order denying plaintiff's motion to substitute other findings of fact for the findings of fact signed by the court, and from an order denying plaintiff's motion to vacate and set aside the judgment and enter another and different judgment. The appeals from these orders are presented upon "bills of exceptions" duly certified, which set forth the papers used on the hearings in the court below.

[1] As the court would have no authority to change its findings of fact after the entry of judgment, the appeal from the order denying the motion for substituted findings of fact cannot be sustained.

By virtue of a writ of attachment issued out of a justice's court of Los Angeles township in an action of one Wilson v. Karl Brehme and Mae E. Brehme, an automobile was attached as property of the defendants Brehme. The attachment was made by Charles R. Thomas, township constable, defendant in the present action, and this action is brought against Thomas and the sureties on his official bond by the plaintiff C. A. Bunnell as a third party claiming to be the owner of said automobile. This action is brought to recover possession of the automobile, or for the value thereof in case delivery cannot be had, together with damages for its detention and for costs. This action was tried on the 15th day of September, 1914, and the findings were filed on the 25th day of September, 1914. On the 16th day of September, 1914, there was filed with the papers in this action in the superior court a document purporting to have been signed and delivered by C. A. Bunnell, purporting to transfer to other parties "all property and sums of money arising from the cause of action" herein, and the judgment recovered herein. That instrument was not introduced as evidence at the trial of the case; and manifestly did not exist at the conclusion of the trial when the case was submitted for decision. Nevertheless, the court annexed said purported assignment to the findings as an exhibit, and the judgment was in part based thereon. The findings of fact, after reciting the fact of the trial, and that evidence oral and documentary had been introduced by the respective parties, state that:

> "The court having read and seen on file a purported assignment of this cause of action, and all rights thereto, and said purported assignment of said cause of action, and said bill of sale being made by the plaintiff herein to strangers to this suit, a copy of which assignment and bill of sale is hereto attached and marked 'Exhibit A,' the court now renders its decision and finds the following facts."

The findings are that the plaintiff has no interest in and is not the owner and is not entitled to the possession of the described property, "but was such owner from May 4, 1914, until September 15, 1914, when he parted with his title thereto by such Exhibit A"; that the defendant as constable did, on the 5th day of May, 1914, without plaintiff's consent, wrongfully and unlawfully take and detain said property from the possession of the plaintiff and has ever since and continuously retained the same under and by virtue of the described writ of attachment, as the property of the defendants in the action of Wilson v. Brehme; that on the 5th day of May, 1914, the defendants Brehme had no right, title, or interest in said automobile; that the automobile on the 5th of May, 1914, was of the value of $500; that on the 9th day of May, 1914, the plaintiff demanded possession thereof from the defendant Thomas; that plaintiff is not damaged in any sum because of the alleged wrongful act of Thomas. The complaint alleged that the value of the use of the automobile during the period of its detention was $10 per day. The answer herein denied that the value of such use was any sum in excess of $1 per day. As conclusions of law from its findings of fact the court found that the plaintiff was not entitled to possession of the automobile nor to damages, and judgment was entered accordingly.

[2] It thus appears upon the face of the record that the court based its judgment upon supposed facts which were not in evidence at the trial, and that when the complaint was filed and until the time of trial and submission of the case for decision the plaintiff was the owner and entitled to possession of the property. Since the findings established plaintiff's ownership of the automobile when the case was submitted for decision on September 15, 1914, the court should have granted a motion for another and different judgment, and should have amended its conclusions of law and rendered another judgment accordingly, which judgment would have been for possession of the property, or its value in case delivery could not be had, and damages should have been awarded in the sum of $1 per day during the period of detention thereof by the defendant Thomas. And the judgment itself as rendered and entered is clearly erroneous, because on the face of the findings it appears that the case was not decided upon the evidence, but upon a transaction which the court was not entitled to consider. It may be that, as claimed by appellant, the evidence was sufficient to establish damages in the sum of more than $1 per day as the value of the use of the automobile while thus detained. In the interest of justice, therefore, it would seem that the judgment should be reversed, and the case remanded for a new trial, rather than that judgment should now be ordered as demanded by the motion for another and different judgment.

For that reason the order denying the motion for another and different judgment is affirmed, and the judgment is reversed.

We concur: JAMES, J.; WORKS, Judge pro tem.

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